Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

13 July 2017*

(Reference for a preliminary ruling — Jurisdiction in civil and commercial matters — Regulation (EC) No 44/2001 — Intellectual property — Community designs — Regulation (EC) No 6/2002 — Articles 81 and 82 — Action for a declaration of non-infringement — Jurisdiction of Community design courts of the Member State where the defendant is domiciled)

In Case C-433/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Court of Cassation, Italy), made by decision of 5 April 2016, received at the Court on 3 August 2016, in the proceedings

Bayerische Motoren Werke AG

v

Acacia Srl,

THE COURT (Second Chamber),

composed of M. Ilešič (Rapporteur), President of the Chamber, A. Prechal, A. Rosas, C. Toader and E. Jarašiūnas, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Bayerische Motoren Werke AG, by L. Trevisan and G. Cuonzo, avvocati,

– Acacia Srl, by F. Munari, A. Macchi and M. Esposito, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Fiorentino and M. Santoro, avvocati dello Stato,

– the European Commission, by C. Cattabriga and M. Wilderspin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: Italian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) and of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

2 The request has been made in proceedings between Bayerische Motoren Werke AG ('BMW'), established in Munich (Germany), and Acacia Srl, established in Eboli (Italy), concerning the determination of the court with jurisdiction to hear an action brought by Acacia against BMW.

Legal context

Regulation No 44/2001

3 Regulation No 44/2001 replaced, in relations between the Member States, the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36, 'the Brussels Convention'). That regulation was replaced in turn by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1). Article 66(1) of that regulation provides that it 'shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015'.

4 Chapter II of Regulation No 44/2001 was headed 'Jurisdiction' and contained 10 sections.

5 Section 1 of that chapter was headed 'General provisions' and contained, inter alia, Article 2 of that regulation. That article reproduced, in essence, the terms of Article 2 of the Brussels Convention; its first paragraph was worded as follows:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

6 Section 2 of that chapter of Regulation No 44/2001, headed 'Special jurisdiction', contained, inter alia, Article 5 of that regulation. That article reproduced, in essence, the terms of Article 5 of the Brussels Convention and provided:

'A person domiciled in a Member State may, in another Member State, be sued:

…

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

…'

7 Section 6 of that chapter of Regulation No 44/2001 was headed ‘Exclusive jurisdiction’ and contained Article 22 of that regulation. That article reproduced, in essence, the terms of Article 16 of the Brussels Convention and was worded as follows:

‘The following courts shall have exclusive jurisdiction, regardless of domicile:

…

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

…’

8 Section 7 of Chapter II of Regulation No 44/2001, headed ‘Prorogation of jurisdiction’, contained Articles 23 and 24 of that regulation.

9 Article 23(1) of that regulation reproduced, in essence, Article 17 of the Brussels Convention and provided:

‘If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. …

…’

10 Article 24 of that regulation reproduced, in essence, the terms of Article 18 of the Brussels Convention and was worded as follows:

‘Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.’

11 Section 9 of Chapter II of Regulation No 44/2001, headed ‘*Lis pendens* — related actions’, contained, inter alia, Article 27 of that regulation. That article provided:

‘1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, 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.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.’

12 Section 9 also contained Article 28 of that regulation, worded as follows:

‘1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. 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.'

13 Chapter VII of Regulation No 44/2001 was headed 'Relations with other instruments'. It contained, inter alia, Article 67 of that regulation, worded as follows:

'This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in Community instruments or in national legislation harmonised pursuant to such instruments.'

Regulation No 6/2002

14 Article 19 of Regulation No 6/2002 is contained in Title II of that regulation, headed 'The law relating to designs'. That article is headed 'Rights conferred by the Community design' and provides in paragraph 1:

'A registered Community design shall confer on its holder the exclusive right to use it and to prevent any third party not having his consent from using it. The aforementioned use shall cover, in particular, the making, offering, putting on the market, importing, exporting or using of a product in which the design is incorporated or to which it is applied, or stocking such a product for those purposes.'

15 Title IX of that regulation is headed 'Jurisdiction and procedure in legal actions relating to Community designs'. That title contains, inter alia, Articles 79 to 82 of that regulation.

16 Under the title 'Application of the [Brussels Convention]', Article 79 of that regulation provides:

'1. Unless otherwise specified in this Regulation, the [Brussels Convention] shall apply to proceedings relating to Community designs …

…

3. In the event of proceedings in respect of the actions and claims referred to in Article [81]:

(a) Articles 2, 4, 5(1), (3), (4) and (5), 16(4) and 24 of the [Brussels Convention] shall not apply;

(b) Articles 17 and 18 of [the Brussels Convention] shall apply subject to the limitations in Article 82(4) of this Regulation;

…'

17 Article 80(1) of Regulation No 6/2002, headed 'Community design courts', is worded as follows:

'The Member States shall designate in their territories as limited a number as possible of national courts and tribunals of first and second instance (Community design courts) which shall perform the functions assigned to them by this Regulation.'

18 As set out in Article 81 of that regulation, headed 'Jurisdiction over infringement and validity':

'The Community design courts shall have exclusive jurisdiction:

(a) for infringement actions and — if they are permitted under national law — actions in respect of threatened infringement of Community designs;

(b) for actions for declaration of non-infringement of Community designs, if they are permitted under national law;

(c) for actions for a declaration of invalidity of an unregistered Community design;

(d) for counterclaims for a declaration of invalidity of a Community design raised in connection with actions under (a).'

19 Article 82 of the regulation, headed 'International jurisdiction', provides:

'1. Subject to the provisions of this Regulation as well as to any provisions of the [Brussels Convention] applicable by virtue of Article 79, proceedings in respect of the actions and claims referred to in Article 81 shall be brought in the courts of the Member State in which the defendant is domiciled or, if he is not domiciled in any of the Member States, in any Member State in which he has an establishment.

2. If the defendant is neither domiciled nor has an establishment in any of the Member States, such proceedings shall be brought in the courts of the Member State in which the plaintiff is domiciled or, if he is not domiciled in any of the Member States, in any Member State in which he has an establishment.

3. If neither the defendant nor the plaintiff is so domiciled or has such an establishment, such proceedings shall be brought in the courts of the Member State where [the European Union Intellectual Property Office (EUIPO)] has its seat.

4. Notwithstanding paragraphs 1, 2 and 3:

(a) Article 17 of the [Brussels Convention] shall apply if the parties agree that a different Community design court shall have jurisdiction;

(b) Article 18 of [the Brussels Convention] shall apply if the defendant enters an appearance before a different Community design court.

5. Proceedings in respect of the actions and claims referred to in Article 81(a) and (d) may also be brought in the courts of the Member State in which the act of infringement has been committed or threatened.'

20 Article 110(1) of that regulation, under Title XII headed 'Final provisions', is headed 'Transitional provision' and provides:

'Until such time as amendments to this Regulation enter into force on a proposal from the Commission on this subject, protection as a Community design shall not exist for a design which constitutes a component part of a complex product used within the meaning of Article 19(1) for the purpose of the repair of that complex product so as to restore its original appearance.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

21 Acacia manufactures and markets alloy rims for automobile wheels. The case file before the Court shows that those rims are replicas of alloy rims produced by automobile manufacturers and marketed under the trade mark WSP Italy, the acronym WSP signifying 'Wheels Spare Parts' ('the replica rims').

22 In so far as the rims produced by automobile manufacturers are registered as Community designs, Acacia considers that its replica rims fall under the 'reparation clause' provided for in Article 110(1) of Regulation No 6/2002.

23 By application allegedly lodged on 21 January 2013, Acacia brought an action against BMW before the Tribunale di Napoli (District Court of Naples (Italy)) seeking a declaration of non-infringement of Community designs, of which BMW is the proprietor, for alloy rims for automobile wheels, as well as a declaration of abuse of a dominant market position and unfair competition by BMW. Acacia also sought an injunction to prevent BMW from taking any action hindering the marketing of the replica rims.

24 BMW entered an appearance by lodging a defence before that court. In that defence, it raised, as preliminary points, the objections that the notification of the application was non-existent or void, as was the mandate of Acacia's counsel. In the alternative, but still as a preliminary matter, BMW also contested the jurisdiction of the Italian courts. In the further alternative, were those objections to be rejected, it claimed that Acacia's applications should be rejected as having no basis in fact or in law.

25 In that defence, BMW argued as follows:

'BMW … as a mere procedural consequence of the material reception of a document appearing to have legal value, in order to avoid running the risk of a declaration of wrongful failure to appear, files this document for the sole purpose of claiming, on the one hand, that no notification was made by [Acacia] and, on the other hand, if, as is highly improbable, the Court were to declare the application validly lodged, that the Italian courts do not have jurisdiction and that the German courts have jurisdiction to hear the case brought by Acacia.'

26 At a hearing held on 27 May 2014, the Tribunale di Napoli (District Court of Naples) set time limits for lodging further submissions on questions of procedure.

27 On 3 October 2014, BMW lodged before the referring court, the Corte suprema di cassazione (Court of Cassation, Italy), an application for the question of jurisdiction, still pending before the Tribunale di Napoli (District Court of Naples), to be settled as a preliminary issue. It repeated its argument that the Italian courts have no jurisdiction to hear the case brought by Acacia. Acacia, for its part, contends that the jurisdiction of the Italian courts was tacitly accepted by BMW given that, after raising the objection that notification of Acacia's application was non-existent or void, as was the mandate of its counsel, before the Tribunale di Napoli (District Court of Naples), BMW raised the objection that the Italian courts had no jurisdiction to hear the case only in the alternative.

28 On 4 March 2015, the Attorney-General before the referring court submitted an opinion that that court should declare that the Italian courts had no jurisdiction.

29 In those circumstances, the Corte suprema di cassazione (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Under Article 24 of Regulation No 44/2001, can an action to contest the jurisdiction of the national court seised that is brought before that court as a preliminary matter but in the alternative to other preliminary procedural objections and nevertheless before issues of substance are raised be interpreted as acceptance of the jurisdiction of that court?

(2) Must the absence of provision in Article 82[(5)] of Regulation [No 6/2002] for alternative jurisdictions to that of the defendant as stipulated in Article 82(1) of that regulation for cases relating to negative declarations be interpreted as implying the attribution of exclusive jurisdiction for such cases?

(3) Is it also necessary, in order to resolve the [second question], to take account of the interpretation of the rules on exclusive jurisdiction in Regulation [No 44/2001], and in particular in Article 22, which provides for such jurisdiction, inter alia in proceedings concerned with the registration or validity of patents, trade marks and designs but not in cases regarding negative declarations, and in Article 24, which provides for the possibility that the defendant may accept a different jurisdiction, except where jurisdiction is derived from other provisions of the regulation, thereby establishing the jurisdiction of the court seised by the applicant?

(4) Is the approach adopted by the Court of Justice in the judgment of 25 October 2012 (*Folien Fischer and Fofitec* (C-133/11, EU:C:2012:664)) with regard to the applicability of Article 5(3) of Regulation [No 44/2001] of a general and absolute nature applicable to every action for a negative declaration seeking to establish the absence of liability in tort, delict, or quasi-delict, including those for a declaration of non-infringement of Community designs, and hence in the present case is it the court referred to in Article 81 of Regulation [No 6/2002] or that referred to in Article 5(3) of Regulation [No 44/2001] that has jurisdiction, or may the applicant opt for one or other of the possible jurisdictions?

(5) If actions for abuse of a dominant position and unfair competition are brought in the context of a case concerning Community designs with which they are connected, in that their admissibility presupposes prior admissibility of the application for a negative declaration, can they be heard together with that case by the same court in accordance with a broad interpretation of Article 28(3) of Regulation [No 44/2001]?

(6) Do the two actions referred to [in the previous question] constitute a case of tort, delict or quasi-delict, and, if so, may they affect the applicability of Regulation [No 44/2001] (Article 5(3)) or of Regulation [No 6/2002] to the present case as regards jurisdiction?'

Consideration of the questions referred

The first question

30 By its first question, the referring court asks, in essence, whether Article 24 of Regulation No 44/2001 must be interpreted to the effect that an objection alleging lack of jurisdiction of the court seised, raised in the defendant's first pleadings in the alternative to other objections of procedure raised in those same pleadings, may be considered to be acceptance of the jurisdiction of the court seised, therefore resulting in prorogation of jurisdiction by virtue of that article.

31 In that regard, it should be noted, on the one hand, that the first sentence of Article 24 of Regulation No 44/2001 provides for a rule of jurisdiction based on the entering of an appearance by the defendant in respect of all disputes where the jurisdiction of the court seised is not derived from other provisions of that regulation. That provision applies also in cases where a court has been seised in breach of the provisions of that regulation and implies that the entering of an appearance by the defendant may be considered to be a tacit acceptance of the jurisdiction of the court seised and thus a prorogation of that court's jurisdiction (judgments of 20 May 2010, *ČPP Vienna Insurance Group*, C-111/09, EU:C:2010:290, paragraph 21, and of 27 February 2014, *Cartier parfums-lunettes and Axa Corporate Solutions assurances*, C-1/13, EU:C:2014:109, paragraph 34).

32 On the other hand, the second sentence of Article 24 of that regulation sets out exceptions to the rule provided for in the first sentence of that article. That second sentence determines, in particular, that there is no tacit prorogation of jurisdiction of the court seised if the defendant contests jurisdiction, thereby expressing its intention not to accept that court's jurisdiction (judgments of 20 May 2010,

ČPP Vienna Insurance Group, C-111/09, EU:C:2010:290, paragraph 22, and of 27 February 2014, *Cartier parfums-lunettes and Axa Corporate Solutions assurances*, C-1/13, EU:C:2014:109, paragraph 35).

33 Referring to its case-law concerning Article 18 of the Brussels Convention, that provision being identical in essence to Article 24 of Regulation No 44/2001, the Court has already held that the challenge to the jurisdiction of the national court prevents prorogation where the applicant and the court seised are able to ascertain from the first defence that it is intended to contest the jurisdiction of the court. That is also the case where the first defence contains submissions on the substance of the dispute as well as submissions on the jurisdiction of the court (judgment of 27 February 2014, *Cartier parfums-lunettes and Axa Corporate Solutions assurances*, C-1/13, EU:C:2014:109, paragraph 37 and the case-law cited).

34 It follows that, where the defendant unambiguously contests the jurisdiction of the court in its first defence, that challenge prevents prorogation of jurisdiction under the first sentence of Article 24 of Regulation No 44/2001, whether or not the submission contesting the jurisdiction of the court is the only subject of that first defence.

35 In the present case, the fact that BMW contested, in its first defence before the Tribunale di Napoli (District Court of Naples), not only the jurisdiction of that court, but also the regularity of the notification of the application and of the mandate of Acacia's counsel, in no way changes the fact, moreover unchallenged, that BMW expressly and wholly unambiguously contested the jurisdiction of that court in that defence. As noted in paragraphs 32 and 33 of the present judgment, the second sentence of Article 24 of Regulation No 44/2001 is intended to prevent prorogation of jurisdiction when the defendant expresses, from its first defence, its intention not to accept the jurisdiction of the court seised. That provision cannot therefore be interpreted to the effect that, in circumstances such as those of the main proceedings, where the jurisdiction of the court seised has clearly been contested *in limine litis*, the fact that the jurisdiction of the court has been clearly contested should be considered, as Acacia maintains, as a tacit acceptance of that jurisdiction, on the ground that that objection was only raised in the alternative to other procedural objections raised *in limine litis*.

36 In the light of the foregoing, the answer to the first question is that Article 24 of Regulation No 44/2001 must be interpreted to the effect that a challenge to the jurisdiction of the court seised, raised in the defendant's first submission in the alternative to other objections of procedure raised in the same submission, cannot be considered to be acceptance of the jurisdiction of the court seised, and therefore does not lead to prorogation of jurisdiction pursuant to that article.

Concerning the second and third questions

37 By its second and third questions, which it is appropriate to consider together, the referring court asks, in essence, if Article 82 of Regulation No 6/2002 must be interpreted to the effect that actions for declaration of non-infringement referred to in Article 81(b) of that regulation may be brought, where the defendant is domiciled in an EU Member State, before the Community design courts of that Member State alone.

38 In that regard, it should first be noted that, notwithstanding the principle that Regulation No 44/2001 applies to court proceedings relating to a Community design, the application of certain provisions of that regulation to proceedings in respect of the actions and claims referred to in Article 81 of Regulation No 6/2002 is excluded under Article 79(3) of that regulation.

39 In the light of that exclusion, the jurisdiction of the Community design courts laid down in Article 80(1) of Regulation No 6/2002 to hear the actions and claims referred to in Article 81 of that regulation follows from rules directly provided for by that regulation, which have the character of *lex*

specialis in relation to the rules provided for by Regulation No 44/2001 (see, by analogy, judgments of 5 June 2014, *Coty Germany*, C-360/12, EU:C:2014:1318, paragraph 27, and of 18 May 2017, *Hummel Holding*, C-617/15, EU:C:2017:390, paragraph 26).

40 It is also clear from the very wording of Article 82 of Regulation No 6/2002 that actions for declaration of non-infringement under Article 81(b) of that regulation must, when the defendant is domiciled in an EU Member State, be brought before the Community design courts of that Member State, except where there is prorogation of jurisdiction within the meaning of Article 23 or Article 24 of Regulation No 44/2001, those provisions having replaced Articles 17 and 18 of the Brussels Convention.

41 Finally, with the exception of the cases of *litis pendens* and related actions, no rule on jurisdiction contained in a provision of Regulation No 6/2002 other than Article 82 of that regulation or in a provision of Regulation No 44/2001 other than Articles 23 and 24 of that regulation may be applied in actions for declaration of non-infringement under Article 81(b) of Regulation No 6/2002. With regard, in particular, to Article 22(4) of Regulation No 44/2001, the relevance of which is the subject of the referring court's question, it should be noted that the application of that provision, which replaced Article 16(4) of the Brussels Convention, to proceedings in respect of actions and claims referred to in Article 81 of Regulation No 6/2002, is excluded pursuant to Article 79(3)(a) of that regulation.

42 Therefore, the answer to the second and third questions is that Article 82 of Regulation No 6/2002 must be interpreted to the effect that that actions for declaration of non-infringement under Article 81(b) of that regulation must, when the defendant is domiciled in an EU Member State, be brought before the Community design courts of that Member State, except where there is prorogation of jurisdiction within the meaning of Article 23 or Article 24 of Regulation No 44/2001, and with the exception of the cases of *litis pendens* and related actions referred to in those regulations.

The fourth question

43 By its fourth question, the referring court asks, in essence, whether the rule on jurisdiction in Article 5(3) of Regulation No 44/2001 may apply to actions for declaration of non-infringement under Article 81(b) of Regulation No 6/2002.

44 In that regard, it suffices to note that Article 5(3) of Regulation No 44/2001 replaced Article 5(3) of the Brussels Convention and that the application of that provision to proceedings in respect of actions and claims referred to in Article 81 of Regulation No 6/2002 is excluded pursuant to Article 79(3)(a) of that regulation.

45 The judgment of 25 October 2012, *Folien Fischer and Fofitec* (C-133/11, EU:C:2012:664), referred to by the national court, was delivered in a case that did not concern Community designs. That case-law does not therefore run counter to the rule of exclusion in that Article 79(3)(a).

46 Therefore, the answer to the fourth question is that the rule on jurisdiction in Article 5(3) of Regulation No 44/2001 does not apply to actions for a declaration of non-infringement under Article 81(b) of Regulation No 6/2002.

The fifth and sixth questions

47 By its fifth and sixth questions, which it is appropriate to consider together, the referring court asks, in essence, whether actions for a declaration of abuse of a dominant position and of unfair competition that are connected to actions for declaration of non-infringement, in so far as granting those applications presupposes that the action for a declaration of non-infringement is allowed, fall within the scope of the rule on jurisdiction set out in Article 5(3) of Regulation No 44/2001 or within the

scope of the jurisdiction regime established by Regulation No 6/2002. Assuming that the rule on jurisdiction set out in Article 5(3) of Regulation No 44/2001 were applicable in respect of such actions for a declaration of abuse of a dominant position and of unfair competition, that court, furthermore, questions whether the rules on related actions set out in Article 28 of Regulation No 44/2001 may be given a 'broad' interpretation, to the effect that the applicant would be free to bring an action before a court with potential international jurisdiction to hear those claims on the basis of that Article 5(3), not only in order to bring those claims, but also to bring the action for a declaration of non-infringement of a Community design mentioned above.

48 As to whether the rule on jurisdiction in Article 5(3) of Regulation No 44/2001 may be applied in a case such as that in the main proceedings, the questions referred for a preliminary ruling and the explanations in the order for reference show that the circumstances of the case are such that only a prior decision as to whether the action for a declaration of non-infringement under Article 81(b) of Regulation No 6/2002 is well founded will enable the court to determine whether the applications for a declaration of abuse of a dominant position and of unfair competition may be, as the case may be, allowed.

49 In that regard, it is appropriate to consider that, when actions for a declaration of abuse of a dominant position and of unfair competition are brought in the wake of an action for a declaration of non-infringement of a Community design and essentially allege that the proprietor of that design objects to the applicant for a declaration of non-infringement manufacturing replicas of that design, the determination of the court with jurisdiction must be based, for the entirety of the proceedings, on the jurisdiction regime established by Regulation No 6/2002, as interpreted in answer to the first to fourth questions.

50 Indeed, in such circumstances, those claims are founded in essence on the argument, submitted in the context of the action for a declaration of non-infringement, that the manufacturing of replicas does not constitute an infringement, with the result that the proprietor of the Community design must accept competition by those replicas. To determine, in those circumstances, the court with jurisdiction on the basis of the rule set out in Article 5(3) of Regulation No 44/2001 would compromise the effectiveness of Article 79(3)(a) of Regulation No 6/2002, which is specifically designed to set aside that rule with regard, in particular, to disputes between manufacturers of replicas and proprietors of Community designs that relate to the question whether the proprietor of the Community design at issue may prohibit the manufacture of the replicas at issue.

51 In the light of the above, it is not necessary to examine the questions in so far as they relate to the interpretation of Article 28 of Regulation No 44/2001.

52 Therefore, the answer to the fifth and sixth questions is that the rule on jurisdiction set out in Article 5(3) of Regulation No 44/2001 does not apply to actions for a declaration of abuse of a dominant position and of unfair competition that are connected to actions for a declaration of non-infringement, in so far as granting those applications presupposes that the action for a declaration of non-infringement is allowed.

Costs

53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1) **Article 24 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted to the effect that a challenge to the jurisdiction of the court seised, raised in the defendant's first submission in the alternative to other objections of procedure raised in the same submission, cannot be considered to be acceptance of the jurisdiction of the court seised, and therefore does not lead to prorogation of jurisdiction pursuant to that article.**

2) **Article 82 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs must be interpreted to the effect that actions for declaration of non-infringement under Article 81(b) of that regulation must, when the defendant is domiciled in an EU Member State, be brought before the Community design courts of that Member State, except where there is prorogation of jurisdiction within the meaning of Article 23 or Article 24 of Regulation No 44/2001, and with the exception of the cases of *litis pendens* and related actions referred to in those regulations.**

3) **The rule on jurisdiction in Article 5(3) of Regulation No 44/2001 does not apply to actions for a declaration of non-infringement under Article 81(b) of Regulation No 6/2002.**

4) **The rule on jurisdiction set out in Article 5(3) of Regulation No 44/2001 does not apply to actions for a declaration of abuse of a dominant position and of unfair competition that are connected to actions for declaration of non-infringement, in so far as granting those applications presupposes that the action for a declaration of non-infringement is allowed.**

[Signatures]