



**Universität
Zürich** UZH

European Civil Procedure

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2nd Part

Slides II: Provisional Measures, Parallel Proceedings

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Provisional Measures (Art. 31 LugC)

May the force (of Art. 31 LugC) be with you!

LG Hamburg, 22.4.2002, GRUR Int. 2002, 1025, *Unilever vs. Colgate-Palmolive (CP)*

Unilever obtained a European patent for a soap packaging (publication 9.1.2002).

CP challenged this patent before the European Patent Office on the same day as not being patentable for lack of novelty.

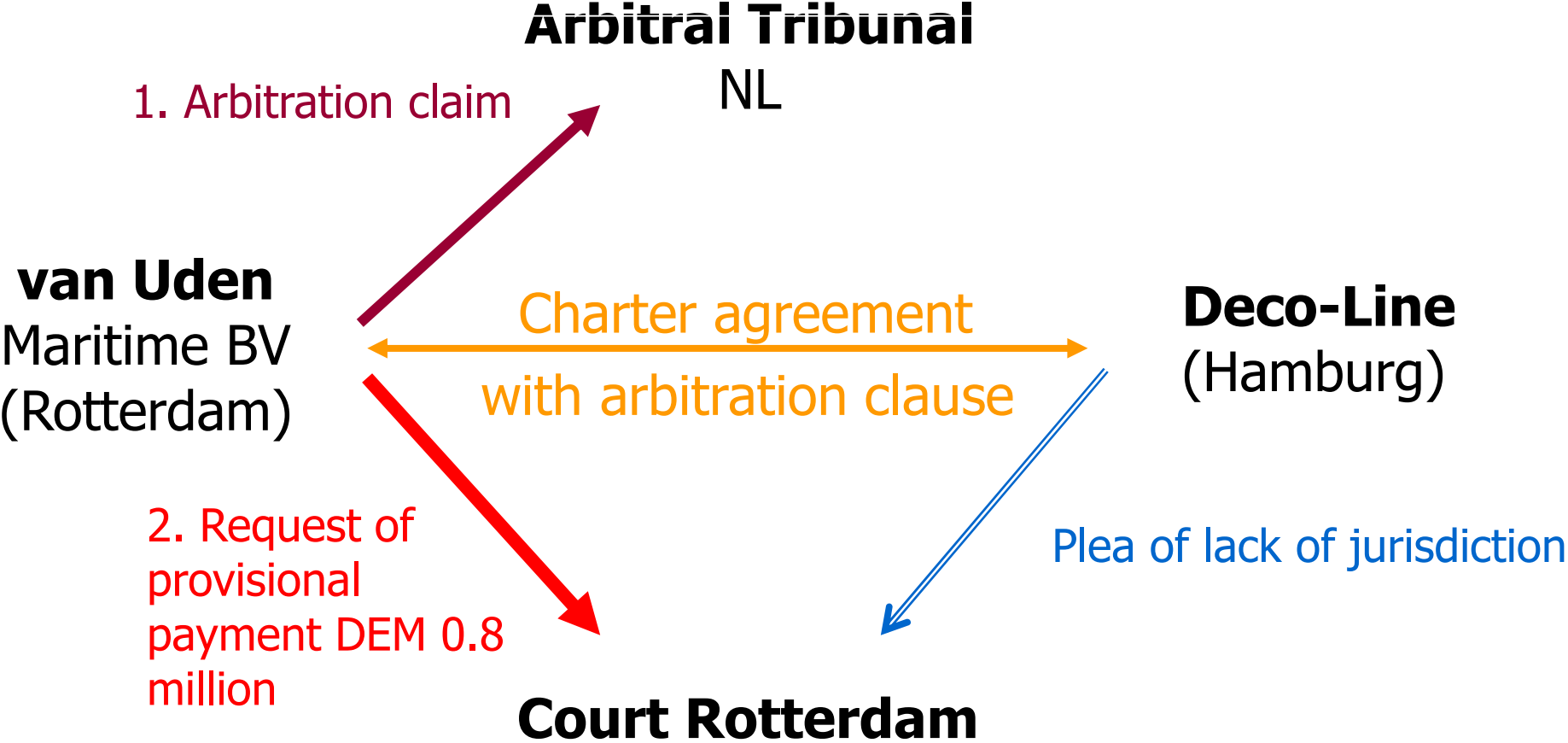
The previous day, CP Germany and other CP group companies had sued in Milan for a declaration that their soaps did not infringe Unilever's patent.

Unilever subsequently asked the Hamburg Regional Court to issue an injunction prohibiting CP Germany from selling the corresponding soap packaging in Germany.

Jurisdiction

- The court having jurisdiction as to the substance of the matter (Art. 2 et seqq. LugC)
- A court that would have jurisdiction as to the substance of the matter (virtual jurisdiction as to the substance, Art. 2 et seqq. LugC)
Disputed: whether alternatively to the jurisdiction of the court seized with the main action
- Art. 31 LugC in conjunction with nation law (Art. 10 PILA)
- Jurisdiction agreement: Prorogued court in principle exclusively competent for interim relief (but reservation of effective legal protection: DFT 125 III 451, same as in PILA)
- Arbitration agreement: interim relief by a state court with competence pursuant to the LugC, even if the main proceedings are taking place or will take place before an arbitral tribunal

CJEU Rs. C-391/95, 17.11.1998, *Van Uden Maritime vs. Deco-Line*



CJEU, C-391/95, 17.11.1998, *van Uden Maritime v. Deco-Line*

“40 It follows that the granting of provisional or protective measures on the basis of Article 24 is conditional on, inter alia, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought.”

(Likewise: Federal Tribunal 5A_2/2013, of 6.3.2013, cons. 1; BGer 5A_801/2017, of 14.5.2018, cons. 3.3.3)

“47 Consequently, interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.”

Limits to the admissibility of provisional measures

Employee A sues his former employer B at the latter's registered office in London for abusive dismissal. B then sues A in Madrid (last place of work) for over EUR 500,000 in damages for alleged damage caused during the employment relationship. The proceedings in Madrid do not go forward, but place a heavy burden on A. He applies to the court in London for an anti-suit injunction to prohibit B from continuing the proceedings in Madrid.

(CJEU C-159/02, 27.4.2004, *Turner vs. Grovit*)

Parallel Proceedings (Art. 27-30 LugC)

First come, first served

Increasing phenomenon

- Choice among various jurisdictions with increasingly facilitated enforceability
- Home court advantage (real or perceived)
- Legal and factual disadvantages of litigation abroad
- Cost factor of parallel procedures
- Danger of conflicting judgements
- Jurisdiction influences result

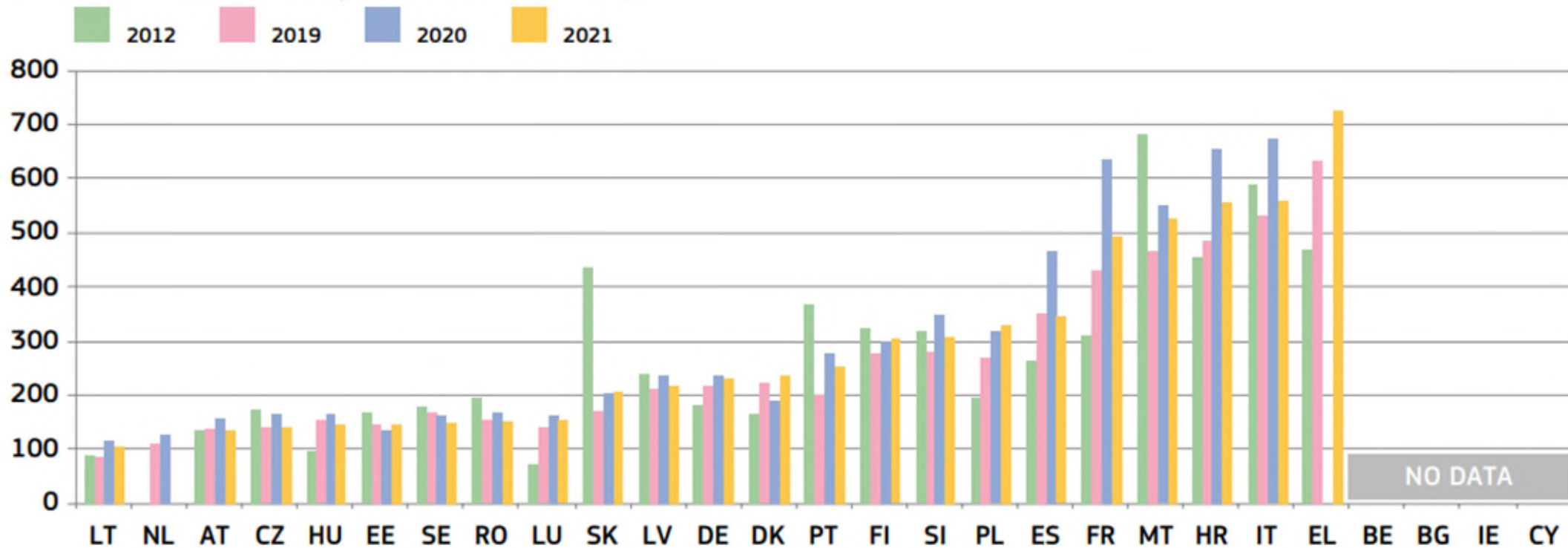
Mutual trust in the judicature?

“(26) Mutual trust in the administration of justice in the Union justifies the principle that judgements given in a Member State should be recognised in all Member States without the need for any special procedure”.

(Brussels Ia Regulation, cons. 26)

Duration of court proceedings in Europe

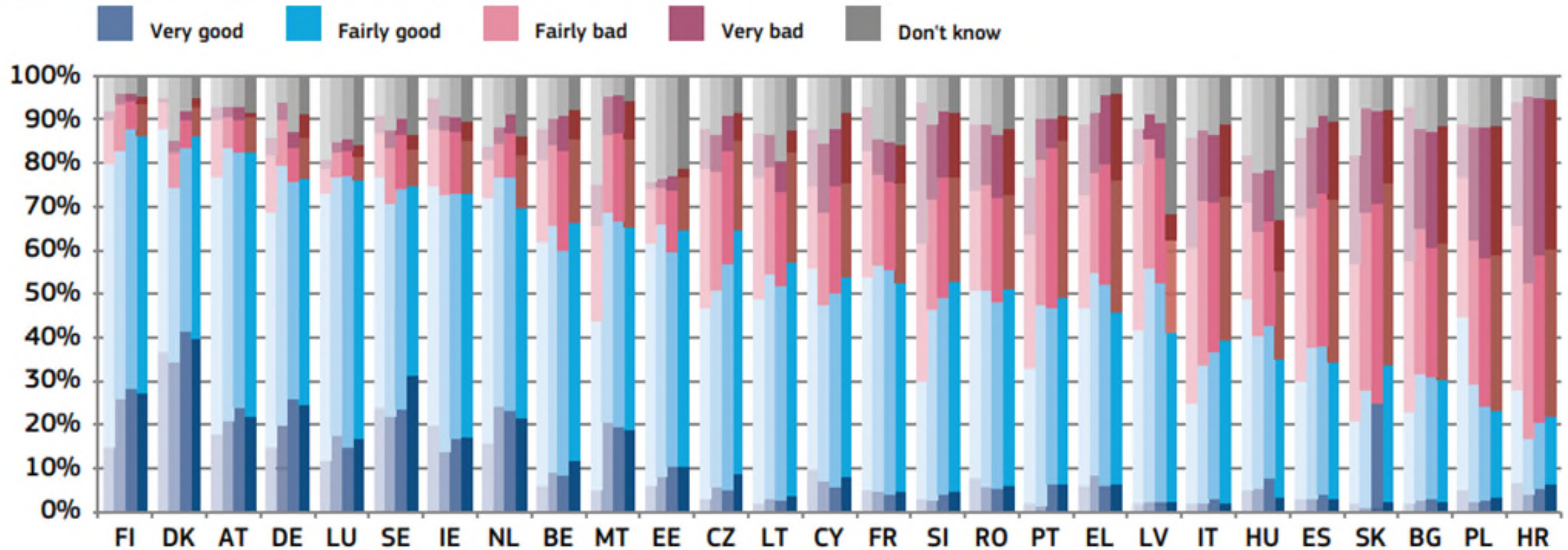
Figure 6 Estimated time needed to resolve litigious civil and commercial cases at first instance in 2012, 2019 – 2021 (*) (1st instance/in days) (source: CEPEJ study)



(*) Under the CEPEJ methodology, litigious civil/commercial cases concern disputes between parties, e.g. disputes about contracts. Non-litigious civil/commercial cases concern uncontested proceedings, e.g. uncontested payment orders. Methodology changes in **EL** and **SK**. Pending cases include all instances in **CZ** and, up to 2016, in **SK**. **IT**: the temporary slowdown of judicial activity due to strict restrictive measures to address the COVID-19 pandemic affected the disposition time. Data for **NL** include non-litigious cases.

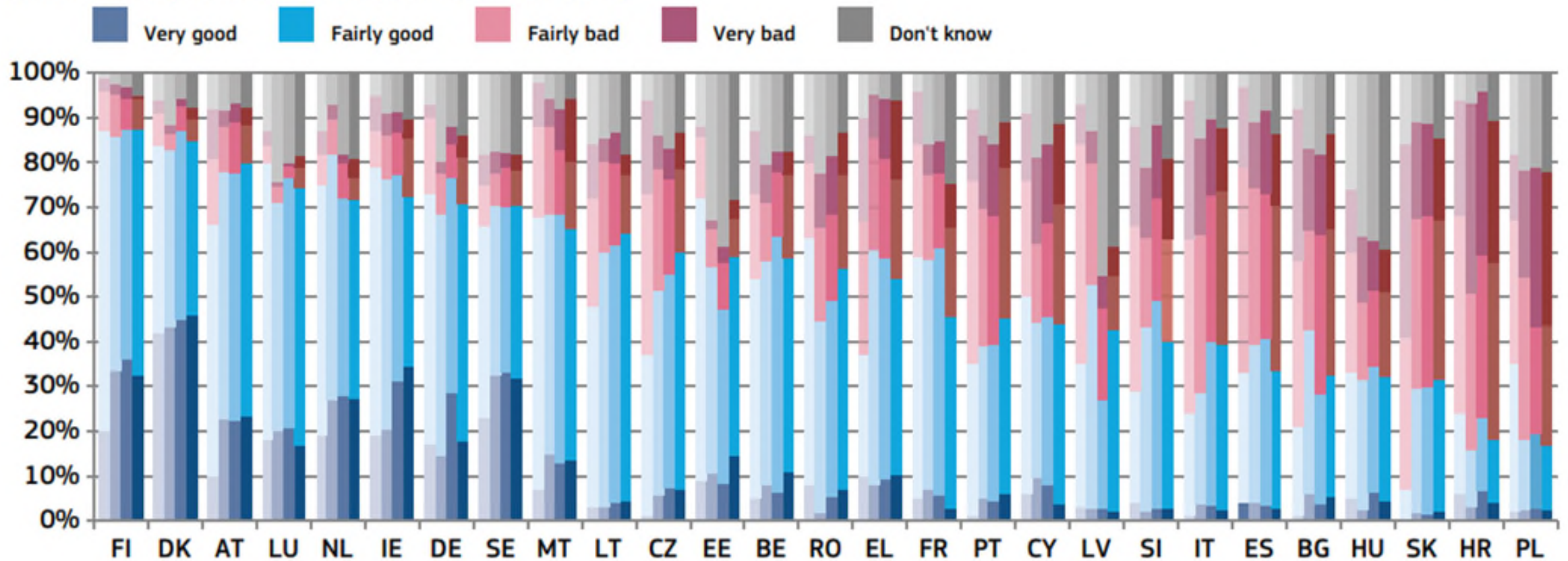
Trust in the courts (?)

Figure 49 How the general public perceives the independence of courts and judges (*) (source: Eurobarometer ⁽⁹⁸⁾ - light colours: 2016, 2021 and 2022, dark colours: 2023)



EU-Justice Scoreboard 2023

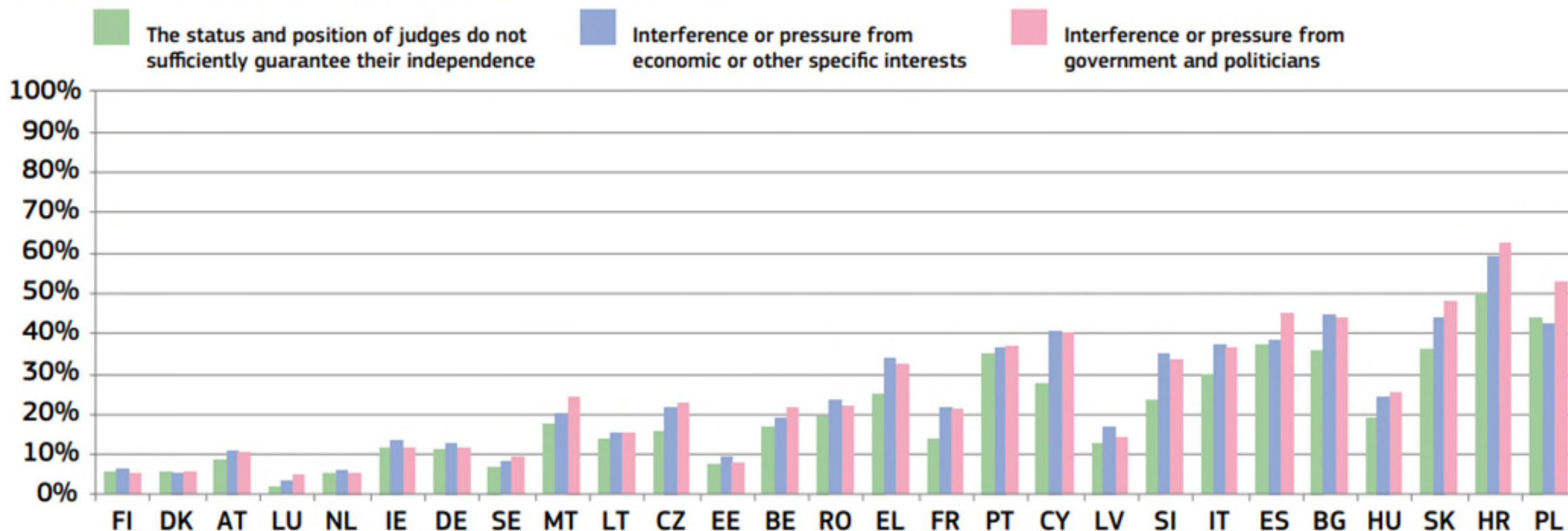
Figure 51 How companies perceive the independence of courts and judges (*) (source: Eurobarometer (100) - light colours: 2016, 2021 and 2022, dark colours: 2023)



EU-Justice Scoreboard 2023

Reasons for the bad reputation

Figure 52 Main reasons among companies for the perceived lack of independence (rate of all respondents - higher value means more influence) (source: Eurobarometer ⁽¹⁰¹⁾)



And elsewhere?

The Loewen Case – The Horror Funeral Home



Local funeral director O'Keefe sues Canadian funeral home company Loewen in a Mississippi state court for alleged breach of contract (amount in dispute < USD 5m).

The jury, fuelled by viciously emotional, racist and untruthful statements by the local star plaintiff's lawyer and supported by the local judge, orders Loewen to pay USD 500m.

Loewen cannot afford to appeal because under local law they would have to deposit a bank guarantee for 125% of the verdict in a short period of time for the suspensive effect to be granted. Loewen had to settle and pay USD 175 million within 10 days and later fell into bankruptcy.

<https://www.italaw.com/cases/632>

Parallel procedures: Possible solutions

- Judgment running
- *Forum non conveniens*

- Anti-suit injunctions
- *Lis pendens* blockage based on temporal priority → forum running

Art. 27 LugC – Art. 9 para. 1 PILA

- **LugC**

- Priority of the court first seised
- Suspension of the later proceedings until the jurisdiction of the court first seised is established (then, if so established, dismissal)
- Exception: Cases under art. 22 LugC
 - Note: Art. 25 of the Brussels I Regulation provides for the primacy of a jurisdiction agreement as a further exception

- **PILA**

- Primacy of the court first seised
- Suspension of the later proceedings until the jurisdiction of the court of first instance is established (then, if necessary, dismissal)
- Exception: if it is not *“to be expected that the foreign court will render a decision that is recognisable in Switzerland within a reasonable period of time”*

Requirements (LugC)

- Pendency before courts of different Contracting States
 - Same parties
 - Same cause of action (what “lies at the heart of the two actions”)
 - Same basis (same facts of life and legal basis)
 - Same subject matter (same purpose of the actions)
 - Not for requests for interim relief and pre-trial taking of evidence
- It is a matter of avoiding conflicts during enforcement!

The Italian manufacturer A sues the Swiss patent owner B at A's seat for a declaration of nullity of its licence agreement.

B later sues in Zurich for payment of the outstanding royalties. A claims that the two proceedings are identical and that the one first instituted has priority. B replies that the proceedings are not identical; moreover, it is notorious that proceedings in Italy are delayed. It is therefore unreasonable for B to wait until the Italian courts have decided.

Variant: B also claims that the action in Zurich is based on a jurisdiction agreement. A had abusively sued in breach of this agreement in Italy and could therefore not invoke priority of his action.

(CJEU 8.12.1987, Rs. 144/86, *Gubisch / Palumbo*; CJEU 9.12.2003, Rs. C-116/02, *Gasser / Misat*, DFT 123 III 414; Federal Tribunal 6.7.2007, 4A_143/2007; Federal Tribunal 20.12.2010, 4A_538/2010)

Relevant point in time

Art. 30 no. 1 LugC: *“at the time when the document instituting the proceedings” [...] “is lodged with the court [...]*”

The Schwäbisch Hall District Office (in Southern Germany) provided social welfare benefits to Ms H.S., who is in need of care. Her daughter, Brigitte Schlömp, lives in the canton of Schaffhausen (in Northern Switzerland). In a request for conciliation dated 16 October 2015 in Reiat, Canton Schaffhausen, the District Office asserted Ms H.S.'s maintenance claims against Ms Schlömp, which had been statutorily assigned to the Office.

After the end of the conciliation proceedings but prior to filing the writ issued by the conciliation office with the Cantonal Court of Schaffhausen, Ms Schlömp filed a negative declaratory application with the District Court of Schwäbisch Hall. The latter transferred the proceedings to the competent District Court in Stuttgart. The District Office raised the plea of *lis pendens*.

(CJEU C-467/16 20.12.2017 *Schlömp/Schwäbisch Hall*)

The two sisters I. Weber and M. Weber are co-owners of a property in Munich. I.W. has a right of first refusal to M.W.'s share. M.W. transfers her share to Z subject to a right of rescission. Based on this, I.W. exercises her right of first refusal, subject to M.W. exercising her right of rescission.

Z sues I.W. and M.W. in Milan for a declaration that the exercise of the right of first refusal by I.W. is invalid and that the purchase agreement between Z and M.W. is valid.

I.W. then sues M.W. in Munich for approval of the registration of the transfer of the co-ownership shares.

(CJEU C-438/12 3.4.2014 *Weber/Weber*)

Swatch I – Declaratory interest in forum running

As part of the introduction of a selective distribution system for spare parts to its watches, the Swatch Group stopped working with wholesalers.

D Ltd, based in the United Kingdom, is a wholesaler of spare parts for watches. By letter dated 16 March 2016, it requested Swatch Group SA and two group companies to confirm the resumption of supply by 6 April 2016, otherwise it would file a lawsuit without further notice. The letter was accompanied by a "(Draft) Order" to the High Court of Justice in London. At Swatch's request, D extended the deadline it had set until 20 April 2016.

On 19 April 2016, the three Swatch companies filed a negative declaratory action with the Commercial Court of the Canton of Bern. They sought a declaration, on the one hand, that they had no obligation to supply D with spare parts for their group's products and, on the other hand, that they owed nothing to D due to the termination of the supply. On 29 April 2016, D, in turn, filed an action against the three Swatch companies in the High Court in London for breach of European antitrust law.

(DFT 144 [2018] III 175, "*Swatch I*")

Excursus: Swatch II - Jurisdiction under Art. 5.3 LugC

The Swatch Group SA, with its registered office in Neuchâtel and administrative headquarters in Biel (BE), and its subsidiaries B SA, with its registered office in Grenchen (SO), and C Ltd, with its registered office in London, brought an action before the commercial court of Berne against D Ltd, with its registered office in London, for a declaration that they had no obligation under competition laws to deliver to D and that they owed D nothing for non-delivery.

D raises the plea of lack of jurisdiction.

(DFT 145 [2019] III 303, "*Swatch II*")