THE RULES ON LIS PENDENS AND ON RES JUDICATA IN THE ELI/UNIDROIT MODEL EUROPEAN RULES OF CIVIL PROCEDURE

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THE RULES ON *LIS PENDENS* AND ON *RES JUDICATA* IN THE ELI/UNIDROIT MODEL EUROPEAN RULES OF CIVIL PROCEDURE

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Abstract: In 2020 the European Law Institute and UNIDROIT approved the European Rules of Civil Procedure ("ERCP"). These are a set of rules through which a model civil procedure is designed with the potential to be operational in any European country. In that regard, it could be said that the ERCP aim to be a "Model Code of Civil Procedure" for Europe. This paper analyses from an analytical perspective the rules on *lis pendens* (Rules 142-146) and on *res judicata* (Rules 147-152) and their interplay with other related legal institutions in the ERCP.

Keywords: European Rules of Civil Procedure, *res judicata*, *lis pendens*, international *lis pendens*, related actions, consolidation of proceedings, Brussels I Regulation (recast), harmonization of civil procedure

1. INTRODUCTION

In 2020 the European Law Institute and UNIDROIT approved the European Rules of Civil Procedure ("ERCP") –also called "Model European Rules of Civil Procedure".[2] These are a set of rules through which a civil process model is designed with the potential to be operational in any European country. In that regard, it could be said that the ERCP aims to be a "Model Code of Civil Procedure" for European countries[3] or, in a certain way, a sort of "Code of Best Practices". Although it is a soft law instrument, the Rules are a unique text that reflects the result of an exhaustive and interesting work of legal comparison from scholars and practitioners all around the continent. For that reason, it is a privileged instrument to analyse legal institutions of procedural law from a comparative perspective and to identify the best solutions to deal with the needs of an efficient civil

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[2] The text and the "official comments" of the Rules are available at: https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules

[3] It should be kept in mind that the ERCP aim to be operative in States that are not part of the EU. This is a consequence of the wide geographical scope of both ELI and, of course, UNIDROIT. See Annex II of the *European Rules of Civil Procedure*, pp. 24-31.

justice system and to reach its principal institutional purpose: to protect the citizens' rights.[4]

As mentioned, the ERCP aim in a way to reach the position of a European Model Code, "offering" a regulation of civil proceedings that has tended to be as complete as possible: some relevant issues, nevertheless, have been kept aside, as happens with the rules on jurisdiction and venue, and on enforcement.[5]

ELI and UNIDROIT dare to offer these rules as a model taking into account the approach followed for their elaboration: on the basis of comparative work, which has taken into account national systems, existing European legislation and *acquis communautaire*, the case law of the Court of Justice and the doctrine of the European Court of Human Rights, the aim has been to present the best solution to the various problematic issues faced by any legislator when designing a fair and efficient civil process (best practice or best rule approach). Indeed, aspiring to offer model rules or best rules implies assuming that the same problem can be tackled in different ways and requires determining which is preferable, both from the point of view of internal functioning and also with a view to a possible future harmonisation of procedural law in Europe

Such an analysis is only possible on the basis of comparative research, which makes it possible to identify not only the various options pursued internally, but also their practical performance, their real effectiveness. It is also necessary to clarify whether the good functioning of certain national civil justice systems is primarily due to their procedural rules or whether it is simply to be expected in a general context of good governance and good public management, possibly associated with adequate funding and an adequate

[4] On the ERCP see, among others, STÜRNER, R., "Principles of European civil procedure or a European model code? Some considerations on the joint ELI-Unidroit project", *Uniform Law Review* 19 (2014), pp. 322 et seq.; SILVESTRI, E., "Towards A European Code of Civil Procedure? Recent Initiatives for the Drafting of European Rules of Civil Procedure". Available at: https://www.academia.edu/18086809/Towards_a_European_Code_of_Civil_Procedure; SILVESTRI, E., "The ELI-UNIDROIT Project: A General Introduction" in GASCÓN INCHAUSTI, F., HESS, B., (eds.), *The Future of the European Law of Civil Procedure. Coordination or Harmonisation?*, Intersentia, Cambridge, 2020, pp. 199-204; HESS, B., "Unionsrechtliche Synthese: Mindeststandards und Verfahrensgrundsätze im acquis communautaire/Schlussfolgerungen für European Principles of Civil Procedure" in WELLER, M., ALTHAMMER, C. (eds.), *Mindeststandards im europäischen Zivilprozessrecht*, Mohr Siebeck, Tübingen, 2015, pp. 221 et seq.; VAN RHEE, C.H. "Approximation of Civil Procedural Law in the European Union" in HESS, B., KRAMER, X. (eds.), *From common rules to best practices in European Civil Procedure*, Nomos-Hart, Baden-Baden, 2017, pp. 63-75; PETERS, L., "UNIDROIT. The first 90 years" in CALVO CARAVACA, A., TIRADO MARTÍ, I. (eds.), *UNIDROIT y la codificación del Derecho Internacional Privado*, Tirant lo Blanch, Valencia, 2020, pp. 19-55; HESS B., *Europäisches Zivilprozessrecht*, De Gruyter, Berlin, 2020, pp. 953-956; GASCÓN INCHAUSTI, F., "Las European Rules of Civil Procedure: ¿un punto de partida para la armonización del proceso civil?", *Cuadernos de Derecho Transnacional*, núm. 1, 2021. Available at: https://e-revistas.uc3m.es/index.php/CDT/article/view/5960

[5] The exclusion of the rules on jurisdiction and venue may be explained by the existence of the Brussels I bis Regulation, that is binding for EU Member States and works as model for non-EU countries. In case of enforcement, it has been more of a pragmatic question: it would have taken too long to find a common ground in this field, where divergences among legal systems are enormous.

awareness of their socio-political relevance. On the other hand, it cannot be ignored that, on many occasions, the best solutions are doomed to failure or mediocre results due to the malfunctioning of the system, whose improvement is not comprehensively addressed: in a suitable environment, they could undoubtedly produce a much better performance. Ultimately, the best solutions are identified from the study and comparative analysis of the effectiveness and practical performance of the possible solutions at stake.

In addition, the European Rules represent a complete model of declaratory civil procedure, whose parts are interrelated and designed to function as a whole: the pleading and evidentiary system is designed to function in a procedural dynamic such as the one designed, assuming the reciprocal roles and powers of judges and parties, the active management of the procedure and a validity of the principle of party disposition qualified by the principle of cooperation (rules 2 to 8). The various rules, therefore, can only be properly understood within their own system. And, consequently, the solutions offered in them can only be considered as the best and as models because they are designed to operate in that systematic whole which they form as a whole.

Against this background, the purpose of this paper is to examine the rules of *lis pendens* (Rules 142-146) and of *res judicata* (Rules 147-152) and their interplay with other related legal institutions in the ERCP. *Lis pendens* and *res judicata* are legal institutions that are part of the "hard core" of any procedural legal order: they should necessarily be addressed by the ERCP. Both *lis pendens* and *res judicata* have, among others, the function of regulating the relationship between parallel proceedings with the same or connected scopes, that are ongoing or that have ended with a final judgment. Obviously, this is an important issue both for domestic and cross-border or transnational litigation. It should also be said that these legal institutions are very closely connected among them and with others as the scope of proceedings, the preclusion of causes of action, and the consolidation of proceedings, among others. The ERCP aim precisely at providing for a complete and systematic set of rules where "all the pieces of the puzzle work together". Let us see how.

2. *LIS PENDENS* AND RELATED ACTIONS

Lis pendens is a legal institution whose purpose is to avoid the simultaneous pendency of proceedings with the same scope, preventing the risk of having conflicting judgments and thus protecting the future negative or exclusionary effect of *res judicata* (*non bis in idem*).[6] It is true that the stay and the consolidation of proceedings can also prevent the contradiction of judgments rendered in proceedings *with different scopes*. In that regard,

[6] Differently, a future positive or binding effect of res judicata is protected by the stay and consolidation of proceedings with related scopes.

it is important to stress from the outset that the rules of the ERCP on *lis pendens* and related actions have the purpose to address both the cases of ongoing proceedings with identical or strongly connected scopes –in what could be called a "strengthened" connection– and with different but closely related scopes –i.e., cases of "simple" connection–. In other words, they aim to cover the whole spectrum of situations that may arise in situations of "parallel proceedings".

The rules on *lis pendens* and related actions proposed in the ERCP are based on the regulation of the Brussels I Regulation (recast) (Articles 29-32) and on the case law that has interpreted it –and, of course, the previous Brussels Convention and Brussels I Regulation.[7] As mentioned in the commentaries to the Rules, we can find there a set of provisions already working within the European Union and with which the courts are already familiar. Therefore, offering their transplantation into domestic litigation has been considered the best option. There are certain reasons, however, why this transfer of rules may not be so obvious.

The Brussels I Regulation (recast) aims to regulate the European *lis pendens* under the need to coordinate different legal orders with different understandings of the notion of scope of the dispute, of *lis pendens* itself and of all the other legal institutions deeply related to them. The main purpose of the Brussels I Regulation (recast) and of the case law of the Court of Justice is therefore to arrange from a functional perspective a system that is capable to operate detached from any national conceptual construction.[8] Only in those cases in which that it was deemed indispensable –and *lis pendens* was one of them–, the Court of Justice created "autonomous notions": it was the most effective way to keep the system operating.

The scope of the Brussels I Regulation (recast) is limited, both because of the legislative competence of the EU and of the scope of the legal instrument itself. The EU lawmaker was in the need to address a wide range of issues arising in situations of cross-border parallel proceedings, although with a limited range of legal tools if compared to a national

[7] See the following decisions of the CJEU: Judgment of the Court (Second Chamber) of 19 October 2017, *Merck*, case C-231/16 [ECLI:EU:C:2017:771]; Judgment of the Court (Third Chamber) of 22 October 2015, *Aannemingsbedrijf*, case C-523/14 [ECLI:EU:C:2015:722]; Judgment of the Court (Third Chamber) of 14 October 2004, *Mærsk*, case C-39/02 [ECLI:EU:C:2004:615]; Judgment of the Court of 9 December 2003, *Erich Gasser*, case C-116/02 [ECLI:EU:C:2003:657]; Judgment of the Court (Fifth Chamber) of 8 May 2003, *Gantner ELECtronic*, case C-111/01 [ECLI:EU:C:2003:257]; Judgment of the Court (Fifth Chamber) of 19 May 1998, *Drouot Assurances*, case C-351/96 [ECLI:EU:C:1998:242]; Judgment of the Court of 6 December 1994, *Tatry*, case C-406/92 [ECLI:EU:C:1994:400]; Judgment of the Court (Sixth Chamber) of 20 January 1994, *Owens Bank*, case C-129/92. [ECLI:EU:C:1994:13]; Judgment of the Court (Sixth Chamber) of 27 June 1991, Overseas Union Insurance, case C-351/89. [ECLI:EU:C:1991:279]; Judgment of the Court (Sixth Chamber) of 8 December 1987, *Gubisch Maschinenfabrik*, case 144/86 [ECLI:EU:C:1987:528].

[8] On *lis pendens* in the Brussels I Regulation (recast) see, among many others, FENTIMAN, R., "Article 29" in MAGNUS/MANKOWSKI, *Brussels I bis Regulation. Commentary*, Otto Schmidt, Köln, 2016, 725-735; LEIBLE, S., "Article 29" in RAUSCHER, T. (ed.), *Europäisches Zivilprozess*, op. cit., 862-888; HESS B., *Europäisches Zivilprozessrecht*, op. cit., pp. 417-430.

legislator dealing with purely domestic cases of parallel proceedings. This entails the need of broadening or narrowing the scope of legal institutions in order to attribute them functions that are traditionally carried out by other means in the internal legal systems of the Member States (e.g., the joinder or the consolidation of proceedings).

The ERCP, differently, have the possibility and purpose of providing for a complete system. In that vein, a *quasi-automatic* import of the regulation of *lis pendens* from the Brussels I Regulation (recast) may be not offering the best solution in all cases. Some of the mismatches already pointed out by academia in relation to the Brussels I Regulation (recast) could be avoided or reduced with a coherent approach, which is sometimes missing in the case law of the CJEU because of its own limitations.

2.1. General notions

From a dynamic perspective, *lis pendens* operates comparing the scopes of different proceedings –if preferred, of different *res judicandae*. Therefore, the first and logic step is to analyse the notion of scope of proceedings under the ERCP. As set down in Rule 23, «*the scope of the dispute is determined by the claims and defences of the parties in the pleadings, including amendments*». Consequently, the scope of proceedings is identified by the following elements: (i) the parties; (ii) the legal and factual elements adduced or that could have been adduced to sustain the claims and defences (Rules 22, 53(2)(a) and (c) and 54(2)); (iii) the requested relief or remedy (Rule 53(2)(d)); and (iv) the defences.

The procedural role of the parties –as plaintiff or defendant– is not relevant to identify the scope of the dispute. Neither is the positive or negative wording/content of the relief sought. Despite a certain confusion in the case law of the CJEU, a claim seeking performance of an obligation and a negative claim seeking declaration that the obligation does not exist are "two sides of the same coin" and trigger two proceedings with the same subject matter.

For the purpose of *lis pendens*, Rule 142(1) establishes the following:

> «*Where proceedings involving the same cause of action and between the same parties are brought in different courts, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established (the priority principle)*».

And, for the purpose of related actions, Rule 144(1) reads as follows:

> «*Where related proceedings are pending in different courts, any court other than the court first seised may stay its proceedings*».

It is clear that the ERCP back here against the terminology and systematics of the "Brussels systems". This triggers two lines of analysis:

First, it is important to note that the Brussels and the ERCP regime do not operate in the same way in cases of *lis pendens* and in cases of related actions. If there is a situation of *lis pendens*, the court second seised *shall* of its own motion stay its proceedings, states today Article 29 of the Brussels I Regulation (recast) –the mirror on which Rule 142(1) reflects itself. By contrast, Article 30 of the Brussels I Regulation (recast) –just as Rule 144(1)– establishes the power for the court to stay or consolidate proceedings, but not the duty to do so, where parallel proceedings are pending, with related actions. The larger the scope of *lis pendens*, the greater the duty to activate the mechanisms of mandatory coordination, ensuring better coherence and avoiding the risk of conflicting decisions.

The key element, therefore, is to determine whether, by transplanting the schemes of the Brussels Regulation in this field, the ERCP are also assuming the specific notion of scope of proceedings for the purpose of finding the borders between *lis pendens* and related actions.

As is well known, the Brussels system is based on a broad notion of the scope of proceedings, which is the one arising from the interpretation made by the Court of Justice of the European Union when dealing with the provisions of the Brussels Convention and the subsequent Brussels Regulations. According to the case law of the Court of Justice,, the notion of "*same cause of action*" encompasses not only the causes of the action stricto sensu, but also their object –*même cause et même objet*–.[9] The cause of action, on the one hand, is formed by the factual and legal grounds that support the claim. As to the object, on the other hand, it is to be understood in a broad sense, not as the prayer for relief or the remedy request, but as the main objective or purpose of the claim. By following this so-called *Kernpunktstheorie*, the Court of Justice has expanded the traditional domestic notions of *lis pendens* –which usually requires a complete identity of all elements–, in order to apply its mandatory provisions also to cases in which, strictly speaking, there are parallel proceedings with strongly related –but not identical– actions.[10] The Court

[9] Judgment of the Court (Second Chamber) of 19 October 2017, *Merck*, case C-231/16 [ECLI:EU:C:2017:771]: "the 'cause of action' comprises the facts and the rule of law relied on as the basis of the action […] As regards the 'subject matter', the Court has stated that this means the end the action has in view […] the concept of 'subject matter' cannot be restricted so as to mean two claims which are formally identical". Judgment of the Court (Third Chamber) of 22 October 2015, *Aannemingsbedrijf*, case C-523/14 [ECLI:EU:C:2015:722]: "'the cause' of an action for the purposes of Article 27 of Regulation No 44/2001, that comprises the facts and the rule of law relied on as the basis of the action […] 'the object' of an action for the purposes of Article 27 of Regulation No 44/2001, the Court has stated that this means the end the action has in view". Also, Judgment of the Court (Fifth Chamber), 8 May 2003. *Gantner ELECtronic*, case C-111/01 [ECLI:EU:C:2003:257]; Judgment of the Court of 6 December 1994, *Tatry*, Case C-406/92 [ECLI:EU:C:1994:400]; and, as the seminal decision, Judgment of the Court (Sixth Chamber) of 8 December 1987, *Gubisch Maschinenfabrik*, case 144/86 [ECLI:EU:C:1987:528].

[10] GEIMER, R., "Article 27" in GEIMER/SCHÜTZE, *Europäisches Zivilverfahrensrecht*, C. H. Beck, München, 2010, Rn. 29-32. FENTIMAN, R., "Article 29" in MAGNUS/MANKOWSKI, *Brussels I bis*, op. cit., pp. 729-732. LEIBLE, S., "Article 29" in RAUSCHER, T. (ed.), *Europäisches Zivilprozess*, op. cit., pp. 873-874. HESS/PFEIFFER/SCHLOSSER, *The Brussels I. Regulation 44/2001*, C. H. Beck, Hart, Nomos, 2008, München, p. 101. VIRGÓS SORIANO, M., GARCIMARTÍN, F. J., *Derecho Procesal Civil*

incorporates thus in the scope of the *lis pendens* regulation both cases of ongoing proceedings with identical *and strongly connected* subject matters: proceedings in which the parties *and* the factual or legal grounds of the action or the object are the same –"strengthened" connection–.[11] This, in turn, reduces the scope of application of the rule on related actions, which may only be used in situations where the connection is "less" strong, although sufficient to trigger the risk of having contradictory or incompatible decisions –including those with *different* parties–.This expansion in the scope of *lis pendens*, operated by the Court of Justice, had the purpose to reinforce the effectiveness of its regime: the mandatory stay –and, eventually, discontinuance– of proceedings in *lis pendens* situations is more fit to prevent the procedural abuses and frauds which were on the core of many of the cases that triggered the Court's preliminary rulings.

In our view, at least three reasons suggest very strongly that the ERCP are also based on this broad notion of scope of proceedings for the purpose of *lis pendens*.

(i) The practically identical terms in which the ERCP regulate this issue, if compared with the Brussels I Regulation (recast) provision.

(ii) The main point at which there is a significant difference affects precisely the definition of related actions. Pursuant to Article 30(3) of the Brussels I Regulation (recast),

> «*For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*».

Rule 144(3) ERCP, differently, has opted here not follow the Brussels text, and offers the following wording:

> «*For the purposes of this Rule, proceedings are deemed to be related where there is a relationship between the causes of action such that it would be in the interests of justice to determine them together*».

The wording explicitly chosen for this rule shows the will not to request that actions are "so closely connected", but rather that there is "a relationship between the causes of action". And this, in turn, suggests that the scope of the provision on related actions is narrower than that of *lis pendens*.

International. Litigación Internacional, Civitas, 2nd ed., Cizur Menor, 2007, p. 365. GARCIMARTÍN ALFÉREZ, F. J., *Derecho internacional privado*, Civitas, 5th ed., Madrid, 2019, para. 13.7. GASCÓN INCHAUSTI, F., "Litispendencia internacional y actuaciones previas al proceso", *Cuadernos de Derecho Transnacional*, 2018, vol. 10, núm. 1, p. 582. Available at: https://doi.org/10.20318/cdt.2018.4139 ROSENDE VILLAR, C., "Litispendencia y conexidad", op. cit., pp. 351-352.

[11] VIRGÓS SORIANO, M., GARCIMARTÍN, F. J., *Derecho Procesal Civil*, op. cit., p. 366. CHOZAS ALONSO, J. M., "Litispendencia internacional y conexidad (artículos 27 a 30 RB)" in DE LA OLIVA SANTOS, A. (dir.), GASCÓN INCHAUSTI, F. (coord.), *Derecho procesal civil europeo. Volumen I*, Aranzadi, Cizur Menor, 2001, pp. 280-284.

(iii) There is, finally, an additional reason to sustain this conclusion: the proposed rules are to be applied not only in domestic cases, but also in cross-border situations –which are precisely those addressed by the Brussels system.

Consequently, the application of the ERCP system on *lis pendens* should not require that the scopes of the parallel proceedings are strictly identical.[12] According to the ERCP system –and because it mirrors the Brussels system–, when the subject matters of parallel proceedings are identical or strongly connected, and provided that the parties to both proceedings are the same, the rules on *lis pendens* will apply. In the rest of cases where parallel pending proceedings have connected subject matters, it will be the rules on related actions that apply.

This would be the most relevant consequence of the ERCP's choice to follow and adopt the broad notion arising from the case law on the "Brussels system". From a more abstract point of view, this would also entail (partially) departing from one of the traditional legal functions of *lis pendens*, protecting the future *negative* effect of *res judicata* as designed in the Rules themselves; such a function, indeed, would not be operating in the cases of strengthened connection.

Addressing a different –but also general– issue, it must be highlighted that the ERCP also follow the Brussels approach as to the definition of the moment in which a court is considered seised for the purpose of pendency and relatedness. In accordance with Article 32 of the Brussels I Regulation, Rule 145 takes into account the different ways of serving proceedings in Europe and states that a court is seised "*at the time when the statement of claim or an equivalent document is filed with the court*" (Rule 145(1)(a)) or "*if the statement of claim or an equivalent document has to be served before being filed with the court, at the time when it is received by an authority responsible for service*" (Rule 145(1)(b)).[13] This provision should only be applicable in cross-border settings, where different methods of first service of the claim on the defendant may coexist. In purely internal cases, on the contrary, no specific rule is needed. It is to be noted, indeed, that the Rules themselves show a preference for one of the models and establish that "[t]*o commence proceedings the claimant must submit a statement of claim to the court*" (Rule

[12] Judgment of the Court (Sixth Chamber) of 8 December 1987, *Gubisch Maschinenfabrik*, case 144/86 [ECLI:EU:C:1987:528].

[13] FENTIMAN, R., "Article 31" in MAGNUS/MANKOWSKI, *Brussels I* bis, op. cit., pp. 755-756. GASCÓN INCHAUSTI, F., "Litispendencia internacional", op. cit., pp. 584-585; GASCÓN INCHAUSTI, F., REQUEJO ISIDRO, M., "A Classic Cross-border Case: the Usual Situation in the First Instance", in HESS, B. (ed.), *An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law. Strand 1 Mutual Trust and Free Circulation of Judgments*, Publications Office of the European Union, 2017, p. 110. Available at: https://op.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en

52) which in turn will be served on the defendant (Rule 68(1)), irrespective of who is responsible for effecting service (Rule 71).

2.2. General rule for *lis pendens*: the priority principle

The ERCP adopt the priority principle as the general rule for cases of *lis pendens*. When a *lis pendens* situation is identified, the second court seised shall stay of its own motion the proceeding until the jurisdiction of the court first seised is established (Rule 142(1)). Once the jurisdiction is established, the second court shall "*order parallel proceedings to be consolidated* [or] [w]*hen the requirements for consolidation are not met* [the second court] *shall, as appropriate, stay or dismiss the proceedings*" (Rule 142(3)). The jurisdiction of the court first seised should be understood to be established, expressly or implicitly, when the court has made a specific decision on it or when it has been not challenged by the parties.[14]

Since the *lis pendens* rules in the ERCP encompass both cases of proceedings with identical scope and with strongly related actions, each of these situations should be examined separately.

It is mainly in proceedings with related scopes –strengthened connection– where the option for a consolidation of the proceedings makes sense: if both actions are decided together, the risk of contradictory judgments is excluded in the simplest manner – although consolidation itself may prove complicated. If consolidation is not possible because its requirements are not met (Rule 146(2)) –e.g., one of the parallel proceedings is not in the first instance or the court does not have jurisdiction to decide on them[15]–, the court second seised shall stay the proceeding until a final judgment is given in the first proceeding. When that happens, the court will be bound by the judgment that has become *res judicata*.[16] In these cases procedural economy is not achieved, but ensuring the positive or binding effect of the *res judicata* of the future judgment that will be issued in the first proceeding will serve the purpose to avoid conflicting rulings on the same issues.

If the parallel proceedings have the same scope –i.e., in cases of *lis pendens* under a traditional and restrictive view–, their consolidation would not make any sense: it does not serve any purpose, since the parties are the same and they carry the burden to make exhaustive pleadings and evidence submissions in the first procedure. For that reason,

[14] Judgment of the Court (Third Chamber) 27 February 2014, *Cartier*, case C-1/13 [ECLI:EU:C:2014:109] para. 44. FENTIMAN, R., "Article 29" in MAGNUS/MANKOWSKI, *Brussels I bis*, op. cit., pp. 734-735. LEIBLE, S., "Article 29" in RAUSCHER, T. (ed.), *Europäisches Zivilprozess*, op. cit., p. 887. ROSENDE VILLAR, C., "Litispendencia y conexidad internacionales y sus últimas reformas legislativas europea y española", *Anuario Español de Derecho Internacional Privado*, 2016, núm. 16, p. 357.

[15] And this will be the case in cross-border situations, where a proper "consolidation" seems utopic, due to the amount of hurdles that would impede it (among which, the lack of rules to govern the way to achieve it, the difficulty of just transferring a court file from one country to another, or language issues).

[16] CHOZAS ALONSO, J. M., "Litispendencia internacional" in DE LA OLIVA SANTOS, A. (dir.), GASCÓN INCHAUSTI, F. (coord.), *Derecho procesal*, op. cit., p. 301.

once the court first seised has established its jurisdiction, the options for the second (or subsequent) court are just to stay or to dismiss the proceeding. As a matter of principle, the logic consequence of the identification of a *lis pendens* situation between two proceedings with the same scope should be the dismissal of one of them. However, the Rules admit the option for the second court to just stay the parallel proceedings, and with good grounds.

As is well known, there are different procedural and material effects related to *lis pendens* –*e.g.*, the so-called *perpetuatio iurisdictionis* or the suspension of the statute of limitation–. There are also legal instruments, such as provisional and protective measures, or measures for the preservation of evidence, which can only be effective as long as proceedings on the merits are pending –they have a strong instrumental nature, as happens, for instance with the European Account Preservation Order, according to Article 10 of its Regulation[17]. A dismissal or discontinuance of proceedings on the merits would entail the disappearance of all procedural and material effects of *lis pendens* and of the above mentioned instrumental procedures linked to them. The possibility of staying the second proceeding is thus thought to prevent the legal and economic damages that the parties would have to bear if the court first seised finally does not issue a judgment on the merits –e.g., because it realizes at a later moment its lack of jurisdiction or of another procedural requirement.

Of course, if the court second seised opts for the stay of proceedings once the court first seised has established its jurisdiction, the stay should end, and dismissal or discontinuance should be ordered instead, once a final judgment has been rendered in the first proceeding.

The second proceedings shall in any case be stayed once the *lis pendens* situation is known to the court, at least until the first court establishes its own jurisdiction. There is no specific provision as to the consequences of this decision on already pending provisional or protective measures linked to the second proceeding; one may also imagine that the stay of proceedings may render the granting of such measures necessary. These, and similar issues, should be solved applying the general rules on case management and on provisional and protective measures. In our view, the rationale of the decision to stay the second proceeding –*i.e.*, the protection of the parties' interests– suggests that these measures should in principle be maintained or could be granted until the final consolidation or dismissal of the second proceeding.

The assessment of a possible case of *lis pendens* shall be made by the court second seised upon motion of a party or *ex officio*. An application to obtain the stay of the second proceeding, on the one hand, should be made in accordance with the general provisions

[17] Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (OJ L 189, 27.6.2014).

on case management. Assessment *ex officio*, established as the rule in Rule 142(1), will be very rare in practice, since courts do not usually have the means to discover the existence of parallel proceedings with identical or strongly connected scopes. The specific provision on the *ex officio* assessment, nevertheless, proves the mandatory nature of the system, which is consistent with the equivalent *ius cogens* nature of the regulation of *res judicata* established in Rule 152, which the institution of *lis pendens* serves to protect.

When a court detects the existence of a potential *lis pendens* situation –normally, upon application of one of the parties—, it must inform itself about the scope and the status of the first proceeding –especially, to confirm whether it is the court second seised and it is, thus, under the duty to enforce the relevant provisions. For this purpose, Rule 142(2) provides for a mechanism of communication and exchange of information between both courts: any of the courts seised of the dispute may request any other court seised to provide it with information about the proceedings pending before it and the date on which it was seised; the requested information should be provided without delay. The relevant judicial cooperation tools will apply, either national or international, depending on the domestic or cross-border nature of the case.

2.3. Exceptions to the priority principle

Rule 143 establishes two exceptions to the priority principle: (i) cases in which the court second seised has exclusive jurisdiction (Rule 143(1) and (2)); and (ii) cases in which the court second seised has jurisdiction based on a choice of court agreement (Rule 143(3) and (4)).

(i) According to Rule 143(1), when the court second seised has exclusive jurisdiction, the first court must decline jurisdiction in its favour. Consequently, if the *lis pendens* situation arises, the court with exclusive jurisdiction does not have to stay its proceeding, not even until the first court establishes its own lack of jurisdiction. If the court first seised fails to take into account the exclusive jurisdiction of the court second seised, that court second seised will nevertheless continue to hear and decide the case, based on the exclusive forum.[18] If, in such a situation, the court first seised gives a judgment, it should be null and void and, at least at an international jurisdiction level, and it would not be recognised abroad –due to the infringement of the rules on exclusive jurisdiction.

The exception of Rule 143(1) does not apply if both courts have exclusive jurisdiction (Rule 143(2)). Two different conclusions arise from that provision. In our view, in situations where the scope of both proceedings is identical, the court second seised should stay proceedings and, eventually, dismiss it. The situation may appear strange, since it is difficult to imagine a case where two different courts could have exclusive jurisdiction

[18] Judgment of the Court (Third Chamber) 3 April 2014, *Weber*, case C-438/12 [ECLI:EU:C:2014:212] para. 55, 58.

on the same case[19]. In *Scherrens*,[20] for instance, the Court of Justice faced a situation of a dispute as to the existence of a lease relating to immovable property situated in two States, where the exclusive jurisdiction is granted to the courts of the State where the property is situated. The Court decided then that the courts of each State should rule exclusively on the part of the property located on their own territory, as a means to respect each court's exclusive jurisdiction. If the parallel proceedings have strongly connected objects, although not identical, we also believe that the same solution should apply, although with a different final consequence: the court second seised should stay proceedings until the first proceedings conclude with a final judgment, which could in turn have binding effects on the second proceedings –the ground to refuse enforcement based on the infringement of the rules of exclusive jurisdiction would not apply, since the court first seised had indeed jurisdiction.

The other exception to the priority principle occurs when the court second seised has jurisdiction based on an exclusive choice of court agreement. In that case, it shall retain its jurisdiction, since the agreement grants that court the priority to rule on the case (Rule 143(3) and (4)

> «*(3) Without prejudice to Rules protecting weaker parties and without prejudice to jurisdiction by appearance, where a court upon which an agreement confers exclusive jurisdiction is seised, any other court must stay proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under it.*
>
> *(4) Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any other court shall decline jurisdiction in favour of that court*».

These provisions aim to prevent the so-called "torpedo claims", which were already known to the case law of the Court of Justice of the European Union in the framework of the Brussels Convention and Regulations.[21] Under a strict priority principle, a party could undermine the effectiveness of the choice of court agreement by simply filing an identical claim before a court of a different State. Once the second claim was filed before the court designated in the agreement, that court was nevertheless obliged to stay proceedings until the court first seised declared its own lack of jurisdiction –on the basis of the exclusive effect of the choice of court agreed by the parties, and assuming that its existence was pleaded by a party. The existence of the agreement should mean that the court first seised

[19] FENTIMAN, R., "Article 31" in MAGNUS/MANKOWSKI, *Brussels I bis*, op. cit., p. 748.

[20] Judgment of the Court (Sixth Chamber) 6 July 1988, *Scherrens v Maenhout and others*, case C-158/87 [ECLI ECLI:EU:C:1988:370].

[21] LEIBLE, S., "Article 29" in RAUSCHER, T. (ed.), *Europäisches Zivilprozess*, op. cit., pp. 884-886. SUDEROW, J., "Nuevas normas de litispendencia y conexidad para Europa: ¿El ocaso del torpedo italiano? ¿Flexibilidad versus previsibilidad?", *Cuadernos de Derecho Transnacional*, 2013, vol. 5, núm. 1, pp. 188-193. The actual wording of Article 31.2 of Brussels I Regulation (recast) responds to the criticisms to the Judgment of the Court of 9 December 2003, *Erich Gasser*, case C-116/02 [ECLI:EU:C:2003:657]. FENTIMAN, R., "Article 31" in MAGNUS/MANKOWSKI, *Brussels I bis*, op. cit., pp. 750-753.

should eventually decline jurisdiction in favour of that one with exclusive jurisdiction by the agreement, but with a relevant investment of time and money. Compensation for damages resulting from the breach of the obligations of the exclusive jurisdiction agreement could be envisaged, as has been the case in some jurisdictions.[22] But the inconveniences triggered by this "rush to the court", forcing the other party to challenge the jurisdiction of the court first seised, allowed to consider this course of action as a bad faith procedural strategy, aimed at losing time –or gaining it, depending on the perspective…[23]

Adopting this approach, the ERCP show their will to grant a special value to choice of court agreements, not only at the level of international jurisdiction, but also in purely domestic settings. It is, thus, another proof of the interest of the Rules to endorse good practices and to foster the principle of cooperation. Let us recall that, pursuant to Rule 2, «*Parties, their lawyers and the court must co-operate to promote the fair, efficient and* speedy *resolution of the dispute*» and that, more specifically, according to Rule 3(e), parties and their lawyers must «*act in good faith and avoid procedural abuse when dealing with the court and other parties*».

From a different point of view, it is important to recall that, as a matter of principle, one court is not empowered to rule on the jurisdiction of another one, at least regarding international jurisdiction within the Brussels I regime[24]. This is the reason why in cases of *lis pendens* the court without preference (the court second seised in ordinary cases, the court first seised in special cases) shall stay proceedings and await the decision on its own jurisdiction of the preferent court. In addition, and according to the principle of mutual trust, the court without preference is bound by the decision given by the preferent court on its own jurisdiction, namely if it is based on a choice of court agreement (see the decision of the Court of Justice in *Gotaher*). In purely domestic cases, however, it is possible for the lawmaker to establish mechanisms to solve differently the positive or negative jurisdiction conflicts that may arise (e.g., allowing a higher court to order a lower court to refer a case, because the higher court considers it has jurisdiction to deal with it).

[22] See, for instance, the decision of the Spanish Supreme Court of 12 January 2009, of the German Supreme Court of 17 October 2019 and the most recent of the Greek Supreme Court of 25 June 2021. In the English case law, see also *Barclays Bank Plc v Ente Nazionale di Previdenza ed Assistenza dei Medici e Degli Odontoiatri* (Queen's Bench Division. Commercial Court) [2015] 10 WLUK 260, *Imperial Marine Co, Bristol Marine Co, Cyclone Maritime Co, Seagarden Shipping Inc, Wave Navigation Inc v "Alexandros T"* (Court of Appeal; Civil Division) [2014] WL 3387869 and *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG and others* (Supreme Court) [2013] 11 WLUK 115.

[23] FENTIMAN, R., "Introduction to Article 29–30" in MAGNUS/MANKOWSKI, *Brussels I bis*, op. cit., pp. 719-720.

[24] Judgment of the Court (Sixth Chamber) of 27 June 1991, *Overseas Union Insurance*, case C-351/89 [ECLI:EU:C:1991:279] para. 26; LEIBLE, S., "Article 29" in RAUSCHER, T. (ed.), *Europäisches Zivilprozess*, op. cit., pp. 881-882; GARCIMARTÍN ALFÉREZ, F. J., *Derecho internacional privado*, op. cit., para. 13.11.

The ERCP remain silent on these issues, due to the decision to refrain from addressing a harmonised proposal to deal with internal jurisdiction.

2.4. Related proceedings

As stated above, and in accordance with the case law of the Court of Justice of the European Union on the «Brussels regime», the ERCP have opted for a more flexible approach in situations of related proceedings.[25] First of all, the notion of related proceedings is primarily functional: «*proceedings are deemed to be related where there is a relationship between the causes of action such that it would be in the interests of justice to determine them together*» (Rule 144(3)). This includes, for example, proceedings in which the position of plaintiff or defendant is occupied by the same person and in which the actions are based on the same facts —e.g., those triggering product liability—. The court may also consider to be related cases in which the parties are *different*, where the action is based on the same factual grounds: in these situations, lack of identity in the parties means that the outcome of one of the proceedings would not have *res judicata* effects on the second one, but the proper administration of justice may make it suitable to prevent contradictory judgments –and this would happen if, e.g.,. A is held liable towards B, but C is not held liable towards D because the facts on which A liability was established, equally relevant in the second of C against D, are considered as not proven in that second case.

The proposal of the ERCP for these cases of related actions is triple: the consolidation of proceedings; staying one of the parallel and related proceedings until the other one concludes; assuming the risk by not doing anything.[26]

Rule 144(2) establishes indeed that "[w]*here related proceedings are pending in different courts, any court other than the court first seised* may *stay its proceedings*". Therefore, the application of this regime is optional for the court and is to be considered part of its case management powers. An *ex officio* application of the rule is possible –provided that the court takes notice of the existence of related proceedings–, but it is more than expectable for the interested party to trigger the established mechanisms.

If the court second seized decides to address the risk of having conflicting decisions, the only option directly available to it is staying the second proceedings (Rule 144(1)). This decision, of course, may be against the interest of the other party and could undermine their procedural fundamental right to speedy proceedings. In that regard, the fact that the

[25] Judgment of the Court (Third Chamber) of 14 October 2004, *Mærsk*, case C-39/02 [ECLI:EU:C:2004:615]. On related cases in Brussels I Regulation (recast) see. FENTIMAN, R., "Article 30" in MAGNUS/MANKOWSKI, *Brussels I* bis, op. cit., pp. 736-748; LEIBLE, S., "Article 30" in RAUSCHER, T. (ed.), *Europäisches Zivilprozess*, op. cit., pp. 888-895; HESS, B., *Europäisches Zivilprozessrecht*, op. cit., pp. 421-422.

[26] FENTIMAN, R., "Article 30" in MAGNUS/MANKOWSKI, *Brussels I bis*, op. cit., pp. 736-740, 743-744. LEIBLE, S., "Article 29" in RAUSCHER, T. (ed.), *Europäisches Zivilprozess*, op. cit., pp. 890-891.

regime is optional –and not mandatory– forces the court second seised to take its decision considering issues as the level of relationship between the proceedings or the timeframe in which it is foreseeable that the first proceeding will finish, among others.[27]

The system, however, envisages another possible solution (Rule 144(2)): consolidation of proceedings, which also serves the purpose of preventing inconcilable decisions. However, it will only operate *upon application of one of the parties*, if the necessary requirements are met (Rule 146).

It is important to note, moreover, that the consolidation of proceedings, strictly speaking, is decided by the court first seised, not by the court second seised. Therefore, consolidation of proceedings is only an option for the court second seised when it is informed of the decision made in this sense by the court first seised and, in practice, it will consist in the court second seised declining its jurisdiction and discontinuing the proceeding (Rule 144(2)) In the meantime, the second court can only limit itself to stay the proceedings until that outcome has been reached. Otherwise, the risk would emerge that the court first seised does not order the consolidation of proceedings and that parties, consequently, would suffer the damages associated to the loss of the procedural and material effects of *lis pendens –e.g.*, the suspension of the statute of limitations– or of the finalization of the proceeding –e.*g.*, the extinction of a provisional measure–. If the proceedings are not eventually consolidated for any reason, the second one *may* be stayed, but cannot be discontinued for that reason.

2.5. Consolidation of proceedings

As already mentioned, Rule 146 regulates the consolidation of proceedings upon the application of one of the parties. Consolidation makes sense in cases of *lis pendens* when the parties of the proceedings are the same and their scopes are related (Rule 142) –strengthened connection– and when the parties are different, but there is a relationship between the factual grounds of the claims –simple connection–. In the first case the consolidation, if possible, becomes mandatory (Rule 142(3)), whereas in the second situation it is just a power that the court may decide to use in the interest of the proper administration of justice. In both cases, and to protect the rights of the parties, the second or further proceedings should be stayed until the court first seised decides on the consolidation.

The court first seised may only order the consolidation of parallel proceedings upon application of one of the parties (Rule 146(1)), provided that two requirements are met: the court has jurisdiction to hear the parallel proceedings and both are pending at the first

[27] LEIBLE, S., "Article 29" in RAUSCHER, T. (ed.), *Europäisches Zivilprozess*, op. cit., p. 893. HESS/PFEIFFER/SCHLOSSER, *The Brussels I*, op. cit., p. 103.

instance (Rule 146 (2))[28]. Although these requirements are met, the court could nevertheless reject the consolidation if it does not appear to be in the best interest of a sound administration of justice (e.g., because the resulting case would be too complex). It is to be regarded, in this vein, as a case management power, in accordance with Rule 49(6). In order to make its decision decide about the consolidation, the court shall hear the parties and should have a fluent communication with the other court seised (Rule 146 (3)). Once the consolidation has been ordered, any other court that was dealing with a parallel proceeding shall decline jurisdiction and discontinue it (Rule 146 (4)).

Rule 146 (5) establishes an important criterion regarding the material and procedural effects related to *lis pendens*: "[c]*onsolidation does not prejudice any procedural or substantive consequences of the filing or pendency of parallel proceedings*". If the consolidation has been effectively made, it shall be considered that all these effects continue. In that regard, this rule operates like a bridge that allows maintaining the effects of *lis pendens*, thus avoiding prejudicial consequences for the parties –e.g., the interruption of statutes of limitation.

The Rules do not envisage the possibility of adopting or maintaining provisional measures, including measures for the preservation of evidence, until the proceedings are consolidated. This issue is to be governed by the special set of rules on provisional and protective measures (Part X of the ERCP) and could, if necessary, be developed by a national lawmaker wishing to build civil proceedings backing on the ERCP.

3. *RES JUDICATA*

The rules on *res judicata* are of the utmost significance in any (European) procedural regulation. All procedural systems need to ensure that court decisions, once they are final, determine the end of the dispute: on the one hand, because they prevent further proceedings with the same subject matter from taking place (*non bis in idem*, negative effect); on the other hand, because they bind the courts hearing subsequent proceedings with a related subject matter (binding or positive effect). *Res judicata* is closely related to many other essential procedural notions, such as the scope of proceedings, *lis pendens*, related actions, or preclusion of causes of actions, among others. It has already been mentioned that the rules on *lis pendens* tend to preserve the future negative effect of *res judicata* in case of identical scopes, while the stay and consolidation of proceedings with related scopes, on the other hand, serve the purpose of preserving its positive effect.

[28] It is important to note that the consolidation of proceedings addressed by the rules on *lis pendens* and related actions regards proceedings pending before different courts. If the parallel proceedings are all pending before the same court, then Rule 37 applies, according to which: «The court may order the consolidation of separate proceedings pending before it to enable them to be managed properly in a single proceeding.»

There are different ways to understand and to establish the boundaries of *res judicata* in the existing legal orders across Europe.[29] A more restrictive or broad notion of *res judicata* usually depends on whether only the operative part of the judgment becomes *res judicata* or, on the contrary, also the rulings included in the reasoning are able to produce this effect. The scope of the *res judicata* logically influences the scope of its negative and positive effect and has in turn an impact on the regulation of the stay or consolidation or proceedings in cases of strong connection, as seen earlier.

Another relevant issue to address is the relationship between *res judicata* and the claimant's duty to bring all the legal and factual grounds in support of the claim, i.e., the preclusion of causes of action. While in some legal orders this preclusion is regulated as being part of the material scope of *res judicata*, in others it is rather an autonomous institution based on procedural economy, the duty of the parties to act in good faith and/or the principle of cooperation.

3.1. Finality and *res judicata*

Rule 148 backs against common ground when it establishes that "*A judgment is res judicata when ordinary means of recourse are not or are no longer available*". Finality, therefore, is the prerequisite of *res judicata*.

When a mean of recourse is considered ordinary is a matter that finds different answers in the different European procedural systems. The ERCP overcome this problem, since they propose their own system in Part IX, under the title of "Means of review". According to this system, both the first appeal and the second appeal are ordinary means of recourse, which are to be exhausted or no longer available to reach finality. The scope of the first appeal –which opens a second instance– is the review of the application of the law in the judgment, the legality of the proceedings in the first instance court and/or the evaluation of the evidence, as established in Rule 169: the ERCP follow a broad approach in the scope of this (first) appellate review, clearly compatible with the notion of an ordinary mean of recourse. The second appeal, differently, is limited to legal issues: the interpretation and application of the law or the legality of the proceedings (Rule 174). In addition, the right to a second appeal is limited, pursuant to Rule 172. This notwithstanding, it is still an ordinary mean of recourse in the framework of the ERCP, since it is envisaged by the whole system as an expectable reaction against the judgment given in the second instance –or directly against the first judgment, pursuant to the

[29] CHASE, O., G., HERSCHKOFF, H., et al., *Civil litigation in comparative context*, Thomson/West, St. Paul (Minnesota), 2007, pp. 435-438; with greater detail, FERRAND, F., "Res Judicata From National Law to a Possible European Harmonisation?", in HESS, B., KOLMANN, S., ADOLPHSEN, J, HAAS, U. (eds.), *Festschrift für Peter Gottwald zum 70. Geburtstag*, C.H. Beck, Munich, pp. 143-158.

possibility of lodging a leapfrog appeal under Rule 177–. To sum up, both first and second appeal are the "ordinary means of recourse" referred to by Rule 148.[30]

In addition, special attention should also be paid to the possibilities set down in the Rules to file an appeal against partial judgments or judgments on specific procedural or substantive issues (Rule 66).

3.2. Types of judgments that become *res judicata*

The types of judgment that become *res judicata* are established in Rule 147: "[f]*inal judgments, including partial judgments, default judgments, and judgments that decide procedural issues or issues on the merits are res judicata*".

As explained in the comments to the Rule, this regulation just applies to State court decisions: therefore, arbitral awards and judicial settlements are excluded (Rule 141), just like settlements reached in mediation or conciliation proceedings. Also consent judgments are kept out from the scope of the *res judicata* regulation, again due to the lack of a real judicial assessment on the case. The Rules do not exclude the possibility that these decisions and agreements have effects similar in practice to those of *res judicata*, but that is an issue not explicitly regulated.

Taking into account the *res* that is judged, there may be judgments deciding on procedural requirements (Rule 133) or on substantive matters: ruling on the claim and the defences –*i.e.*, on the scope of the proceedings (Rule 23)–. Taking into account the scope of the *res* that has been judged, there may be judgments deciding the whole of a claim for relief (Rule 130(1)(a)), partial judgments (Rules 130(1)(b) and (c)), as well as judgments that decide on specific issues on the merits or procedural matters (Rule 130(1)(d)). In addition, these judgments may also be issued in default (Rule 130(1)(e)).

The final judgment shall either uphold or dismiss the claim for relief based on procedural or substantive maters (Rule 130(1)(a)). The partial judgment shall either uphold or dismiss part of a claim for relief (Rule 130(1)(b) or one or more of the claims for relief –but not all of them–, also based on procedural or substantive grounds (Rule 130(1)(c)).

If the defendant fails to appear, the final or partial default judgment becomes *res judicata* (Rule 138), because default judgments may only be made after a genuine assessment of the subject matter of the dispute (Rule 136(2)).

The Rules allow the court to issue partial judgments on just one or more procedural or substantive *issues* (Rules 66 and 130(1)(c) and (d)). In such cases the claim for relief is not upheld nor dismissed: the decision affects only a specific substantive matter –e.g., whether the claim is not time-barred– or on a procedural one –e.g., whether the court has

[30] The extraordinary motion for review (Rules 181 et seq.), on the contrary, has precisely the aim of challenging a final decision and rescinding a judgment that has become *res judicata*.

jurisdiction-. These possibilities are part of the case management powers of the court (Rule 49(7)).

It is in our view particularly interesting to further analyse the ERCP's choice to grant *res judicata* to judgments that decide procedural issues. In many legal orders, indeed, decisions on procedural issues do not become *res judicata*: it is considered that only the subject matter of the dispute is the *res* that technically the court is judging and that may be considered as *judicata*.

These divergences were evidenced by the Court of Justice of the European Union in the *Gothaer* case, where the cross-border recognition of a decision on jurisdiction –i.e., on a procedural issue– was at stake. [31] As is known, the recognition of a foreign decision may follow two principles, that of extended effects and that of assimilation. The assimilation model "nationalizes" the foreign decision, which is given the same effects that an equivalent judgment would have under the national law of the State of recognition. The principle of extended effects, differently, assumes and recognizes the procedural effects that the judgment has in its State of origin. This last one is the model of the Brussels I system: the *res judicata* effects of a decision will be recognized with the scope and effects attributed under the law of the State of origin –*i.e.*, accepting their objective, subjective and temporal limits–.[32]

In the *Gothaer* case the Court of Justice examined whether the Brussels I Regulation obliged a German court to recognize the judgment of a Belgian court which, having the force of *res judicata* in its legal system, had dismissed the claim due to the lack of international jurisdiction –based, in turn, on the existence of a valid choice of court agreement in favour of the courts of a third State. The German referring court observed that such judgments given by foreign courts are for the most part not capable of recognition under German law. The Court of Justice was therefore asked whether the model of the extension of effects imposes the recognition of *res judicata* also on final judgments on procedural issues.[33] The CJEU eventually affirmed that the court before which recognition is sought of a judgment by which the court of another Member State has declined jurisdiction based on a clause of prorogation of jurisdiction is bound by that decision, which is thus recognised.

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[31] Judgment of the Court of Justince of 15 November 15 2012, *Gothaer Allgemeine Versicherung*, case C-456/11 [ECLI:EU:C:2012:719].

[32] VIRGÓS SORIANO, M., GARCIMARTÍN ALFÉREZ, F. J., *Derecho Procesal Civil*, op. cit., p. 564.

[33] On the *Gothaer* case see SCHUMANN BARRAGÁN, G., "Cosa juzgada y cuestiones procesales: una perspectiva nacional y europea", *Revista General de Derecho Procesal*, núm. 49, 2019. Available at: https://www.researchgate.net/publication/352491397_Cosa_juzgada_y_cuestiones_procesales_una_perspectiva_nacional_y_europea_Revista_General_de_Derecho_Procesal_num_49_2019. Also TORRALBA MENDIOLA, E., RODRÍGUEZ PINEAU, E., "Two's Company, Three's a Crowd: Jurisdiction, Recognition and Res Judicata in the European Union", *Journal of Private International Law*, 10:3, pp. 403-430.

This case shows part of the problems of not attributing *res judicata* to judgments on procedural issues. From an international litigation perspective, the most important one is the possibility of triggering positive or negative conflicts of jurisdiction, without having any specific mechanism to deal with them.[34] Also, and both from an international and national litigation perspective, if the judicial decisions on procedural matters are not considered *res judicata*, there would be a risk for the defendant to unduly suffer the plaintiff's attempts to bring new claims before different courts infringing the same procedural requirement.

From a more academic point of view –but with clear practical implications– the main concern raised by the attribution of *res judicata* to decisions on procedural matters is the gap between the *res judicanda* and the *res judicata*. If the law considers that the decisions on procedural issues are *res judicata*, it is necessary to assume that the *res* that has been judged is not the merits of the case, but rather the procedural issue itself, obviously related to a specific subject matter: e.g., the jurisdiction *related to a claim about the performance of the contract X between A and B*. It is necessary to bear in mind that, by nature, *res judicata* operates in practice through the comparison of two different objects: the *res judicata* –what was actually decided in the first proceeding– and the *res judicanda* –what is to be decided in the second one–. It is therefore of the essence to correctly identify the scope of the *res judicata* of a procedural issue, in order to establish how it shall operate in a different proceeding –either in a positive or in a negative manner. Extending *res judicata* to issues that are not part of the scope of the proceeding could generate some imbalances that should be kept in mind.[35]

Apart from that, Rule 147(2) establishes that provisional measures do not o have *res judicata* effects *on the merits of the issues in dispute in proceeding*. This is a logical consequence of the nature and scope of provisional measures and of the procedure to grant them. The required *fumus bonis iuris* determines that the court will give a *prima facie* decision, insufficient to consider the matter as finally judged. This provision, however, does not impede decisions on provisional measures to have *res judicata* effects on subsequent applications to obtain provisional measures, provided that the circumstances have not changed.[36]

[34] The lack of positive and negative conflicts of competence at the European level makes it essential to attribute *res judicata* effects to this kind of decision. Otherwise the risk would arise of situations whre no court would consider itself competent to hear the case. In this regard, SCHUMANN BARRAGÁN, G., "Cosa juzgada y cuestiones procesales", op. cit., p. 16. HESS/PFEIFFER/SCHLOSSER, *The Brussels I*, op. cit., p. 118. CHOZAS ALONSO, J. M., "Litispendencia internacional" in DE LA OLIVA SANTOS, A. (dir.), GASCÓN INCHAUSTI, F. (coord.), *Derecho procesal*, op. cit., p. 303.

[35] SCHUMANN BARRAGÁN, G., "Cosa juzgada y cuestiones procesales", op. cit., pp. 8-10.

[36] See, in this vein, the very recent Conclusions of Advocate General Rantos in case C-581/20, TOTO, published on 9 September 2021 [ECLI:EU:C:2021:726].

3.3. Material scope of *res judicata*

As stated in Rule 149 (1) and (2) "[t]*he material scope of res judicata is determined by reference to the claims for relief in the parties' pleadings, including amendments, as decided by the court's judgment. Res judicata also covers necessary and incidental legal issues that are explicitly decided in a judgment where parties to subsequent proceedings are the same as those in the proceedings determined by the prior judgment and where the court that gave that judgment could decide those legal issues*".

First, it is worth noting that, according to Rule 149(1) the material scope is determined by the subject matter of the proceeding "*as decided by the court's judgment*". This particular sentence covers also inconsistent judgments —*ultra* and/or *extra petita*—. If the court gives a judgment which is not consistent with the parties' pleadings, they may avail themselves of the ordinary means of recourse to remedy that procedural mistake. If none of the parties files an appeal to challenge the inconsistent judgment, then the issue will become *res judicata* "*as decided by the court*".

In our view, the ERCP adopt a broad notion of the material scope of *res judicata*, which encompasses the ruling of the judgment in its operative part, but also the reasoning in which it is based. *Res judicata* shall therefore display its positive effects upon another proceeding in which part of the scope of the dispute is a legal issue that had already been decided in the first proceeding.

The material scope of *res judicata* must also be put in relation with the preclusion of causes of actions of the claim for relief set down in Rule 22. In accordance with it, "[p]*arties must bring all the legal and factual elements in support of, or in objection to, a claim for relief that arise out of the same cause of action*". This provision establishes the preclusion of all the grounds –factual and legal– that could sustain the claim of relief or the defences.

It is important, however, to emphasize the difference between the preclusion of causes of action and the preclusion of claims. In the first case, it is the factual or legal grounds that could be alleged to support *a specific claim for relief* that are precluded –e.g., if compensation for damages can be pursued on the basis of contract (cause 1) or on tort (cause 2), the non-pleaded cause of action will be precluded and will not be admittable as the basis for a subsequent proceeding claiming the same compensation. In the second case, preclusion affects the actions or claims for relief that could have been brought in relation to the legal dispute between the parties –e.g., in case of non-performance of a contract, a party may seek the termination of the contract (action 1) and a compensation of damages (action 2)–. Rule 22 ERCP addresses the first situation: plaintiffs must concentrate all legal and factual elements in support of their claims for relief, but they have no obligation to bring all the claims for relief potentially available to them.

As previously mentioned, this preclusion of causes of action could be conceptually regulated as part of the objective scope of *res judicata* or as an "independent" preclusion rule. In both cases the function is the same; the difference lies in the explanation and the conceptual construction of the legal institution. In any case, the burden of concentration of issues –in its positive wording– or their preclusion –in its negative wording– have a direct effect on the material scope of *res judicata*.

The preclusion of causes of action allocates a special burden on the parties, since they have to foresee and allege all the causes that exist to support *a specific claim for relief*. This, in turn, maximizes the procedural economy, anticipates the finalization of the legal dispute between the parties and prevents a bad faith attitude, consisting of potentially keeping the other party under the pressure or the threat of constant legal proceedings.

With a broader or more limited scope and with one or the other conceptual construction, this type of preclusion is known to most European legal orders. In Spain, for instance, it is expressly established in Article 400 of the Spanish Code of Civil Procedure[37] In Germany an equivalent preclusion of causes of actions is explained with the theory of the *Anspruchskonkurrenz*: in cases where the claim for relief –the so-called *prozessuale Anspruch*–, which is the subject matter of the dispute, could be based on different *materielle Ansprüche*. As a rule, *res judicata* covers the claim for relief and, with it, all the *materielle Ansprüche* that could be alleged in support of it.[38] In France the preclusion rule was established by the case law of the *Cour de cassation*, in the famous *arrêt Césaréo*.[39] In England, finally, this issue is addressed by the so-called *Henderson* rule[40], which is based on the good faith principle and on the abuse of process in which a party may incur when she submits the same defendant to unnecessary proceedings related to the same legal dispute. As a consequence of this wide *ratio* of the *Henderson* rule, it covers both the preclusion of causes of actions and –unlike the other legal systems– in some cases also the preclusion of actions or claims for relief that could be sought regarding a specific legal dispute.[41]

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[37] Article 400 of the Spanish Code of Civil Procedure (*Ley de Enjuciamiento* Civil) reads as follows: «1. When the claim may be based on different facts or on different legal grounds or titles, the claim shall state as many of them as are known or may be invoked at the time the claim is filed, and it shall not be admissible to reserve their allegation for a later proceeding. The burden of pleading referred to in the preceding paragraph shall be without prejudice to complementary pleadings or pleadings of new facts or new information permitted by this Law at times subsequent to the claim and the defence. 2. In accordance with the provisions of the preceding paragraph, for the purposes of lis pendens and res judicata, the facts and legal grounds adduced in a lawsuit shall be deemed to be the same as those adduced in a previous lawsuit if they could have been adduced in that lawsuit».

[38] GOTWALD, P., "§ 322" in *Münchener Kommentar zur ZPO*, 6th ed., Munich, 2020, Rn. 111-112. LEIPOLD, D., "§ 322" in STEIN-JONAS, *Kommentar zur Zivilprozessordnung. Band 4*, Mohr Siebeck, 22th ed., Tübingen, 2008, Rn. 98.

[39] Arrêt n° 540 du 7 juillet 2006 Cour de cassation - Assemblée plénière.

[40] *Henderson v. Henderson* (1843) 3 Hare 100 (1843) 3 Hare 100, 67 ER 313 (Court of Chancery).

[41] ANDREWS, N. H., *On Civil Procedure*, Cambridge University Press, Cambridge, 2013, pp. 483-491. CHASE, O., G., HERSCHKOFF, H., *et al*., *Civil litigation*, op. cit., pp. 441-447.

In short, the interplay between Rules 22 and 149 determines that all the legal and factual elements in support of a claim for relief fall within the material scope of the *res judicata* irrespective of whether they were alleged by the plaintiff or not. Due to their intimate connection, this will also be a relevant factor to assess the existence of a *lis pendens* situation (*vid. supra*): the *res judicandae* that must be compared to identify the similarity or connection between the scopes of two or more parallel proceedings include the factual and legal grounds that have been alleged, but also those that could have been alleged (Rules 22 and 53(2)(a) (c)).

Rule 149 also deals with a more specific issue, regarding the *res judicata* effect of the judgment deciding on a defence based on set-off. It is sometimes difficult to establish whether the set-off operates as a mere defence or as a counterclaim. The ERCP avoid delving in this issue by establishing a clear rule: the set-off issue shall become *res judicata* if the court has expressly decided on it –upholding or rejecting it– (Rule 149 (3)). If the claim for relief is rejected on other grounds –e.g., the claim is time-barred–, the set-off matter does not become *res judicata* (Rule 149(4)), since it was not within the scope of the judicial decision.

3.4. Temporal scope of *res judicata*

The temporal scope of the *res judicata* is partially regulated in Rule 150, according to which "[w]*here a judgment that has become res judicata requires periodic performance, on application by a party, the court may vary the judgment prospectively* […] *A judgment may only be varied under this Rule where there is a substantial change of circumstances*". Although the provision addresses the special case of judgments requiring periodical performance, it is possible to extract from it a general principle applicable to all cases: new facts or circumstances that occur after the judgment became *res judicata* are not included within its material scope.

This Rule also must be read in connection with the preclusion of causes of action established in Rule 22. The temporal scope of *res judicata* encompasses all facts or circumstances that were alleged and all those that could have been alleged in support of the claim for relief –which, of course, will not be regarded as "new" circumstances for the purpose of avoiding the effects of *res judicata* in a potential subsequent proceeding based on them.

To sum up, (only) new facts or circumstances could be the ground of another claim for relief in a subsequent proceeding: neither are they a *res* which has been judged nor precluded.

3.5. Personal scope of *res judicata*

The ERCP incorporate the general rule of *res iudicata inter partes*: "*Only parties to proceedings, the heirs and successors are bound by those parts of a judgment that are res*

judicata" (Rule 150). This definition of the personal scope of *res judicata* is a logical consequence of the fundamental right to be heard and of the principle of party disposition, which inspire the whole procedural system designed by the Rules.

This general rule is aimed to apply only to individual proceedings. Part XI of the ERCP is devoted to collective proceedings and, more specifically, Rule 227(1) establishes specific provisions as to the persons bound by a final judgment: (a) all of the parties, and all group members who have opted-in to the proceedings; or (b) all of the group members resident in the forum State who have not opted-out of the proceedings.

If a domestic lawmaker wanted to build its procedural system on the basis of the ERCP, nothing should prevent it to expand the personal scope of *res judicata* beyond the provision of Rule 150, provided that there would be a valid ground (this may be the case, for instance, of some judgments in family law matters, which may have an *erga omnes* effect).

It is also important to bear in mind that *res judicata* describes –or encompasses, if preferred– one of the range of effects that may arise from a final judgment. Procedural law scholars have traditionally established the relationship and the distinction between the *inter partes res judicata* effect and the *material* effects of the judgment. Judgments creating or altering a legal situation produce a specific *material effect* –the *Gestaltungswirkung* described by German literature– that operates *erga omnes*. These judgments operate a change in the legal world that can be asserted by anyone that brings the judgment as a (public) document to another proceeding to prove that the legal change has indeed been operated.[42] Another type of material effect arises where a legal rule considers the judgment or its content as part of its premise –again, using the German terminology, the *Tatbestandswirkung*–.[43] Rule 150 ERCP only deals with the positive and negative *procedural* effects of *res judicata*. The rest of potential procedural or material effects of a judgment, including their impact on third parties, are not covered by the ERCP and could therefore be developed by a national lawmaker wishing to back a new procedural system against the model offered them.

3.6. Court assessment of *res judicata*

According to Rule 152, "[t]*he court shall take res judicata into account of its own motion*". The *ex officio* assessment operates both for its positive and negative effect. An *ex officio* assessment of *res judicata* in practice will only be possible if the court is aware

[42] LEIPOLD, D., "§ 322" in STEIN-JONAS, *Kommentar*, op. cit., Rn. 7-16. GOTTWALD, P., "§ 322" in *Münchener Kommentar*, op. cit., Rn. 16-23. GASCÓN INCHAUSTI, F., *Derecho procesal civil*, p. 363.
[43] LEIPOLD, D., "§ 322" in STEIN-JONAS, *Kommentar*, op. cit., Rn. 15-16. GOTTWALD, P., "§ 322" in *Münchener Kommentar*, op. cit. Rn. 20. ROSENBERG/SCHWAB/ GOTTWALD,, *Zivilprozessrecht*, C. H. Beck, 18ª ed., München, 2018, p. 928; ROSENDE VILLAR, C., "Efectos directos y reflejos de la sentencia", *Revista Chilena de Derecho*, Vol. 28, núm. 3, 2001, pp. 490-493.

by itself of the existence of the judgment. Most courts, however, lack the means to know if there is a previous judgment that became *res judicata* with an identical or connected scope to the one of the proceedings it is hearing. The Rule is a demonstration of the *ius cogens* nature of the regulation and of the reasons that justify *res judicata* itself as a legal institution: the need for legal certainty in social life, for a final resolution of legal disputes and for a reasonable investment of public resources in the proceedings.

Of course, this Rule does not exhaust the regulation of the "procedural treatment" of *res judicata*, which will normally be applied upon application of the interested party. The existence of its positive effect may be alleged also by the parties in their initial submissions (Rules 53 and 54) and shall be decided by the court in any final or partial judgment or decision limited to specific procedural or substantive issues (Rule 130 in relation with Rule 149(2)). The negative effect of *res judicata* (*non bis in idem*) may be alleged by the defendant in its statement of defence (Rule 54) and will have to be addressed by the court before entering into the merits of the case (Rules 139 and 133(d)).