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*GROUNDS FOR REFUSAL OF RECOGNITION OF FOREIGN JUDGMENT: DEVELOPMENTS AND PERSPECTIVES IN EU MEMBER STATES ON PUBLIC ORDER AND CONFLICTING DECISIONS**

Summary: 1. Converging notions of procedural public order – 2. Developments in notions of substantive public order – 3. Conflicting decisions – 3.1 Conflict with local decision – 3.2 Conflicts between local provisional remedy and eu judgment – 3.3 Conflicts between local appealable judgment and foreign *res iudicata* – 3.4 Conflicts between local *res iudicata* and foreign *res iudicata* – 3.5 Conflicts between foreign non-eu decisions – 3.6 Conflicts between foreign eu decisions – 3.7 Conflicts between foreign eu and non-eu decisions – 3.8 Final remarks

Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters supports extension of effects of EU decisions as a means to grant them identical scope within the whole European judicial space. Complete fulfilment of such task, however, is hindered by residual margins of sovereignty.

Notwithstanding growing convergence between Member States' legal systems and corresponding public order issues, in facts, conflicts may nevertheless survive due to limits of preventive procedural devices nested in rules governing *lis pendens* and related actions, differences in operation of *res iudicata*, variations of systems of recognition of non-EU judgments, and even hidden equitable considerations. A European federal judiciary with jurisdiction on the merits would be necessary to significantly enhance achievement of the aim of granting the winning party the same benefits in the whole Union.

1. CONVERGING NOTIONS OF PROCEDURAL PUBLIC ORDER

This paper aims at developing a comparative analysis of the rules governing refusal of recognition of foreign judgments, fundamentally based on national reports delivered within the research project “*Remedies concerning Enforcement of Foreign Titles according to Brussels I Recast*”.¹

Albeit Member States provide for different procedural devices when it comes to recognition and enforcement of non-EU foreign judgments (automatic recognition e.g. in Italy,² *exequatur* system e.g. in Slovenia,³ new trial e.g. in Sweden⁴), and albeit only

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¹ Reports came from the following countries: Austria, Belgium, Czech Republic, Estonia, France, Greece, Italy, Lithuania, Portugal, Sweden, The Netherlands, United Kingdom.

² Pursuant to Art. 64 of law no. 218 of 31 May 1998; recognition is also automatic in Belgium, pursuant to Art. 22 of the *code de droit international privé*, in Greece, pursuant to Art. 323 of the local code of civil procedure, and in Estonia, pursuant to Art. 620 of the local code of civil procedure; the U.K. allows automatic recognition in actions *in rem* after the case *Carl Zeiss Stiftung v. Rayner & Keeler Ltd* [1967] 1 AC 853; according to the Austrian report, the same holds for § 415 of the *Exekutionsordnung* and § 236 of the local *Zivilprozessordnung*; according to the pertinent reports, recognition is also deemed automatic in the Czech Republic and in France, albeit with some unclear limits in the latter (on the topic compare also, e.g., G. CUNIBERTI, C. NORMAND, and F. CORNETTE, *Droit international de l'exécution*, LGDJ, Paris 2010, esp. pp. 30-31, 40, 62).

³ Pursuant to Artt. 94-111 of the *Zakon o mednarodnem zasebnem pravu in postopku*; *exequatur* is also required in Lithuania, pursuant to Art. 809 of the local code of civil procedure, and in Portugal, pursuant to Art. 978 of the *Código de Processo Civil (Novo)*.



some of them require reciprocity,⁵ they all significantly converge with respect to the reasons that justify refusal to give effect. This convergence is determined mainly by the general clause of public order, and the growing consensus over the idea that such clause includes violation of fundamental procedural rules: hence, despite several variations in the wording of the rules concerning specific procedural violations, such as lack of jurisdiction, violation of the rights of the defense, or fraud, it is quite unlikely that a judgment whose recognition is refused in a Member State for this kind of procedural considerations would nevertheless be recognized and enforced in a different Member State.⁶ The same reasoning obviously applies to recognition of EU judgments, since grounds for refusal provided by Regulation 1215/2012 substantially correspond, in these respects, to those provided by Member States' national rules for recognition and enforcement of non-EU ones (albeit violation of public order must also be manifest when it comes to Regulation 1215/2012⁷), but for the obvious general curtailment of challenges concerning jurisdiction and *lis pendens*.

2. DEVELOPMENTS IN NOTIONS OF SUBSTANTIVE PUBLIC ORDER

With respect to violations of substantive public order, mainly two relevant fields of general interest can be identified: antisuit injunctions and punitive damages (instances of violation of a specific Member State's substantive public order will not be considered here, because exposition of such details is not necessary to the analysis of the procedural problems involved).

English antisuit injunctions were held incompatible with the system of reciprocal trust between Member States,⁸ but after Brexit U.K. interested parties might try to plead that they should be recognized as non-EU foreign judgments. However, antisuit injunctions are not only a form of unfair jurisdictional competition within the system of reciprocal trust: they also infringe the fundamental principle of *Kompetenz-Kompetenz*,⁹ and, most importantly, the fundamental right of action of their addressee;¹⁰ hence the public order clause contemplated in every Member State should preclude their recognition even as non-EU foreign judgments. Traditional European hostility to U.S. punitive damages awards, by contrast, seems to be fading: case law admitting their enforcement is emerging in several Member States, at least when they are not exceedingly disproportionate to the actual ones, especially because many European legal systems actually contemplate instances of civil damages discretionally awarded by the court to a tort victim, regardless of the proof of prejudice, as a punishment for reckless wrongdoing.¹¹

⁴ Pursuant to Ch. 3, § 2 of the *Kronofogdemyndigheten*; new trial is also required in the Netherlands, pursuant to Art. 431(1) of the local code of civil procedure, and in the U.K. for actions *in personam* after the case *Adams v. Cape Industries plc* [1990] Ch. 433.

⁵ Albeit no mention of reciprocity can be found in the reports from Italy, France, Belgium, Greece, Portugal, Lithuania, Estonia, and the U.K., this requirement appears in Art. 101(3) of the Slovenian *Zakon o mednarodnem zasebnem pravu in postopku*, and in § 406 of Austrian *Exekutionsordnung*, and according to pertinent reports is also applied in Sweden and in the Czech Republic.

⁶ Correspondingly, comparatively restrictive interpretations of the notion of public order may be also countered by wide interpretations of, e.g., the notion of lack of jurisdiction (see, e.g., for a refusal to recognize, on ground of lack of territorial jurisdiction, a judgment disregarding foreign States' immunity for *acta iure imperii*, after the holding by the Italian Constitutional Court no. 238 of 22 October 2014, in *Giurisprudenza italiana*, 2015, 339, that denied the latter defense in cases of violation of human rights, the judgment of the Italian Court of Cassation no. 21946 of 28 October 2015 in *Giurisprudenza italiana*, 2016, 859); on European procedural public order European Court of Justice leading cases were Case C-7/98, *Dieter Krombach v. André Bamberski* [2000] ECR I-1935, Case C-38/98, *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento* [2000] ECR I-2973.

⁷ On this respect it is worth noting that public order precluding recognition of foreign judgments according to national rules is anyway often more limited in scope than public order governing implementation of national law (see, e.g., in Italy, the judgment of the Court of Cassation no. 17349 of 6 December 2002, in *Archivio civile*, 2003, 1081; compare, on the scope of public order in the field of recognition of EFTA decisions, the judgment of the Court of Cassation no. 4392 of 24 February 2014).

⁸ The European Court of Justice reaffirmed this principle beyond any reasonable doubt in Case C-185/07, *Allianz SpA v. West Tankers Inc* [2009] ECR I-663, para. 30.

⁹ See again *Allianz SpA v. West Tankers Inc*, *supra*, n. 8, para. 29.

¹⁰ See again *Allianz SpA v. West Tankers Inc*, *supra*, n. 8, para. 31.

¹¹ Paralleling the rejection of proposals for a mandatory exclusion of punitive damages in Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199 (see Consideration 32 thereof), in Germany, the notorious halt to punitive damages in the judgment of the Bundesgerichtshof, 4 June 1992, in *ZfP*, 1993, 79, has been tempered by a decision of the Bundesverfassungsgericht, 24 January 2007, in *JZ* 2007, 1046; in France a general preclusion to recognition was denied by judgments of the Cour de Cassation, 1 December 2010, in *Bull.* 2010, I, no. 248, and 7 November 2012, in *Bull.* 2012, I, no. 228; in Spain treble damages were already recognized by a decision of the Tribunal Supremo, 13 November 2001, ECLI:ES:TS:2001:1803A; in Greece, a punitive damages award was already recognized in judgment 17/1999 of the plenary session of the Areios Pagos (see E. D'Alessandro, "Riconoscimento di punitive damages: in attesa delle Sezioni Unite", in *Int'l Lis*, 2016, p. 91); in Slovenia, a punitive damages award has been enforced by a decision of the Vrhovno sodišče, 29 May 2013, in *DR* 2014, 18; an opposite trend appeared, e.g., in Poland, after the judgment of the Trybunał Konstytucyjny of 23 June 2015, but the European Court of Justice seemingly put an end to it in Case C-367/15, *Stowarzyszenie Oławska Telewizja Kablowa v. Stowarzyszenie Filmowców Polskich*, 25 January 2017, EU:C:2017:36; in Italy, recognition was denied by the judgments of the Court of Cassation no. 1183 of 19 January 2007, in



3. CONFLICTING DECISIONS

The most complex difficulties in this field, hence, come from the problem of recognition of conflicting judgments: case law specifically on the topic is limited, but the issue is very often intensely litigated in the context of the issues of *lis pendens* and parallel litigation, both with respect to cases pending in a different Member State and to cases pending outside the EU (albeit in such circumstances there is not yet an actual conflict, but only a prediction of risk of conflict: hence, *lis pendens* precludes also decisions that in the end might have turned out coherent, and not conflicting, if the case was not stayed).

A realistic evaluation of the dynamics of the resolution of conflicts of decisions, however, should warn from the start that rules governing preclusive effects are actually applied with a much less analytical approach than what the supporting opinions would directly tell. In fact, especially when it comes to the determination of the scope of the preclusive effects of a judgment with respect to issues explicitly or implicitly resolved, or with respect to third parties, governing principles are riddled with incoherencies that allow courts to exercise hidden discretionary powers, in order to take account of the possible errors of the judgment they should conform to: *res iudicata* is enforced according to several balancing factors, including symptoms of the reliability of the holdings whose implementation is asked, allowing the court to disregard effects that would determine a gross injustice; when this happens, however, reference to such factors remains implicit in the court's supporting opinion, where the refusal to enforce the previous judgment is generally explicitly justified by way of an arbitrary selection of one of the principles governing operation of preclusive effects fit to reach the desired outcome.¹² Public interest in transparency of the administration of justice, indicates that courts should be more candid in their exercise of such inevitable discretionary powers, albeit such transparency may be more discomforting for civil law judges than for common law ones (since their legitimacy is more based on technical rather than political grounds, due to differences in the respective recruiting systems).¹³

In the current state of opacity, however, consequent difficulties in decoding nuances of foreign judgments' preclusive effects in the field of recognition are not the only factors putting at risk identity of effects of a EU decision within the whole European judicial space. In fact, several other factors, depending from the relative timing and force of conflicting decisions, concur with them, according to the following analysis.

3.1 CONFLICTS WITH LOCAL DECISION

The first set of problems to consider concerns conflicts with local decisions. ECJ case law provides a very wide notion of conflict when Regulation 1215/2012 rules on *lis pendens* and related actions apply,¹⁴ and Member States tend to follow a similar approach with respect to national rules governing effects of non-EU foreign judgments.¹⁵

Giurisprudenza italiana, 2008, 395, and no. 1781 of 8 February 2012, in *Giurisprudenza italiana*, 2013, 126, but the issue has been deferred anew to the plenary session of the Court of Cassation for reconsideration by decision no. 9978 of 16 May 2016 in *Giurisprudenza italiana*, 2016, 1854, and the following decision by the plenary session no. 16601 of 5 July 2017 finally allowed recognition; compare the analysis developed in A. GIUSSANI, "Resistenze al riconoscimento delle condanne al pagamento di punitive damages: antichi dogmi e nuove realtà", in *Giurisprudenza italiana*, 2008, pp. 396-397.

¹² This phenomenon is explored, in the Italian context, e.g. in A. GIUSSANI, "Intorno alla "riflessione" del giudicato contro il terzo", in *Rivista di diritto processuale*, 2014, pp. 1193-1198; A. GIUSSANI, "Appunti dalla lezione sul giudicato delle Sezioni Unite", in *Rivista di diritto processuale*, 2015, pp. 1564-1568; A. GIUSSANI, "Effetti conformativi della sentenza e sospensione del processo", in *Rivista di diritto processuale*, 2017, pp. 260-267; compare, for an overview in English of the set of general principles governing preclusive effects of judgments in Italian case law, A. GIUSSANI, "Effects of judgments – res iudicata", in M. DE CRISTOFARO and N. TROCKER (eds.), *Civil Justice in Italy*, Jigakusha, Tokio 2010, pp. 123-160.

¹³ This aspect is analyzed in the classic contribution of M. DAMAŠKA, *The Faces of Justice and State Authority*, Yale University Press, New Haven and London 1986, esp. pp. 67-69.

¹⁴ Notorious European Court of Justice leading cases in the field are Case C-144/86, *Gubisch Maschinenfabrik KG v. Giulio Palumbo*, [1987] ECR 4861, Case C-406/92, *The owners of the cargo lately laden on board the ship "Tatry" v. the owners of the ship "Maciej Rataj"* [1994] ECR I-5439, Case C-351/96, *Drouot assurances SA v. Consolidated metallurgical industries (CMI industrial sites), Protea assurance and Groupement d'intérêt économique (GIE) Réunion européenne*, [1998] ECR I-3091.

¹⁵ See, e.g., in Italy, the judgment of the Italian Court of Cassation no. 11185 of 15 May 2007, in *Rivista di diritto internazionale privato e processuale*, 2008, 224.



With respect to the latter, albeit *lis pendens* might preclude recognition only if the proceedings in the State of destination begun before the foreign ones, local *res iudicata* can be preclusive even if both the action and the judgment came after the foreign ones, albeit there might have been a violation of the *lis pendens* rule in the local proceedings: in fact, such violation cannot be pleaded any more after *res iudicata*.¹⁶ This reflects also the idea, prevailing in the Member States, that a subsequent *res iudicata* prevails over a preceding one, because the effects of the latter one could have been raised in the proceedings that led to the former one, and therefore were (at least implicitly) conclusively denied: the second *res iudicata* might be illegal, but its violation of the law cannot be challenged any more (with the exception of some Member States, providing for a special extraordinary remedy for violation of *res iudicata*).¹⁷

With respect to EU decisions, whenever rules on *lis pendens* and related actions fail to prevent the conflict, a similar rule applies: recognition is precluded by a local conflicting decision, even if issued after the foreign one, and even if foreign proceedings started before the local ones; in such cases the purpose of granting a judgment the same effects within the whole European judicial space, according to the principle of extension of effects that is a pillar of the European system further implemented by the new wording of Art. 54 of Regulation 1215/2012, can be frustrated. However, since EU decisions are recognized regardless of *res iudicata*, and even if they are merely provisional remedies, and preclusive effects are also granted, correspondingly, to decisions still subject to ordinary appeal, or even to merely provisional remedies, this rule must be reconciled with the principles governing conflicts between decisions of different force.

3.2 CONFLICTS BETWEEN LOCAL PROVISIONAL REMEDY AND EU JUDGMENT

On this regard, it is worth remembering from the start that whenever different Member States have concurring jurisdiction on a case, pendency of proceedings for provisional remedies in one of them does not prevent the action on the merits in the other one.¹⁸

¹⁶ For this solution see, e.g., in Italy, Art. 64(e) and (f) of law no. 218 of 31 May 1998; compare also, e.g., Art. 99 of Slovenian *Zakon o mednarodnem zasebnem pravu in postopku*, and Art. 25 of Belgian *code de droit international privé*.

¹⁷ Within Italian scholarly analysis, prevalence of the subsequent internal *res iudicata* is justified according to the general rule for resolution of conflicts favoring the last-in-time pursuant to art. 15 of the preliminary rules of the Italian civil code (see, e.g., the order of the Italian Constitutional Court no. 77 of 24 February 2006, in *Giusto processo civile*, 2006, 143), e.g., in M.G. CIVININI, *Il riconoscimento delle sentenze straniere*, Giuffrè, Milano 2001, esp. p. 50, note 54; E. MERLIN, *Il conflitto internazionale di giudicati. Profili sistematici*, Giuffrè, Milano 2004, esp. pp. 50-55; E. D'ALESSANDRO, *Il riconoscimento delle sentenze straniere* Giappichelli, Torino 2007, esp. pp. 311-313; this also means that subsequent internal *res iudicata* erroneously recognizing the foreign *res iudicata* whose recognition should have been precluded by former internal *res iudicata* also prevails, see again E. MERLIN, *Il conflitto internazionale di giudicati. Profili sistematici*, Giuffrè, Milano 2004, esp. pp. 55-57; compare, for an implicit statement in the same direction, the judgment of the European Court of Justice Case C-145/86, *Horst Ludwig Martin Hoffmann v. Adelheid Krieg* [1988] ECR 645; see also *infra*, §§ 3.4 ff.; in France, traditional preference for the last-in-time *res iudicata* has been superseded by decree no. 79-941 of 7 November 1979, providing for discretionary resolution of conflicts by the Cour de Cassation, pursuant to art. 618 of the French code of civil procedure, according to the transparency needs expressed above in the text, but this means that the remedy is not aimed at protecting the effects of previous *res iudicata*, and that later *res iudicata* is therefore generally prevailing, if any because a later judgment is generally more accurate (for a recent implementation of the rule in favor of the later decision see, e.g., the judgment of the plenary session of the Cour de Cassation no. 621 of 3 July 2015, ECLI:FR:CCASS:2015:AP00621); an extraordinary remedy for violation of *res iudicata*, and consequently, prevalence of the first-in-time, by contrast, seems to be the rule, e.g., in Germany, pursuant to § 580, n. 7, of the *Zivilprozessordnung*, such remedy being extraordinary especially because according to some doctrinal analysis the priority rule should allow the interested party to plead the violation of previous *res iudicata* at any time (that is, even after expiry of the five-years deadline set by § 586 of the same *Zivilprozessordnung*), the main reference being the seminal work of H.-F. GAUL, *Die Grundlagen des Wiederaufnahmerechts und die Ausdehnung der Wiederaufnahmegründe*, Deutscher Heimat, Bielefeld 1956, esp. 94; in Italy general theory suggested that remedies should be deemed ordinary, that is automatically postponing effects of *res iudicata*, whenever their ground can be detected from the judgment, while grounds for extraordinary remedies (such as fraud) do not postpone such effects because they can be detected at any time, so that the deadline to file them runs from the moment of the detection, and only in an exceptional case a ground detectable from the judgment gives only an extraordinary remedy, that is the case introduced by law no. 353 of 26 November 1990 of art. 391-bis of the Italian Code of civil procedure, qualifying the special remedy against manifest error in the reading of the fact-finding in the proceedings at the Court of Cassation, introduced by a holding of the Italian Constitutional Court no. 17 of 30 January 1986, in *Giurisprudenza italiana*, 1986, I, 1, 1440, as an extraordinary one, see, e.g., on the reasons of this choice, C. CONSOLO, *La revocazione delle decisioni della Cassazione e la formazione del giudicato*, Padova, Cedam 1989, esp. 185-235; it was argued that a special remedy against violations of European law, implementing holdings of the European Court of Justice such as Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA* [ECR] I-6199, should also be extraordinary, see, e.g., C. CONSOLO, "La sentenza Lucchini della Corte di Giustizia: quale possibile adattamento degli ordinamenti processuali interni e in specie del nostro?", in *Rivista di diritto processuale*, 2008, pp. 225-238, esp. 237-238, but see also, *contra*, R. CAPONI, "Corti europee e giudicati nazionali", in ASSOCIAZIONE ITALIANA FRA GLI STUDIOSI DEL PROCESSO CIVILE (ed.), *Corti europee e giudicati nazionali*, Bologna University Press, Bologna 2011, pp. 239-390, esp. 363; revocation of a judgment for violation of *res iudicata* in Italy, however, is always an ordinary remedy, and is not available against judgments of the Court of Cassation, see the holding of its plenary session no. 10867 of 30 April 2008, in *Giurisprudenza italiana*, 2008, 2776, and e.g. the subsequent judgments no. 29580 of 29 December 2011, and again from the plenary session no. 17557 of 18 July 2013 (a contrary view was endorsed in an *obiter dictum* of the judgment no. 18234 of 22 August 2006 in *Giurisprudenza italiana*, 2007, 1722).

¹⁸ This can be seen as a necessary implication of Art. 35 of Regulation 1215/2012, as well as of the holdings of the European Court of Justice Case C-321/95, *Van Uden Maritime BV, trading as Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line and Another* [1998] ECR I-7091, para. 29 ("the mere fact that proceedings have been, or may be, commenced on the substance of the case before a court of a Contracting State does not deprive a court of another Contracting State



This necessarily implies that a subsequent judgment on the merits conflicting with a prior provisional remedy in a different Member State is not even in violation of the *lis pendens* rule: hence, such judgment must prevail over the provisional remedy not only in the Member State that issued it (where a conflicting decision prevails even if it was issued in violation of the *lis pendens* rule or of the foreign *res iudicata*), but also in the Member State that issued the provisional remedy.

In fact, a different solution would introduce an incentive to another form of unfair competition between Member States' jurisdictions: if a Member State's provisional remedy could be superseded only by a judgment on the merits in the same jurisdiction, a Member State could become a magnet jurisdiction simply by being very generous with provisional remedies; moreover, proceedings on the merits in the Member State that issued the provisional remedy might be precluded altogether by *lis pendens* on the merits in a different Member State. Hence, the correspondence between conflicts relevant for *lis pendens* and related actions and conflicts relevant for recognition within Reg. 1215/2012 must be preserved: rules on refusal of recognition apply only to conflicts that could have been prevented; conflicts between decisions of different force are not prevented because they are resolved according to their difference of force, without undermining the production of the same effects within the whole European space by the (prevailing) judgment on the merits.

The inevitable conclusion is that local decisions prevent recognition of foreign ones only if they have the same force: a provisional remedy precludes recognition of a conflicting EU provisional remedy, regardless of the violation of the *lis pendens* rule by the former or by the latter, and regardless of the violation of the first-in-time decision by the second one, but not of a conflicting EU judgment on the merits.¹⁹ Likewise, a local judgment on the merits precludes recognition of a conflicting EU judgment on the merits, but does not necessarily preclude recognition of EU, and non-EU, conflicting *res iudicata*.

3.3 CONFLICTS BETWEEN LOCAL APPEALABLE JUDGMENT AND FOREIGN *RES IUDICATA*

With respect to non-EU judgments, this is made quite clear in rules like the Italian ones, providing that local pendency is preclusive only if it precedes pendency abroad, and that local conflicting judgments preclude recognition only if they are *res iudicata*: a foreign *res iudicata* subsequent to a local judgment still subject to an ordinary remedy prevails over it, if the proceedings abroad started before the local ones.²⁰ However, the same should hold with respect to EU *res iudicata*, according to the rationales shown above: a Member State's jurisdictions should not be allowed to compete unfairly, and become a magnet jurisdiction just granting very quickly generous first-instance judgments still subject to appellate review; rules on refusal of recognition should govern only conflicts that could have been prevented by rules on *lis pendens* and related actions; *res iudicata* implies that the losing party lost every further opportunity to plead the effects of a previous conflicting decision in a different Member State.

Hence, a local conflicting decision, still subject to ordinary remedy, should not preclude recognition of a conflicting *res iudicata* from a different Member State, nor hinder the purpose of granting a judgment the same effects within the whole European

of its jurisdiction under Article 24 of the Convention"); compare also the recent holding of the European Court of Justice Case C-29/16, *Hanse Yachts AG v. Port D'Hiver Yachting SARL and Others*, 4 May 2017, para. 35 ("Having regard to that independence and the very clear distinction between the proceedings for the taking of evidence, on the one hand, and any substantive procedure, on the other, the concept of an 'equivalent document' to a document instituting legal proceedings, set out in Article 30 of Regulation No 44/2001, must be interpreted as meaning that a document instituting proceedings for the taking of evidence cannot be regarded, for the purposes of assessing a situation of *lis pendens* and of determining which court is the court first seized within the meaning of Article 27(1) of that regulation, as also being the document instituting the substantive proceedings"); Italian case law already reached this conclusion with the holding of the plenary session of the Court of Cassation no. 1821 of 13 February 1993.

¹⁹ Preclusion of recognition of conflicting provisional remedies was upheld by the European Court of Justice *Italian Leather SpA v. WECO Polstermöbel GmbH & Co.*, C-80/00, 6 June 2002; prevalence of foreign judgment of the merits, even if still subject to ordinary remedies, was so obvious in Italian law (art. 669-novies, c. 4, of the Italian code of civil procedure expressly provides it), that even minor case law applies it straightforwardly since the last century (see, e.g., the holding of the Tribunal of Rome of 25 March 1993, in *Giustizia civile*, 1996, I, 1479); according to the pertinent report, the same was held in the Netherlands by a decision of the Tribunal of The Hague 25 August 2011; for the same conclusion see also the judgment of the French Cour de Cassation of 14 May 1996, in *Bull.* 1996, I, no. 201, 140; the holding to the contrary of the same Cour de Cassation of 20 June 2006, in *Bull.* 2006, I, no. 315, 272, who did not even care of submitting the issue to the European Court of Justice, is therefore a blatant violation of European law, seriously undermining France's credibility as a trustworthy Member of the EU (see, e.g., for a deeper analysis of the latter decision, the critical considerations developed by E. D'ALESSANDRO, "Il diniego di riconoscimento per contrasto tra provvedimenti nell'interpretazione della Corte di cassazione francese: il caso dell'*ordonnance de référé* in conflitto con una sentenza di condanna straniera", in *Int'l Lis*, 2006, pp. 134-139; compare, however, for the solution adopted in 1996, and with no mention of the 2006 odd precedent, H. GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe*, LGDJ, Paris 2010, 4th ed., esp. p. 441).

²⁰ According to Italian doctrinal analysis, effects of such recognition elapse when also the local conflicting judgment becomes *res iudicata* (compare, e.g., also for further references, E. MERLIN, *Il conflitto internazionale di giudicati. Profili sistematici*, Giuffrè, Milano 2004, esp. pp. 53-55; E. D'ALESSANDRO, *Il riconoscimento delle sentenze straniere* Giappichelli, Torino 2007, esp. pp. 311-312); compare *supra*, § 3.1, n. 16.



judicial space, even if rules on *lis pendens* or related actions were also violated in the foreign proceedings: in fact, when it comes to Regulation 1215/2012 (as opposed to Member States' national legislation on recognition of non-EU judgments), violation of rules governing *lis pendens* or related actions is no ground for refusal, and recognition should not be precluded by a conflicting local decision still subject to ordinary appeal, because *res iudicata* has a greater force.²¹ However, it is important to stress that in such circumstances the interested party has the right, and therefore the burden, of pleading the foreign, automatically recognized, *res iudicata* in the appellate proceedings concerning the local decision: the proceedings concerning recognition should be stayed until exhaustion, or waiver, of all ordinary remedies against the local judgment.²²

3.4 CONFLICTS BETWEEN LOCAL RES IUDICATA AND FOREIGN RES IUDICATA

A preclusion of recognition of a conflicting EU foreign *res iudicata*, therefore, operates only when the local judgment is also *res iudicata*: in such case the judicial determination is final and conclusive within the local jurisdiction, and conflicting foreign *res iudicata* cannot overcome it, regardless of the relative timing of the judgment or of the start of the litigation. However, even this holds only unless the later foreign *res iudicata* deals with the effects of a wider set of facts, including subsequent ones producing effects overcoming the effects previously ascertained: in fact, in such circumstances the second judgment is not actually conflicting, because *res iudicata* operates always, as it were, *rebus sic stantibus*.²³

It is worth noting that this latter reasoning might lead to think that subsequent foreign *res iudicata* might also prevail whenever in the foreign proceedings the effects of the local previous *res iudicata* were denied, explicitly or even implicitly: in fact, in such case the foreign subsequent *res iudicata* might be deemed covering a wider set of facts and effects exactly because it dealt also with the new fact consisting in the previous local *res iudicata* and its effects. The idea that the foreign judgment should never be recognized in such cases prevails in doctrinal analysis, but on quite weak grounds: with respect to non-EU judgments, it can be justified by a sovereign nationalistic choice,²⁴ but in the context of Regulation 1215/2012 general principles of mutual trust indicate that a later *res iudicata*, having a greater force than a preceding one, should prevail even over local *res iudicata*.

In fact, the relationship between rule and exception in the field of recognition is totally the other way round: a strict interpretation is required for the grounds of refusal;²⁵ hence, if extension of effects is the rule, the superseding effects of later *res*

²¹ Irrelevance of violation of *lis pendens* in the foreign proceedings for the purposes of recognition of an EU judgment derives directly from the wording of art. 45 of Regulation 1215/2012 and its predecessors (see, e.g., the judgments of the Italian Court of Cassation no. 12181 of 15 September 2000, and no. 9554 of 12 November 1994 in *Giurisprudenza italiana*, 1995, I, 1, 2093; irrelevance of such violation in local proceedings is the necessary premise of the European Court of Justice case law cited *supra*, n. 14); according to some doctrine, enforceability should also grant a judgment a greater force, see, e.g., J. KROPHOLLER, *Europäisches Zivilprozessrecht, Kommentar zu EuGVÜ und Lugano-Übereinkommen*, Recht und Wirtschaft, Heidelberg 1998, 6th ed., p. 364, but see, *contra*, for the sound reply that enforceability has no inherent relation with the degree of finality of a decision, e.g., E. MERLIN, *Il conflitto internazionale di giudicati. Profili sistematici*, Giuffrè, Milano 2004, esp. pp. 93-94; the judgment of the Italian Court of Cassation no. 9554 of 12 November 1994 granted enforcement to a German *res iudicata* notwithstanding a contrary local appealable judgment on the merits (albeit with an unclear supporting opinion); prevalence of foreign *res iudicata* over a local appealable judgment was also granted by a decision of the Tribunal de Grand Instance de Paris 31 May 1989, in *Revue critique de droit international privé*, 1990, 550 (before the odd judgment of the Cour de Cassation cited *supra*, n. 19); it is worth repeating that relevant finality derives from exhaustion of waiver of all remedies whose deadline starts to run from the judgment (compare *supra*, n. 17), so that a French judgment subject to appeal to the Cour de Cassation, despite being a *chose jugée*, is not yet *res iudicata* within the meaning of the analysis developed here, and has a lesser force than an Italian judgment not subject to ordinary remedy, see again E. MERLIN, *Il conflitto internazionale di giudicati. Profili sistematici*, Giuffrè, Milano 2004, esp. pp. 95, 99-101.

²² The stay of proceedings may be justified by way of an analogical application of Art. 51.1 of Regulation 1215/2012 (see the considerations developed by E. MERLIN, *Il conflitto internazionale di giudicati. Profili sistematici*, Giuffrè, Milano 2004, esp. pp. 95-103); since such stay does not prejudice recognition, but rather helps it, allowing the local jurisdiction to implement the foreign judgment, and does not allow to resist recognition on grounds that should have been alleged in the Member State of origin, it would not defy the rationales that supported the ruling for a restrictive interpretation of the power of staying the proceedings in the Member State of destination held by the European Court of Justice Case C-183/90, *B. J. van Dalzen and others v. B. van Loon and T. Berendsen* [1991] ECR I-04743.

²³ Obviously new facts are relevant only insofar as they change the previous course of business between the parties (see, for an analysis of the meaning of the *rebus sic stantibus* clause, R. CAPONI, *L'efficacia del giudicato civile nel tempo*, Giuffrè, Milano 1991, esp. pp. 103-106); relevance of a wider set of fact may explain, e.g. the elusive judgment of the European Court of Justice Case C-145/86, *Horst Ludwig Martin Hoffmann v. Adelheid Krieg* [1988] ECR 645 (compare *supra*, n. 17), and the predictable frequency of such development in family matters explains why the need to give prevalence of the later judgment was more easily acknowledged in Art. 15.2(f) of Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L 160 (compare again E. MERLIN, *Il conflitto internazionale di giudicati. Profili sistematici*, Giuffrè, Milano 2004, esp. pp. 106-107).

²⁴ A concurring rationale might consist in the aim of simplifying the court's task (see again E. MERLIN, *Il conflitto internazionale di giudicati. Profili sistematici*, Giuffrè, Milano 2004, esp. pp. 42-45).

²⁵ See, *ex multis*, the judgment of the European Court of Justice Case C-414/92, *Solo Kleinmotoren GmbH v. Emilio Boch* [1994] ECR I-2237, para. 20.



iudicata should be recognized as well, unless the procedural public order exception may apply, but no procedural public order can preclude recognition of such effects if violation of previous *res iudicata* is not subject to extraordinary remedy. Since such extraordinary remedy is contemplated only in some Member States, there seems to be no ground for refusal at least in Member States that do not have it.

Hence, the purpose of granting a judgment the same effects within the whole European judicial space should not be generally frustrated when local *res iudicata* precedes the foreign one: since later *res iudicata* has a greater force, rules on refusal of recognition should generally not apply. Refusal to recognize in such cases, therefore, especially in Member States that do not grant extraordinary remedies for violation of *res iudicata*, looks rather like a breach of the mutual trust between Member States, in defense of local jurisdiction, unauthorized by Regulation 1215/2012, and certainly should not operate for the resolution of conflicts between decisions both coming from different jurisdictions, which will be dealt with in the following paragraphs: it is only with respect to non-EU foreign judgments that a local *res iudicata* might determine a full preclusion.

3.5 CONFLICTS BETWEEN FOREIGN NON-EU DECISIONS

Whenever a conflict ensues between foreign decisions, both Regulation 1215/2012 and some national rules²⁶ governing effects of non-EU foreign judgments provide that in principle priority should govern its resolution. It is worth noting at the outset of this analysis, however, that identification of priority between different judgments must be carried out making reference to the last moment available for the parties to plead the effects of a foreign judgment: if *res iudicata* depends from the losing party's neglect of an ordinary remedy that allowed such pleading, the deadline to file such remedy is the relevant moment; otherwise, it coincides with the deadline for the last procedural step that allowed it.²⁷

This consideration leads to underscore that with respect to conflicts between different non-EU foreign judgments, whose resolution is not governed by Regulation 1215/2012, the priority rules explicitly provided by some Member States may find a rationale in at least one of the following factors: *i*) in the Member State violation of *res iudicata* is a ground for an extraordinary remedy and is deemed contrary to public order; *ii*) in the Member State recognition of foreign judgments has constitutive effects; *iii*) in the Member State recognition does not follow the theory of extension of effects.²⁸ By contrast, whenever in the State of destination automatic recognition to foreign judgments of the same effects they have in the State of origin applies, and violation of *res iudicata* allows ordinary remedies only, systematic reasons dictate a preference for the later *res iudicata* that cannot be overcome by any parochial bias: in fact, in such case no purpose of defending the local jurisdiction can justify denial of its recognition, utterly regardless of the relative timing of the start of the respective proceedings.

3.6 CONFLICTS BETWEEN FOREIGN EU DECISIONS

The analysis of the rules provided by Regulation 1215/2012 for resolution of conflicts between different EU decisions seems to require from the start to underscore that the difference in wording with respect to the identification of conflicts should not be overestimated: albeit only conflicting decisions specifically concerning the same cause of action and the same parties are considered, the scope of the rule tends anyway to coincide with the scope of the rules aimed at preventing conflicts, given the wide notion of *lis pendens* adopted by European case law. Hence, reversed claims, and third parties subject to the effects of the judgment, might well be involved in conflicts to be solved pursuant to Art. 45.1(d) of Regulation 1215/2012.

However, this rule refers to conflicting decisions: hence, just like Art. 45.1(c), it applies only to decisions of the same force, for the several reasons already seen above. Since recognition of EU decisions is automatic under the theory of extension of effects,

²⁶ See, e.g., Art. 99(1) of Slovenian *Zakon o mednarodnem zasebnem pravu in postopku*, Art. 25 of Belgian *code de droit international privé*, Art. 620 of Estonian code of civil procedure, § 15 of the Czech Private International Law Act (according to the pertinent report, this might also be the French rule).

²⁷ On these classic problems see again, for a thorough analysis and details over nuances and exceptions that need not be dealt with here, R. CAPONI, *L'efficacia del giudicato civile nel tempo*, Giuffrè, Milano 1991, esp. pp. 113-172.

²⁸ The third factor can be identified, e.g., in Art. 94(1) of Slovenian *Zakon o mednarodnem zasebnem pravu in postopku*, and, according to the pertinent report, in the Czech Republic (the issue is not dealt with in the Belgian, Estonian, and French reports).



this means, e.g., that: *i*) a subsequent conflicting judgment on the merits prevails over a provisional remedy; *ii*) a later *res iudicata* prevails over a judgment on the merits, having a higher force (even when the proceedings leading to *res iudicata* started after the other ones, because the State of destination would have no interest in defending local *lis pendens*); *iii*) a later *res iudicata* prevails over a previous one, having a higher force, at least when the State of destination does not provide for an extraordinary remedy for violation of *res iudicata*, and the former *res iudicata* could have been pleaded in the State of origin.

3.7 CONFLICTS BETWEEN FOREIGN EU AND NON-EU DECISIONS

Some further observations may be devoted to the conflict between a EU decision and a non-EU recognizable one, also governed by the priority rule pursuant to Art. 45.1(d) of Regulation 1215/2012. In this field it is obviously dispositive the choice of the State of destination between automatic or constitutive recognition of non-EU judgments: in fact, in the latter case only prior recognition of the non-EU judgment might preclude recognition of a conflicting subsequent EU decision of the same, or even of a lesser, force.

If, on the contrary, automatic recognition of non-EU decisions applies, the same set of conclusions seen above would hold. However, Member States may provide for automatic recognition of non-EU decisions only when they are *res iudicata*.²⁹ In such States, the wording of Art. 45.1(d) of Regulation 1215/2012 might then imply that enforcement of a subsequent EU provisional remedy would not be prevented by a non-EU appealable conflicting judgment on the merits, notwithstanding the greater force of the latter. Moreover, preclusive effects of recognized non-EU judgments may be influenced by a Member State's choice to assimilate them, instead of extending them: whenever a conflict ensues, its resolution may be accordingly different.³⁰

3.8 FINAL REMARKS

The several variations shown here, however, do not seem to foster significant unfair competition between Member States' jurisdictions, and do not undermine operation of rules aimed at preventing conflicts between EU decisions: the purpose of granting an EU decision the same effects in the whole European judicial space may be sometimes frustrated by differences between the Member States in their degree of openness to non-EU legal systems but these differences remain within the realm of their own sovereignty. Hence, they may be deemed compatible with the reciprocal trust between Member States in the field of recognition of foreign judgments.

A more comprehensive fulfillment of the task of granting a decision identical effects within the whole European judicial space, in fact, probably requires that a European federal judiciary provides it.

²⁹ For this solution see, e.g., in Italy Art. 64(d) of law no. 218 of 31 May 1998, in Greece Art. 323 of the local code of civil procedure, in the Czech Republic § 15 of the local Private International Law Act; the same rule might also apply in France, according to the analysis of the pertinent report.

³⁰ Italy should apply the extension system also with respect to recognition of non-EU judgments, according to the analysis developed by E. D'ALESSANDRO, *Il riconoscimento delle sentenze straniere*, Giappichelli, Torino 2007, esp. pp. 64-76, but other Member States may not (compare *supra*, n. 28).