

# 10 Towards a Unified System of Jurisdiction in the Field of Intellectual Property between Japan and Europe<sup>(\*)</sup>

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*At present, markets have become global. As a consequence, enterprises need to protect their intangible assets in several countries. There are several international conventions that facilitate the registration of IPR abroad. However, things are not facilitated at all when IPR are infringed and right holders have to claim their rights in courts. With the exception of the European Union, international jurisdiction is established according to national laws. Therefore, it is very difficult for right holders to know where they can claim the protection of their rights. In addition, it is very usual that they will have to face parallel proceeding in several States. This situation increases the costs of international commerce activities and undermines the effective protection of IP right.*

*To overcome this situation, an international convention to unify the rules on jurisdiction, recognition and enforcement of judgements in the field of IP is needed. It is the purpose of this work to compare the systems of the EU and Japan with the aim of identifying points in common and points of disagreement in their rules of jurisdiction. In particular, first part of the work will compare the rules on jurisdiction related to actions concerning validity, registration, infringement of IPR and provisional measures. Second part will focus in the regulation of parallel proceedings.*

*Thanks to this analysis it would be possible to determine which elements should be present in an international convention in this field so that the EU and Japan would ratify it.*

## Introduction

At present, markets have become global thanks to the removal of barriers to commerce in the framework of WTO, the increase of the number of economic integration organizations such as the European Union and the development of information and communication technologies (Internet).

As a consequence of these elements, it is more and more common for courts to hear about cross-border disputes related to intellectual property rights. In these cases, the first a court must do before hearing on the merits is to determine whether it has jurisdiction or not. At present to answer this question, except for the case of the countries in the European Union, national courts must rely on their national laws. This situation is inconvenient for two reasons:

a) *Lack of legal certainty*: it is difficult for entities acting on international trade to know

where they can sue and where they can be sued;

b) *Risk of parallel proceedings*: courts from different countries may have jurisdiction to hear about the same dispute. Litigants risk being involved in different proceedings with an increase on the costs of litigation and with the lost of legal certainty.

These two problems constitute a serious obstacle to international commerce and to the effective enforcement of IPR in cross-border disputes<sup>(\*1)</sup>.

Despite the fact that works on this field of law in the framework of the Hague Conference of Private International Law failed, there is consensus that an international instrument on jurisdiction, applicable law and recognition of judgment in the field of intellectual property is needed. In fact, there are some academic proposals of such an instrument such as the ALI Principles<sup>(\*2)</sup>, the CLIP Principles<sup>(\*3)</sup> or the

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(\*1) It has to be recalled that this is an objective adopted by the Member States of WTO in Part. III TRIPs Agreement.

(\*2) American Law Institute, *"Principles governing jurisdiction, choice of law, and judgments in transnational disputes"*, available at [http://www.ali.org/doc/2007\\_intellectualproperty.pdf](http://www.ali.org/doc/2007_intellectualproperty.pdf)

(\*3) The European Max Planck Group on Conflict of Law and Intellectual Property *"Principles of Conflict of Laws in Intellectual Property, Second Preliminary Draft"*, available at <http://www.ip.mpg.de/shared/data/pdf/draft-clip-principles-06-06-2009.pdf>

Transparency of Japanese Law Project<sup>(\*4)</sup>.

It is my opinion that rules of jurisdiction of that international instrument should try to reach a balance between two objectives:

- a) The effective enforcement of intellectual property rights. For this purpose, rules on jurisdiction must facilitate right holders to file a complaint to protect their rights in cross-border situations.
- b) Defendant's right to a due process. Rules on jurisdiction must be predictable and they must manifest a close connection between the courts and the dispute.

The objective of this work is to compare the systems of jurisdiction in the European Union and in Japan and to analyze whether they meet these standards. For this purpose, the work is divided in five sections. The first one focuses on a general explanation of the rules of jurisdiction in both systems and on the different approached they adopt to regulate these questions. The following sections will focus on the analysis of the rules that determine the jurisdiction of the courts to hear about disputes related to IP matters. Both in Japan and the European Union, these rules are different depending on the subject matter of the complaint. Therefore, a distinction needs to be made among actions concerning the validity and registration of industrial property rights (section II), actions related to the infringement of those rights (section III) and requests for provisional or interim measures (section IV). Finally, section V will deal with the solutions provided in each system to international parallel litigation.

## I General overview of the European Union and Japanese systems on jurisdiction: predictability vs. fairness

The European and Japanese approaches to the regulation of jurisdiction are quite different. To start with, in the European Union this question is governed by R. 44/2001<sup>(\*5)</sup>, an instrument that is in the process of being revised by the European institutions<sup>(\*6)</sup>.

In Japan, there is not an instrument on international jurisdiction. Courts apply rules on domestic jurisdiction in Arts. 4 and ff of the Code of Civil Procedure (CCP) to declare jurisdiction in international cases<sup>(\*7)</sup>. Japan is in the process of adopting an Act on international jurisdiction<sup>(\*8)</sup>.

Another distinction of both systems lies on the binding or non binding nature of their rules on jurisdiction. In R. 44/2001 these rules are binding. That is, if the conditions established in one of its provisions are met, a court must declare jurisdiction<sup>(\*9)</sup>. In this sense, the system is very rigid. This favors legal certainty and predictability of solutions. Thanks to this, defendant's right to a due process is ensured. However, the system lacks flexibility: it does not allow the courts to take into account other objectives (such as the effective enforcement of IPR) on the application of the grounds of jurisdiction.

In the Japanese system, rules in the CCP are not binding. This is so because, even when the conditions to apply those rules are met, Japanese courts can decline jurisdiction on the basis of the "special circumstances doctrine": if the declaration of jurisdiction would be contrary to the principles of fairness as between the parties and of the expectation of a proper and speedy trial Japanese courts should decline jurisdiction<sup>(\*10)</sup>.

(\*4) The Copyright Group, Industrial Property Rights Group and the International Civil Procedure Group of the Transparency of Japanese Law Project submitted informal proposals related to jurisdiction, choice of law, recognition and enforcement of judgments in the field of Intellectual Property (hereinafter the Japanese Transparency Project) in May 2009. The informal proposals and other relevant documents are available at [http://www.tomeika.jur.kyushu-u.ac.jp/chizai/symposium/index\\_en.html](http://www.tomeika.jur.kyushu-u.ac.jp/chizai/symposium/index_en.html). Another Project in Japan that is dealing with these questions is the WASEDA Project. Unfortunately, the opinions of the members of this project have not been published in English so far.

(\*5) Regulation 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16 January 2001). Switzerland, Iceland, Norway and the European Union are part of the Lugano Convention, an instrument whose content is similar to that of R. 44/2001.

(\*6) *Green Paper on the review of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, Doc. COM(2009)175 final.

(\*7) See Supreme Court, Judgement 16 October 1981, "*Malasyan Airline System*", *Minshu* Vol 35, No. 7, p. 1224.

(\*8) An Interim Proposal of that Act can be found in Japanese at <http://www.moj.go.jp/SHINGI/090710-1-2.pdf>.

(\*9) See for example EJC Judgment of 10 February 2009, C-185/07, "*West Tankers*", of 13 July 2006, C-539/03, "*Roche Nederlanden c. Primus*" and of 13 July 2006, C-4/03, "*GAT c. Luk*".

(\*10) Supreme Court, Judgement 11 November 1997, "*Family*", *Minshu* Vol. 51, No. 10, p. 4055.

This flexibility is good because it allows judges to accommodate the application of each ground of jurisdiction to the particularities of each case. However, as several Japanese authors have affirmed, it may lead to legal uncertainty<sup>(\*11)</sup>. A person can never know for sure whether they can be sued or can sue before Japanese courts because, on application of this doctrine, courts can always decline jurisdiction.

In our opinion, to reach a balance between effective enforcement of IPR and defendant's right to a due process, a general provision establishing the "special circumstances doctrine" should be avoided. Flexibility must be introduced on the drafting of the rules on jurisdiction for each category of actions.

## II Actions on the validity or registration of intellectual property rights

Both in Japan<sup>(\*12)</sup> and the European Union<sup>(\*13)</sup>, actions on the validity or the registration of IPR are of the exclusive jurisdiction of the courts of the State where those rights are registered. This means that courts from other States cannot hear about this category of actions and, in any case, the decisions they may adopt will never be recognized at least in the country where the IPR is registered<sup>(\*14)</sup>.

However, consensus does not exist on whether this exclusive jurisdiction is also

applicable when the question of validity of the IPR is raised as a defense or as a counterclaim in the framework of an infringement proceeding. In the European Union, the ECJ declared in "*GAT*"<sup>(\*15)</sup> that exclusive jurisdiction applies in both cases. This solution hinders the effective enforcement of IPR because it creates the risk that a court can be hearing about an infringement of an IPR that is clearly invalid and because it allows defendants to easily block infringement proceedings. In Japan a different solution has been sustained *obiter dicta* in the "*Coral Sand*" Case: Japanese courts can hear about the validity of a foreign patent as an incidental question in the framework of an infringement proceeding. The decision about the validity of the IPR shall only have effects between the parties and it cannot be recognized in the foreign state<sup>(\*16)</sup>.

The solution provided in Japanese law favors the effective enforcement of IPR and it is in line with the academic proposals in this field<sup>(\*17)</sup>. However it is very unlikely that the European Union will amend its case law in the near future<sup>(\*18)</sup>.

## III Actions related to the infringement of intellectual property rights

While in actions concerning validity or registration of IPR, the courts of a State can declare their jurisdiction according to one and

(\*11) Y. NISHITANI, "Intellectual Property in Japanese Private International Law", JAIL, No 48, 2005, pp. 87 and ff. 88; T. KONO, "Recent Judgments in Japan on Intellectual Property Rights, Conflicts of Laws and International Jurisdiction", in J. Drexler / A. Kur (eds.), *IP and Private International Law: Heading for the Future*, IIC Studies, Oxford /Portland, Hart Publishing, 2005, pp. 229 ss, 230; T. UENO, "International Jurisdiction in Intellectual Property Rights Infringement Cases", p. 8, available at [http://www.tomeika.jur.kyushu-u.ac.jp/chizai/symposium/index\\_en.html](http://www.tomeika.jur.kyushu-u.ac.jp/chizai/symposium/index_en.html).

(\*12) Tokyo District Court Judgment 16 October 2003, "*Coral Sand*" Case, *Hanrei Jiho*, No. 1874: 23. *Obiter dicta*: "it is generally understood that the country of patent registration has exclusive jurisdiction over actions seeking a judgment negating the establishment of a patent right or invalidating a patent right".

(\*13) Art. 22.4 R. 44/2001.

(\*14) See Art. 25 and 35 R. 44/2001.

(\*15) ECJ Judgment 13 July 2006, C-4/03, "*GAT c. LuK*".

(\*16) Tokyo District Court, Judgment 16 October 2003 (*Coral Sand* case), *Hanrei Jiho*, No. 1874: 23: "the decision of invalidity of the patent only has effect as a decision within the reasoning of a judgement in the action seeking injunction, and does not invalidate the patent right as against third parties. Therefore, recognition of this defense is not a reason to reject the international jurisdiction other than the country of registration, and even if the defending party in an action for injunction raises the defense of patent invalidity, that is not a barrier to hearing the action in a court of a country other than the country of registration". Translation taken from S. CHAEN, "Legislative proposal....", p. 2.

(\*17) See Art. 2:401 (2) CLIP Principles.

(\*18) First, the Green Paper does not mention this question as a problem that needs to be solved. Therefore, it seems that this is not on the agenda of the Commission. Second, certain Member States have strongly expressed their opinion in favor of the present interpretation of Art. 22 (4). According to their participation in the "*GAT*" proceedings before the ECJ and the works on the Hague Convention, that is the position of the United Kingdom and France. Finally, the unwillingness of the European Union to change this interpretation of the exclusive jurisdiction rule is also expressed in the new Art. 22.4 Lugano Convention: contrary to the parallel provision in R. 44/2001, this provision clearly states that the exclusive jurisdiction applies "irrespective of whether the issue is raised by way of an action or as a defense".

exclusive rule – that of the place of registration –, in actions related to infringement of IPR several grounds of jurisdictions might be applicable both in Japan and in the European Union<sup>(\*19)</sup>:

- a) Japanese and EU Member States' courts can declare their jurisdiction to hear about these actions if the defendant is domiciled in the territory of that State (Art. 4 CCP, Art. 2 R. 44/2001).
- b) Alternatively Japanese and EU Member States' courts can declare their jurisdiction if the infringement of the IPR took place in the territory of that State. This is the so-called *forum delicti commissi* (Art. 5 (ix) CCP, Art. 5 (3) R. 44/2001)<sup>(\*20)</sup>.
- c) Japanese and EU Member States' courts can also declare their jurisdiction if the defendant has a business office in the territory of that State (Art 4 (5) CCP, Art 5 (5) R. 44/2001)<sup>(\*21)</sup>.
- d) In those cases where there are multiple defendants whose domiciles are in different States, both Japan and EU allow the subjective joinder of claims as far as certain conditions are met<sup>(\*22)</sup>.

As it can be observed, the existence of several grounds of jurisdiction<sup>(\*23)</sup> allows litigants in cross-border disputes to practice *forum shopping* –e. i. they can choose to submit the complaint before the courts of the State that better fit their interests. Thanks to this, effective enforcement of IPR in cross-border disputes is strengthened. However, some limits must be imposed to this practice on the interpretation of

the rules on jurisdiction. If not, defendant's right to a fair trial and access to justice might be harmed.

These limits are related to b), *forum delicti commissi*; and d), infringement by multiple defendants.

## 1 *Forum delicti commissi*

*Forum delicti commissi* is the general rule of jurisdiction in torts. In both systems it is interpreted that the place where the tort was committed includes the "place of the harmful act" or the "place of the consequences of the act"<sup>(\*24)</sup>. On its application to infringements of IPR, three elements need to be taken into account.

First of all, in disputes where the infringement has taken place in multiple States, the interpretation provided to this ground of jurisdiction in Europe and Japan is different. According to the ECJ "*Shevill*" Decision<sup>(\*25)</sup>, an action related to the whole infringement can only be filed before the courts of the State where the defendant has its domicile or a permanent establishment. The courts of each of the States where the infringement occurred can only hear about the infringement that took place in their territory. In Japan, if part of the infringement occurred in the territory of Japan, the courts can hear about the whole of the infringement on application of the objective joinder of claims (Art. 7 CCP)<sup>(\*26)</sup>. While this latter solution favors the effective enforcement of IPR, it is too dangerous

(\*19) These grounds of jurisdiction are not applicable if the parties to the dispute have entered into a forum choice agreement. Furthermore, they do not apply either if one of the parties files a complaint and the other submits summons on the merits and does not challenge the jurisdiction of that courts. In any case, it is unrealistic that these situations may appear in actions on infringement of IPR.

(\*20) In the case of Art. 5 (3) R. 44/2001, this provision is only applicable when the defendant is domiciled in a Member State. In cases where the defendant is domiciled in a third State, Member States' courts must determine their jurisdiction in accordance with their national laws. Broadly speaking, Member States' national rules on jurisdiction also established the *forum delicti commissi*.

(\*21) In the European Union, Art. 5 (5) R. 44/2001 is only applicable when the parent company is domiciled in a Member State.

(\*22) Art. 7 CCP, Art. 6 (1) R. 44/2001. The provision in R. 44/2001 is only applicable when all the defendants are domiciled in the European Union.

(\*23) In Japan, there is another ground of jurisdiction available to the plaintiff: according to Art. 5 (iv) CCP, Japanese courts can declare jurisdiction when the location of the subject matter of the claim or security over the same or of any seizable property of the defendant is in Japan. The ground is particularly relevant in disputes where an infringement does not exist. That is the case of actions related to the existence and ownership of IPR. In Europe, these actions can only be filed before the courts of the Member State where the defendant is domiciled. There is not an special ground of jurisdiction for this category of actions.

(\*24) In Europe, this interpretation can be found in ECJ Judgment 30 November 1976, C-21/76, "*Bier c. Mines de Potasse d'Alsace*". In Japan, this interpretation is sustained by legal doctrine. See as an example the document "International ...", p. 16.

(\*25) ECJ Judgment 7 March 1995, C-689/93, "*Shevill c. Presse Alliance*".

(\*26) Supreme Court, Judgment 8 June 2001, "*Ultraman*", *Minshu*, Vol. 55, No. 4, p.727. Y. NISHITANI, "Intellectual Property...", *supra* note 11, p. 94. The author underlines the differences between the solutions provided by the EU and Japanese systems in these cases.

for the defendant's right to a due process since he cannot predict that he can be sued in Japan for the whole of the infringement. That is so, even if Japanese courts may apply the "special circumstances doctrine" in these situations. For this reason, it is our opinion that jurisdiction to hear disputes related to the whole of the infringement should correspond to the courts of the State where the defendant is domiciled or has an establishment, or to the courts of the *forum delicti commissi* if there are the most closely connected to the dispute.

Second, in infringements of IPR in the Internet, simple accessibility of a web site is not enough for courts to declare jurisdiction on the basis of *forum delicti commissi*. In both systems there seems to exist consensus that it has to be shown that the web site is targeted towards that State<sup>(\*27)</sup>. To determine this at least the following elements must be taken into account: a) whether the web site is interactive or passive; b) whether consumers from that country have purchased products or contracted services from that web site; c) whether residents from that country have download illegal contents from the web site; d) whether the web site includes disclaimers that informs that the products or services are offered on not to that country<sup>(\*28)</sup>.

Finally, it has to be interpreted that actions for declaration of non infringement can be filed before the courts of the *forum delicti commissi*. While this interpretation has been sustained in Japan ("*Miyakoshi v. Gould*" Case<sup>(\*29)</sup>), in Europe national courts have adopted divergent judgments and the ECJ has not had the chance to adopt a conclusive interpretation yet. In our opinion, the possibility to file these actions before the courts of the *forum delicti commissi* (the place where the IPR whose infringement is questioned is exploited) favors the effective enforcement of IPR while it does not affect at all defendant's due process right. This interpretation is in line with the academic proposals in this field<sup>(\*30)</sup>.

## 2 Actions on infringements of IPR against multiple defendants

It usually arises that an IPR is infringed in multiple countries by several companies belonging to the same group and administered by a parent company. In these cases, it is convenient to consolidate the actions against the different defendants in one court. However, in Europe, according to the ECJ "*Roche*" Decision<sup>(\*31)</sup>, this is not possible. Art. 6 (1) R. 44/2001 requires the claims to be closely connected and the existence of a risk of irreconcilable judgments if the claims were to be judged separately. In the situation above the infringed IPRs are different thus this latter condition is not met. It is sustained that this interpretation hinders the effective enforcement of IPR. For this reason, a more flexible approach such as the one in Japan should be adopted<sup>(\*32)</sup>.

In any case, the subjective joinder of claims always entails a danger to the defendant's due process right. The reason is that the court that declares jurisdiction might be unexpected or might not have a close link with the claim related to that defendant. To avoid these problems, it is convenient to follow the proposal provided by the CLIP Principles<sup>(\*33)</sup>: consolidation should only be possible before the courts of the State of domicile of the defendant coordinating the infringing activities (the parent company) or before the courts most closely connected to the dispute.

## IV Application for provisional measures in international IPR disputes

It is widely acknowledged that provisional or interim measures play a very important role in IPR disputes both international and domestically<sup>(\*34)</sup>. For this reason, both the European and the Japanese systems provide the parties with two alternatives to apply for them in international litigation: a) application before the

(\*27) In Europe, see the Joint Declaration of the Council and the Commission on Art. 15 R. 44/2001. In Japan, Y. NISHITANI, "Intellectual Property...", *supra* note 11, p. 94 understands that the "special circumstances doctrine" would apply in the only contact with Japan is the accessibility of the web site.

(\*28) This interpretation is in line with the academic proposals in the field: Section 202 (2) ALI Principles and Art. 2:202 (2) (b) CLIP Principles.

(\*29) Tokyo District Court, 30 May 1989, *Hanrei Jihō*, vol 1348, p. 91.

(\*30) Section 213 (1) ALI Principles and Art. 2:210 CLIP Principles.

(\*31) ECJ Judgment 13 July 2006, C-539/06, "*Roche*".

(\*32) Supreme Court, 28 April 1998, "*Sadwani*", *Minshu*, vol 52, n° 3, p. 853. An example of subjective joinder of claims in the filed of IPR can be found in "*Ultraman*" case.

(\*33) Art. 2:206.

(\*34) Art. 50 (1) TRIPs Agreements underlines the relevance of these measures in IPR disputes.

court that has jurisdiction as to the merits of the case; b) or before the courts of the State where such measure is to be executed – that is where the property to be seized is located or where the alleged infringing activities are to be stopped.

The provisional measures that can be applied for are those established in the *lex fori*. They can be asked before the start of the proceedings as far as the *lex fori* states so. Although, it is not clearly established, it should be understood that the court hearing about the main action has jurisdiction to adopt provisional measures with extraterritorial effects, while the rest can only adopt measures with territorial effects. This is in line with the CLIP Principles<sup>(\*35)</sup>.

## V International parallel litigation in IPR disputes

By “international parallel litigation” we are referring to the situation where overlapping litigation is initiated in two different states in respect of the same case. Both in the EU and Japanese systems it is considered that in international parallel litigation cases a concentration or at least a coordination of the proceedings is needed for two basic reasons: reduction of costs both for the parties and for the states involved; avoidance of the risk of contradictory judgments. However, the way to ensure that concentration or coordination is completely different in Europe and in Japan.

In *lis pendens* situations, Art. 27 R. 44/2001 states that the court second seized must stay proceedings until the court first seized determines whether it has jurisdiction or not. This system has proved to be extremely rigid and leads to abusive strategies such as the “*torpedo* actions”: as soon as wrongdoers receive warning letters or acknowledge that they are going to be sued for IPR infringement, they file an action for declaration of non infringement before courts which are known to be very slow. Thanks to this, any action for infringement is blocked until these courts decide on their jurisdiction.

In Japan, there is not a uniform solution to *lis pendens* situations. In some cases, Japanese courts ignore pending foreign proceedings, in others the “special circumstances doctrine” is applied and in others the expectation of

recognition of the future foreign judgment is taking into account. The lack of a uniform solution in Japan is dangerous for legal certainty and the effective enforcement of IPR. The situation is even worse because current Japanese law does not allow the courts to stay proceedings<sup>(\*36)</sup>.

In our opinion, the best solution would be to adopt the European solution with some amendments. The court second seized should stay proceedings until the court first seized determines its jurisdiction. However, if this court has not adopted a decision within a reasonable period of time, the court second seized should be able to continue with the proceedings. This interpretation is in line with the CLIP Principles<sup>(\*37)</sup> and should make “*torpedo* actions” inefficient.

Finally, another complicated situation appears when a party files an action for IPR infringement before the courts of the state where the defendant has its domicile or a permanent establishment and subsequently the other party challenges the validity of the IPR before the courts of the state where the IPR is registered. In these cases, the court first seized should stay proceedings until the court second seized adopts a decision concerning the validity of the IPR. At present the possibility to stay proceedings in this situation is not contemplated in R. 44/2001 although nothing prevent national courts to do so in accordance with their procedural laws. The problem is that there is a lack of uniformity on the way courts act in these situations. Legal certainty is thus in great danger.

In Japan, there is no case law on this question. Taking into account the way the courts treat questions on validity of foreign IPR, the most feasible outcome is that Japanese courts will ignore the foreign pending action and will incidentally decide on the validity of the foreign IPR before adopting the decision about the infringement of the IPR in the foreign country. Such decision will only have effects among the parties in that proceeding. The problem with this solution may appear if the foreign court decides differently from the decision adopted by the Japanese court. The defendant will have a right to claim compensation for damages as far as the law of the country where the patent was registered provides that but, in any case, the solution does

(\*35) Art. 2:501 (2) CLIP Principles states that provisional measures can be ordered by the courts of the State where the measure is to be enforced or for which protection is sought. However, such measures cannot be recognized in other contracting state (Art. 4:301 (1)), thereby their effects are limited to the country in which they were granted.

(\*36) M. DOGAUCHI, “Japan”, in Fawcett, J. (Dir), *Declining jurisdiction in Private international law*, Oxford, Clarendon Press, 1995, pp. 303 ff.

(\*37) Art. 2:701 and ff.

not benefit the effective protection of IPR. As previously explained this would not happen if Japanese courts would be able to stay proceedings.

To solve these problems a solution similar to that in Art. 2:703 CLIP Principles might be adopted both in Japan and the EU: a court may stay proceedings about an IPR, if an action having as its object the grant, registration, validity, abandonment or revocation of a registered IPR is brought in the State of registration afterwards. The court first seized may order provisional measures for the duration of the stay of proceedings.