Chapter 5
Provisional and Protective Measures in the European Civil Procedure of the Brussels I System

Ilaria Pretelli

Abstract This article deals with the rules governing the territorial adjudication of interim relief. Firstly, it addresses how the rules introduced already in the 1968 Brussels Convention and taken over in the Brussels I Regulation have been explained and enriched by the ECJ/CJEU. Thereafter, the major changes introduced in the Brussels Ibis Regulation are discussed in connection with the regime of interim relief measures conceived for other relevant EU legal instruments, as the European Account Preservation Order.

Keywords Provisional and protective measures · European civil procedure · Brussels Convention of 1968 · Brussels I Regulation · Brussels Ibis Regulation · Lugano Convention · European Account Preservation Order · Territorial

The title of this paper is a wink of the eye towards Luigi Mari, whose enlightened lessons shaped my understanding of the system's philosophy since the earliest years of my studies in Urbino (see Mari 1999). By the expression Brussels I system I refer to all the pieces of legislation generated by the 1968 Brussels Convention (Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Consolidated version OJ C 097, 11/04/1983, pp. 2–24), namely: the 1988 Lugano Convention (Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 16 September 1988, OJ L 319, 25/11/1988, pp. 9–48), the Brussels I Regulation (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 L 012, 16/01/2001, pp. 1–23), the 2007 Lugano Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 and its protocols—Protocol 1 on certain questions of jurisdiction, procedure and enforcement—Protocol 2 on the uniform interpretation of the Convention and on the Standing Committee, OJ L 339, 21/12/2007, pp. 3–41) and the Recast (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 L 351, 20.12.2012, pp. 1–32; hereinafter Brussels Ibis Regulation).

I. Pretelli (✉)
Swiss Institute of Comparative Law, Lausanne, Switzerland
e-mail: ilaria.pretelli@isdc-dfjp.unil.ch

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adjudication · Jurisdiction · Recognition and enforcement of judgments · Measures for taking evidence · Circulation of judgments · *Ex parte* measures · *Inter partes* measures

Contents

5.1 Introduction

Before presenting the Brussels system and the role of provisional measures in its framework and philosophy, I will take advantage of the opportunity to congratulate the Asser Institute on the occasion of its fiftieth anniversary. I am both delighted and honoured to celebrate the creation of the "inter-university institute for international law", dedicated to Tobias Michael Carel Asser. I am here today to represent a much younger sibling of your prestigious Institution: the Swiss Institute of Comparative Law, born no less than seventeen years after the creation of the T.M.C. Asser Instituut in 1965. I would also like to give due attention to the fact that the eminent person who leant his name to the *Instituut* was awarded the 1911 Nobel Peace Prize for his commitment to give a structure to international justice through the Permanent Court of Arbitration, the Hague Conference of Private International Law and the *Institut de Droit International*.

Based on the same philosophy linking peace and justice, the former Article 220 of the original EC Rome Treaty set the foundation for a "European Civil Procedure" and for what may be called the "Brussels I system".

That provision gave rise to the first text of civil procedure rules common to Members of the European Communities: the 1968 Brussels Convention.[1] The idea to develop uniform rules of civil procedure—coexisting with national ones—came as a logical consequence of an inspired intuition by the Convention's drafters.

[1] On the origin and the characteristics of the Brussels Convention see Mari 1999, 1–67.

They shifted from the traditional binary logic of mutual recognition conventions—with the aim to create uniform rules for a State's recognition of a foreign judgement–to a unitary system of rules on jurisdiction—where the focus is on the geolocalisation, so to say, of European disputes.

In other words, the Convention's drafters decided to address the issue of recognition upstream and instead of enumerating the conditions for a *foreign* judgement to be recognised by another Member State, they established a priori common rules for the territorial adjudication of *European* disputes.

There was at that time no real need to shift from the traditional reasoning to some other reasoning: the binary logic functions well in many federal states and primarily in the United States of America. However, the new logic based on the geographical link as a precondition for the exercise of jurisdiction proved to be successful.

Since then, coordination between different systems of civil procedure is carried out by choosing which *European* court, as part of a unified territory, is in *the best geographical position* to ensure *the best administration of justice*. Once identified, the court best placed to hear the case guarantees the most efficient administration of justice by delivering a decision that shall be enforceable in all parts of the unified territory subject to the EU, thus ensuring effective judicial protection for European citizens.

This logic also characterises the regime of provisional measures.

5.2 The *Acquis* on Interim Relief Measures and Its Impact in the Recast

The rules governing the territorial adjudication of interim relief have remained unchanged since the Brussels Convention of 1968.

With the exception of the rewording due to the necessity of making a reference, respectively, to Contracting States or States bound by the Convention and Member States, not a single comma appears to differ in the texts of Articles 24 Brussels Convention and Article 24 Lugano Convention, Article 31 Brussels I Regulation, Article 31 2007 Lugano Convention and Article 35 Brussels Ibis Regulation.[2]

This means that all the problematic issues revealed by the case law and concerning provisional and protective measures could be dealt with by way of the interpretation of the first rule. These include: (i) the definition of provisional and protective measures and the possible inclusion of measures allowing the taking of evidence in that notion; (ii) the identification of the possible connecting factors "justifying" the delivery of a provisional and protective measure; (iii) the possibility to enforce provisional and protective measures abroad and, in particular, the regime of *ex parte* measures.

[2] For a synoptic view refer to Ancel et al. (2015), Lynxlex: From Brussels to Lugano, a panoramic table, http://www.lynxlex.com last accessed on 4.10.2016.

As previously explained by the ECJ, it is perfectly coherent with the Brussels I system that a creditor may only obtain an exportable protective measure from the judge who will hear the substance of his case and no other.[3] In this respect, the new Article 35 Brussels Ibis Regulation allows a plaintiff to seek a more efficient and swiftly enforceable measure in the jurisdiction of any other European court: that is addressing his request to a judge capable of directly enforcing the sought interim relief in his jurisdiction.

It is indeed difficult to imagine any reason that could possibly justify a request for interim relief abroad (i.e. issued by a court that has no jurisdiction on the merits) when the relief needs to be enforced at home (in the jurisdiction that decides on the merits). Obviously, the judge empowered with jurisdiction on the substance is better placed to decide on the interim protection, since he or she may evaluate not merely the *fumus boni iuris* and the *periculum in mora* but also the merits of the case.

In plus stat minus.

On the other hand, it has been pointed out that the circulation of interim relief may be even more important than the circulation of final judgments themselves, for several reasons.[4] First, because transnational disputes are usually longer than purely internal ones and judges need more time to issue a final decision since they need to enter the insidious lands of comparative and private international law. In addition, the need to notify acts abroad and/or to take evidence abroad, with all the well-known series of obstacles to a successful communication created by the diversity of legal culture (and thus of legal expectations), and the diversity of the legal language—short of language *tout court*—are all factors capable of increasing the time which is necessary for a transnational proceeding as compared to a purely internal one.

It is not difficult, in light of the case law, to see the additional difficulties occurring in the event of "procedural strategies" that exploit the flaws of the system. Just as in the case of *forum shopping*, a debtor may benefit from procedural advantages from a legal system that he knows well and he is thus encouraged to use (or even abuse) in order to frustrate the execution of decisions taken abroad. Interim relief may play a significant role in such transnational strategies where the "surprise effect" of the national measure may be increased by the ignorance of the measure itself by the "foreign" counterparty. On the other hand, it has been observed that the regime of provisional measures may create a "market" of provisional measures within the area of freedom, justice and security that would not be without beneficial effects as regards access to justice.[5]

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[3] Bogdan 2012, p. 125 ff., Sandrini 2012, 273 ff.

[4] Garcimartín 2014/2015, pp. 57–58.

[5] *Ibidem* and Honorati 2012, p. 543 ff. and Schlosser 2007, p. 288 ff., 312 ff. In contrast, Nioche 2012, p. 301 argues that *forum shopping* of interim relief measures may virtually generate parallel proceedings resulting in unmanageable situations, even within the Brussels I system.

5.3 Provisional, Including Protective, Measures

5.3.1 The Lowest Common Denominator of Member States' Interim Relief Measures

Comparative law shows a great heterogeneity of measures having both a provisional and protective character. Indeed, the measures of seizure and injunctions provided for by national laws differ widely from one country to another, up to a point where it often becomes very difficult or even impossible to "translate"—even in a purely linguistic form—an interim measure into another legal language, not to say to compare it to any other measure provided for in the other(s) country(ies) involved in the legal battle. Here in the Netherlands the *kort geding* provides for an excellent example: is it not a measure that may only be appropriately referred to in Dutch and in no other language? This kind of relief may have many possible and alternative functions: conservatory, anticipatory, for securing evidence etc. Some of these effects may inevitably be "lost in translation" with the consequence of affecting their "freedom of movement".

From a methodological point of view, the first step taken by the ECJ in this respect was that of drawing a European notion of "provisional and protective measures".[6] In more recent years, the ECJ's notion has been used for the first tentative European uniform measure: the European Account Preservation Order (EAPO).[7]

At the European level, however, even a literal interpretation confronts the interpreter with the twenty-four official languages in which European legislation is drafted. It goes without saying that few lawyers will be able to confront more than a handful of versions and, in this respect, we will also limit ourselves to some observations on the most diffuse of these languages.

Within the English version of the Brussels I system it is common to refer to "provisional *including* protective measures." This corresponds to the German linguistic versions of the original Regulation and its Recast[8] whereas the French and

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[6] This effort is not recognised by Nioche 2012, p. 18 ff. who excludes the existence of an autonomous notion of provisional and protective measures. The author suggests to simply characterise provisional and protective measures through the use of a negative definition that would include all measures *not* covered by *res judicata*. For a first comprehensive definition of provisional measures in light of ECJ case law (albeit until 1999) see Mari 1999, pp. 714–723 and Kaye 1999, pp. 3022–3062.

[7] See 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, p. 59 ff.

[8] Article 35 Brussels Ibis Regulation: *einstweilige Maßnahmen einschließlich Sicherungsmaßnahmen* while Article 31 Brussels I Regulation reads *einstweilige Maßnahmen einschließlich solcher, die auf eine Sicherung gerichtet sind*.

the Italian versions are more evocative of two distinct kinds of measures: one being characterised as provisional, the other as protective.[9]

Since the versions are all official and their interpretation cannot differ from one country to another within the EU, it is important to clarify whether provisional and protective measures are two alternative categories or whether precautionary measures may only be a sub-category of provisional measures. The question of whether the European concept includes measures of a protective nature that do not have a provisional character must be answered in the negative. Rather, the adjectives "provisional" and "protective" bring to mind the traditional characteristics of the measures granting precautionary protection: the *fumus boni iuris* (protective nature) and the *periculum in mora* (provisional nature).

These two substantial elements are common to the extraordinary variety of *escamotages*—so to say—conceived by national legislators in order to ensure the efficiency and effectiveness of justice. This circumstance is easily explained by the common Roman roots of European provisional/protective measures and by the resilience of Roman legal notions over the centuries. Insofar, despite the plethora of national forms of interim relief, the two aforementioned elements are recurrent as umpteenth proof of the persistence of Romanist structures in contemporary legal thinking and in the shaping of European law.

While keeping intact the heterogeneity of measures available within Member States' procedural systems, the Court of Justice has progressively highlighted the criteria that make it possible to characterise relief available in a national procedural system as a "provisional measure" within the meaning and for the purposes of Articles 24 Brussels Convention, 31 Brussels I Regulation, 35 Brussels Ibis Regulation, 24 1988 Lugano Convention, 31 2007 Lugano Convention, whose texts are identical. These criteria all eventually reveal one element that can be taken as the lowest common denominator of all the possible forms of interim, anticipatory, precautionary and provisional relief available under European national legal systems.

5.3.1.1 Instrumentality

The very first clarification by the ECJ as regards the notion of provisional and protective measures came in the context of the Reichert/Köchler case,[10] in which the Court excluded the possibility that the French *action paulienne* regulated by

[9] In French, the need to specify that provisional measures *include* protective ones does not seem to be felt: the wording is *mesures provisoires* ou *conservatoires*. See for example recital 33 of the Recast. In Italian the title of section 10 of the original Brussels I Regulation reads: "*Provvedimenti provvisori* e *cautelari*" whereas Article 31 reads: *Provvedimenti provvisori* o *cautelari*, the same wording may be found in section 10 and Article 35 of the Recast. All emphasis added.

[10] Case C-261/90—Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG., ECLI:EU:C:1992:149 following a previous decision in the same instance (Case C-115/88—Mario P.A. Reichert and others v Dresdner Bank—ECLI:EU:C:1990:3, where the *pauliana* had been (wrongly) characterised by the plaintiff as a matter relating to rights *in rem* in immovable property).

Article 1167 of the *code Napoléon* could be characterised as a "provisional or protective measure".

> The German Reichert spouses were heavily indebted to Dresdner Bank and the latter sought to recover its credit through a former property belonging to the couple which was discovered in France. It turned out that the asset located in the French region of *Provence* had been given by Mr and Mrs Reichert to their adult child as a gift.

The French *action paulienne*, of Roman origin,[11] corresponds *mutatis mutandis* to the German *Gläubigeranfechtung* (which literally means annulment by the creditor), and allows creditors to sue a third party (alien to the relationship between creditor and debtor but) related to the debtor as a successor in title to a specific property.[12] It is a cause of action that allows creditors—whether in reality or by fiction—to seize assets no longer belonging to their debtor who sold or gave them away in an attempt to secure them from the creditor's enforcement.

In the Reichert case, Dresdner Bank thought it more convenient to sue its debtors in France rather than in their *forum*, thus seeking heads of a possible French jurisdiction in the framework of the Brussels Convention.[13] In so doing it gave an opportunity to the ECJ to verify the possibility to characterise the *pauliana* as a form of interim relief for the purposes of Article 24 Brussels Convention. The ECJ delivered a negative answer because the action named *paulienne*, as well as comparable national versions, was not instrumental to the protection of rights litigated in other jurisdictions. Rather, actions like the *pauliana* imply a thorough analysis of the merits and not a rapid inspection of a *fumus boni iuris*; moreover, they ensure conclusive protection to the creditor's substantive rights. Once successful, the plaintiff is satisfied and the defendant is deprived of the right he was previously enjoying: this kind of relief is not temporary nor reversible.[14]

The lack of instrumentality of the French *action paulienne* is an insurmountable obstacle to its characterization as a *provisional* measure.

The functional link between a national measure and the future decision on the merits is also revealed by the two *De Cavel* judgments.[15]

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[11] Ankum 1962, offers an in-depth analysis of Roman and medieval sources of the *pauliana*.

[12] For a comparative analysis, Pretelli 2010, pp. 55–117 in Italian and, for a synthetic overview in English, Pretelli 2011, pp. 589–600.

[13] Namely, the bank tried a European characterization of the *pauliana* as an action in matters of: real estate for the purposes of Article 16-1 Brussels Convention; torts for Article 5-3 Brussels Convention; provisional and protective measures in order to make use of Article 24 Brussels Convention; and the enforcement of judgments for Article 16-5 Brussels Convention. It is still uncertain if the bank would have found the alternative sought to the *forum rei* in the *forum contractus* as later suggested by an Italian judgment of the *Corte di cassazione*: Pretelli 2004, p. 612 ff.

[14] In many legal systems it is even acknowledged that the decision has a constitutive character and may even be compared, to a certain extent, to a constructive trust. See Pretelli 2011, pp. 599–600.

[15] Case 143/78—Jacques de Cavel v Louise de Cavel, ECLI:EU:C:1979:83 and Case 120/79—Louise de Cavel v Jacques de Cavel, ECLI:EU:C:1980:70.

In both decisions, the ECJ excluded the contention that a provisional and protective measure of a civil nature could fall under the material scope of Article 24 Brussels Convention in a case where the measure was instrumental to the settlement of a divorce.

> The case arose from the divorce of a Franco-German couple in the context of which the judge of family matters at the *Tribunal de Grande instance de Paris* had ordered the "putting under seal of furniture, effects and other objects in the flat at Frankfurt-am-Main belonging to the parties and the freezing of the assets and accounts of the [wife] at two banking establishments in that city" (*De Cavel I*, point 2). Before the German Courts the husband had requested the enforcement of the French provisional measure under the Brussels Convention then in force. The German Courts referred the question to the ECJ which subsequently made it clear that: "ancillary claims … come within the scope of the convention according to the subject-matter with which *they are concerned* and not according to the subject-matter involved in the principal claim" (*De Cavel II*, pt. 9, emphasis added). However, on the other hand, the Court further added that "an application in the course of divorce proceedings for placing assets under seal did not come within the scope of the convention, *not on account of its ancillary nature*, but because it appeared that, having regard to its *true function*, it concerned, in that case, rights in property arising out of the spouses' matrimonial relationship" (*De Cavel II*, pt. 9 emphasis added).

It thus became clear that the "provisional" nature of the measure is a corollary of its instrumentality and does not stand per se as an inherent characteristic of the measure: a provisional measure may well become a final one provided that the subsequent decision on the merits allows for this. In other words, the effects of a relief measure available in a national procedural context must be limited "in time" because of the functional link of the interim measure to the substantive rights that the measure seeks to protect.

> The expression "provisional, including protective, measures" within the meaning of Article 24 must therefore be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.[16]

The interim measure needs to serve the protection of a substantive right and thus it only stands as long as it is necessary for the judge to decide the issue once and for all: "Provisional means preliminary to further proceedings for final judgments on substance".[17]

5.3.1.2 Measures for the Taking of Evidence

The same definition, limits and conditions may be applied to interim relief aimed at preserving evidence. Here, too, "instrumentality" is the lowest common

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[16] C-261/90—Reichert and Kockler (note 10), pt. 34.

[17] Kaye 1999, p. 3026, see also his comments on the following rulings: Case C-261/90—Mario Reichert (supra note 9); Banque Cantonale Vaudoise v Waterlily Maritime Inc. [1997] 2 Lloyd's Rep. 347 (UK); Re an Italian Cargo of Adultered Wine [1991] I.L.Pr. 473 (Germany); Oblique Financial Services Ltd. v The Promise Production Co. Ltd. [1994] I.L.R.M. 74 (Ireland).

denominator of Article 24 Brussels Convention measures (as well as of Article 24 Lugano Convention, 31 Brussels I Regulation, 31 2007 Lugano Convention and 35 Brussels Ibis Regulation). Also in the case of measures for preserving evidence the advantages of direct enforcement justify the adoption of the measure by a judge not empowered with jurisdiction on the merits.

> The *leading case* on this subject is "St-Paul dairy"[18], a case raised in very peculiar circumstances. In the framework of a 100 % Belgian dispute,[19] a Dutch order was requested and issued by the *Rechtbank te Haarlem.* The measure sought was the provisional hearing of a witness resident in the Netherlands. According to Dutch law, the measure is conceived as a preliminary step "to enable [an] applicant to decide whether to bring a case, determine whether it [is] well founded and assess the relevance of evidence which might be adduced in that regard" (pt. 16). Since the Netherlands did not have jurisdiction as to the substance and no proceedings were pending in Belgium, it was impossible for the ECJ to see the hearing of the witness in the Netherlands as instrumental to "avoid causing loss to the parties as a result of the long delays inherent in any international proceedings" (pt. 12). In the absence of any *periculum in mora*, in a case that had no substantial connection with the Netherlands, nor had it ever been brought in front of a judge, the statement that "the grant of such a measure could easily be used to circumvent, at the stage of preparatory inquiries, the jurisdictional rules set out in Articles 2 and 5 to 18 of the Convention" (pt. 18) appears obvious.

As for any other interim relief, those aimed at taking evidence benefit under the same conditions of the extension given to their scope of application by Article 35 Brussels Ibis Regulation (and by Article 31 2007 Lugano Convention, as well as, previously, by Articles 24 Brussels Convention, 24 Lugano Convention, 31 Brussels Ibis Regulation in their respective scope of application).

A judge not having jurisdiction as to the substance may order interim relief for preserving evidence whenever the measure is sought "to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case" (pt. 13).[20]

This test is commonly referred to as "double-condition test" and is based on the following rationale: any judge deprived of jurisdiction as to the substance may grant a provisional measure on the basis of his or her own legal system, because he or she will limit him or herself to verifying the *fumus boni iuris* of the request in a situation of *periculum in mora*, thus only whenever the measure *needs* to be taken

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[18] Case C-104/03, St. Paul Dairy Industries NV v Unibel Exser BVBA, ECLI:EU:C:2005:255.

[19] *Ibidem.* See point 7 of the decision: "With regard to the substance of the dispute between Unibel and St. Paul Dairy, the order for reference states that it is common ground that both parties are established in Belgium, the legal relationship at issue in the main proceedings is governed by Belgian law, the court having jurisdiction to hear the matter is the Belgian court and no case on the same subject has been brought in the Netherlands or in Belgium".

[20] The ECJ explicitly referred to its previous statements in pt. 34 of *Reichert and Kockler* (note 10), and pt. 37 of *Van Uden* (note 29).

within his or her jurisdiction.[21] No other justification seems to be acceptable to depart—in order to request interim relief—from the Court that has jurisdiction as to the substance of the case. Unless the measure *needs* to be taken *presto* within another jurisdiction, no other court seems better placed to hear the arguments in favour of granting interim relief.

5.3.2 A Semantic Evolution? The References to the IP Directive

No apparent or invisible semantic evolution appears between the lines of the Recast. In this respect, what seems to be a semantic clarification appears in Recital 25 as regards measures for the taking of evidence.

Recital 25 of Brussels Ibis Regulation reads:

> The notion of provisional, including protective, measures should include, for example, protective orders aimed at obtaining information or preserving evidence as referred to in Articles 6 and 7 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. It should not include measures which are not of a protective nature, such as measures ordering the hearing of a witness. This should be without prejudice to the application of Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters[22]

Let us turn, for a definition of provisional, including protective, measures, to Article 6.2. and 7.1 of the Directive 2004/48/EC on the enforcement of intellectual property rights (hereinafter IP Directive).

The former urges Member States to adapt, whenever necessary, their own internal legislation to the following specific needs of copyright protection:

> Member States shall take such measures as are *necessary to enable the competent judicial authorities to order*, where appropriate, on application by a party, *the communication of* banking, financial or commercial *documents under the control of the opposing party,* subject to the protection of confidential information.[23]

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[21] *E multis* see Mari 1999, p. 729 on the *acquis Mietz* with regard to Article 24 Brussels Convention: "Posto dunque che il rifiuto dell'*exequatur* è diretto a colpire un provvedimento abnorme sotto il profilo della competenza […], i provvedimenti [cautelari] sono conformi all'Article 24—vale a dire legittimamente emanabili sul base del ricorso al diritto nazionale—solo se possono essere attuati senza bisogno dell'*exequatur* in un altro Stato contraente".

[22] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004) in the text resulting from the subsequent *Corrigendum* published in the OJ L 195, 2.6.2004, pp. 16–25.

[23] *Ibidem*, Article 6, emphasis added. See Stamatoudi 2014, pp. 573 ff.

The norm seems to suggest that, in addition to the existing national forms of interim relief for the taking of evidence, Member States shall ensure the availability, within their borders, of measures that roughly correspond to the English "worldwide disclosure order".[24] One may be tempted to argue, following this instruction, that measures such as the worldwide disclosure order are to be characterised as interim relief measures also for the purposes of Article 35 Brussels Ibis Regulation. However, as stated above, differently from the Directive on intellectual property rights, the Recast does not unify the judicial protection of specific substantive rights. Therefore, jurisdiction to issue a "worldwide disclosure order" within the framework of the Brussels I system will continue to depend on the results of the aforementioned "double-condition test".

In Article 7 of the Directive we find further indications:

> Member States shall ensure that, even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his/her claims that his/her intellectual property right has been infringed or is about to be infringed, order prompt and effective *provisional measures to preserve relevant evidence* in respect of the alleged infringement, subject to the protection of confidential information. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto. Those measures shall be taken, if necessary without the other party having been heard, in particular *where any delay is likely to cause irreparable harm to the right holder or where there is a demonstrable risk of evidence being destroyed*.[25]

One must bear in mind, that this rule concerns solely *ex parte* measures and their regime.

In light of the identity of the text of Article 35 and its predecessors, and in light of Recital 25, we may therefore conclude that the answer to the question of whether the Recast has modified the meaning of *provisional, including protective, measures* within the existing European civil procedure of the Brussels I system seems to be negative.

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[24] On recognition and enforcement of the English worldwide freezing order in the framework of the recast see van Rest 2014, p. 351 ff. See Cruz City 1 Mauritius Holdings v Unitech Ltd and others [2014] EWHC 3704 (Comm) with reference, *inter alia*, to Credit Suisse Fides Trust SA v Cuoghi [1997] 3 All ER 724, at 730, and [1998] QB 818 at 827 suggesting that "protective measures should be granted by those courts best able to make their orders effective. In relation to orders taking direct effect against the assets, this means the courts of the state where the assets are located; and in relation to orders *in personam*, including orders for disclosure, this means the courts of the state where the person enjoined resides".

[25] *Ibidem*, emphasis added.

5.3.3 Echoes of the Recast in the European Account Preservation Order

After the IP Directive, a brand new unified interim relief was created by Regulation (EU) No. 655/2014 (hereinafter EAPO Regulation)[26] under the name of European Account Preservation Order (hereinafter EAPO).[27]

The EAPO is an interim relief instrument that may be requested before a court in a European Member State in order to secure the outcome of a "cross-border case". A "cross-border case", for the purposes of the EAPO Regulation, occurs in two hypotheses: (i) when it is dealt with by a court located in one Member State whereas "the bank account concerned by the Order is maintained in another Member State" and, (ii) when the creditor asking for the relief is domiciled in one Member State and "the court and the bank account to be preserved are located in another Member State" (Recital 10).

The EAPO can function either as interim relief, aimed at securing "the enforcement of a later judgment on the substance of the matter prior to initiating proceedings on the substance of the matter and at any stage during such proceedings" (Recital 11). However, it may also be used as a measure for the enforcement of a previous judgment.

In both cases, it is instrumental to the enforcement of a judgment, whether already existing or yet to be pronounced.

Jurisdiction needs to be justified by the verifiability of a "close link between the proceedings for the Preservation Order and the proceedings on the substance of the matter" (Recital 13).

The EAPO Regulation is clear and drastic in stating that such a link may only be expressed by the identity of the court issuing the EAPO and the court judging the case on the merits (Article 6).

It is just as clear and radical in stating that the EAPO needs to respond to a situation of *periculum in mora* since the issuing of an EAPO obliges the creditor to initiate proceedings on the merits "within 30 days of the date on which he lodged the application or within 14 days of the date of the issue of the Order, whichever date is the later" (Article 10-1) and obliges him or her "to provide proof of such initiation to the court with which he lodged his application for an Order" whenever there is no coincidence between the two courts.

Had the creditor not initiated proceedings or not informed the Court having issued the EAPO of the commencement of proceedings, then the EAPO is subject to revocation by the Court of its own motion or automatically (Article 10-2 and Recital 16).

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[26] Regulation (EU) No. 655/2014 (note 7).

[27] A special regime governs EAPOs issued for the recovery of consumers' debts.

In sum, the basic principles lying at the heart of the need to which Article 35 Brussels Ibis Regulation responds inspired the construction of the EAPO regime, that allows ex parte measures from the competent court (art. 11).

5.3.4 Characterization in the Absence of a Taxonomy

Mietz[28] and *Van Uden*[29] prompted further clarification on the characterization of interim relief, in connection with the Dutch *kort geding*.

The ECJ, in charge of progressively making the Brussels I system a workable and efficient system of territorial adjudication of disputes in Europe, has avoided constructing a "European taxonomy" of interim measures for the purposes of Article 24 Brussels Convention (and its successors). This may explain why the ECJ has not felt the need to take a position on the "nature" of the *kort geding*. In both decisions there is no dogmatic classification of the *kort geding* as a provisional measure falling within the scope of Article 24 Brussels Convention or outside it.

Certainly, a classification of all interim measures existing under the national laws of Member States would not have been undemanding. In addition, it seems that for the ECJ, it was not useful for the efficient and proper functioning of the Brussels I system. In the framework of the Recast, it seems to have been equally unnecessary.

Regardless of its "true nature", the *kort geding* may well fit within Article 35 Brussels Ibis Regulation (*brevitatis causa*) or not fit within the scope of that rule, depending on its "true function" in a given case, as explicitly stated by the ECJ.[30]

In proceedings governed by the Brussels I system, a judge may extract from his or her national procedural law the power to grant interim relief if and only if the double-condition test leads to a positive result: namely, if the true function of the relief is to prevent future problems with the enforcement of the final decision (or to prevent the risk that relevant evidence becomes unavailable); and if the measure is to be enforced in a jurisdiction different from the one empowered to decide on the merits.

This verification takes place on a case by case basis and not through an *a priori* classification. A European taxonomy of national forms of interim relief is not needed for the system to perform correctly.[31]

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[28] Case C-99/96 Hans-Hermann Mietz v Intership Yachting Sneek BV, ECLI:EU:C:1999:202.

[29] Case C-391/95 Van Uden Maritime v Kommanditgesellschaft in Firma Deco-Line and Others, ECLI:EU:C:1998:543.

[30] The reference is to the second *Reichert* case (note 10) at pt. 9, quoted *supra* section 2.1.1.1.

[31] Cf. Recital 13 of Regulation (EU) No. 655/2014 (note 7): "proceedings on the substance of the matter should cover any proceedings aimed at obtaining an enforceable title on the underlying claim including, for instance, summary proceedings concerning orders to pay and proceedings such as the French *procédure de référé*." Here, the references to national procedures seems to have been added as mere examples, rather than as a tentative sketch of a primitive taxonomy.

5.4 Enforcement of Provisional Measures Abroad

5.4.1 The Double-Condition Test as a Detector of the Instrumental Character of a Measure

In deciding *Mietz*,[32] the ECJ has highlighted the distinction to be made between the jurisdictional power to grant provisional and protective measures that belongs to the Court having jurisdiction as to the substance (jurisdictional power grounded on the Brussels system) and the jurisdictional power to grant interim relief that belongs to the Court not having jurisdiction as to the substance (jurisdictional power grounded on national law).

> The case pitted Mr Mietz against Intership Yachting after disagreements over the "contract of sale" of "an Intership boat model 1150 G, which would have to undergo several changes". Subsequent disagreements between the parties led to the delivery of a Dutch judicial order, directed to Mr Mietz, to pay the sum of 143,750 DM plus interest. The judgment was pronounced under Articles 289 to 297 of the Dutch Code of Civil Procedure, which provide, upon application for a *kort geding*, for the adoption of urgent measures. It was declared provisionally enforceable. The ECJ took note of the following: *i)* "Articles 289 to 297 of the Netherlands Code of Civil Procedure deal with a form of procedure known as *kort geding*, which allows the President of the *Arrondissementsrechtbank* to grant enforceable measures 'in all cases which, having regard to the interests of the parties, require an immediate measure on grounds of urgency"(pt. 34); *ii*) "under Article 292 of the … Code, 'interim decisions are without prejudice to the main proceedings' [and] *Kort geding* may be instituted without the need to bring substantive proceedings before the court having jurisdiction. The President of the *Arrondissementsrechtbank* may, however, refer the parties back to the ordinary proceedings" (pt. 35); *iii*) "Under Article 289 of the Netherlands Code, *kort geding* may be instituted at very short notice and, in accordance with Article 295, an appeal must be lodged within two weeks, on pain of being declared inadmissible" (pt. 37).

The instrumental character of the *kort geding* permitted its characterization as an interim relief because, in the circumstances of the case, the Court considered, on the one hand, that the effects of the *kort geding* were reversible and, on the other, that it concerned assets located within the jurisdiction of the "interim" judge (see especially pt. 42).

When the jurisdictional power to grant a relief exists "solely by virtue of the jurisdiction provided for under Article 24", the reversibility of effects is of crucial importance. It is essential not to undermine a possible decision on the merits dismissing the case. For the same reason, it is essential for the measure to be taken outside the territory of the judge entrusted with jurisdictional power as to the substance of the case, so that the measure does not need any enforcement abroad.

In a system of uniform *fora*, it is possible to seek an interim relief elsewhere than in the jurisdiction entrusted with the power to decide the issue on the merits only if "the measure ordered relates … to specific assets of the defendant located

[32] *Supra* (note 28).

or to be located within the confines of the territorial jurisdiction of the court to which application is made" (*Mietz*, pt. 2 of the operative part).

These assumptions had already been set in *Van Uden*,[33] making it clear that Article 24 Brussels Convention "may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators". In other words, Article 24 Brussels Convention had the function of extending the scope of application of national rules on the adjudication of interim relief in connection with proceedings pending abroad. In those circumstances, the ECJ set the "Double-condition test" according to which Article 24 Brussels Convention permitted the obtaining of interim relief from a jurisdiction deprived of the power to decide the merits subject to two cumulative conditions: the reversibility of the measure's effects and the existence of a genuine link between the measure and the jurisdiction. Also, the clarifications on the genuine nature of the required link is made through a reference (albeit implicit) to enforcement: the ECJ states that in case of interim payment orders, a European judge may order the payment whenever it may be enforced through "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" (pt. 5 of the operative part).

Both conditions reveal once more the aforementioned aspects of the instrumental character of the measure. As to the first condition, it is certainly obvious to acknowledge that no irreversible measure may be said to be instrumental for a future decision on the merits, since an irreversible measure affects the outcome of the decision on the merits. As to the second condition, the "genuine" character of the link between a measure and a territory cannot but be appreciated in light of the "true function" of the relief which is (or at least should be) that of securing the decision on the merits.

Rather obviously, the genuine character of such a link is easy to ascertain, and may even be ascertained *a priori*, whenever the measure is issued by the same Court that will eventually decide on the merits. On the other hand, the nature of the link is more difficult to understand when the measure is sought elsewhere: in this case the reasons for the plaintiff's choice are inevitably those of benefiting more rapid enforcement.[34] For what other legitimate reason would a claimant seek interim relief in a Member State other than the one where the final decision will be taken?

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[33] *Supra* (note 29).

[34] Mari 1999, pp. 713–740. See, however, Dickinson 2010, pp. 557–558, identifying the courts better placed to grant specific interim relief according to the measure's characteristics, and Garcimartín 2014/2015, p. 66 on interim relief *in personam*.

5.4.2 Enforcement of Provisional Measures in the Recast

A specific regime for the enforcement of provisional measures is prescribed by Article 42-2 of the Recast. In this respect, the regulation maintains what is described as a two-track system, because it provides a different regime for the movement of the protective measure, depending on whether the decision is issued by the judge responsible for the merits or by a different judge.[35]

Recital 33 of the Recast explicitly states:

> Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation.[36] However, provisional, including protective, measures which were ordered by such a court without the defendant being summoned to appear should not be recognised and enforced under this Regulation unless the judgment containing the measure is served on the defendant prior to enforcement. This should not preclude the recognition and enforcement of such measures under national law. Where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State.

The main noticeable differences between the enforcement regime of a provisional measure and the general regime of Article 42-1 concern the formalities of the certificate accompanying the decision. The latter needs to include a certification that: "(i) the court has jurisdiction as to the substance of the matter; (ii) the judgment is enforceable in the Member State of origin".

The order issued must contain a specific statement by the judge as to its competence.

One may wonder how it would be possible, in the current system, to challenge such a statement. One possibility is certainly to refer to the irreconcilability of judgments for the purposes of Article 45(c) and/or (d) of the Brussels Ibis Regulation.[37]

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[35] Domej 2014, p. 543, Garcimartín 2014/2015, p. 59, Heinze 2011, p. 602, Honorati 2012, p. 526.

[36] See C-39/02, Maersk Olie, pt. 46: "As is pointed out in the Report on the Brussels Convention (OJ 1979 C 59, p. 71, point 184), Article 25 of that Convention is not limited to decisions which terminate a dispute in whole or in part, but also applies to provisional or interlocutory decisions."

[37] See C-80/00 Italian Leather SpA—WECO Polstermöbel GmbH & Co., ECLI:EU:C:2002:342 whose operative part, at pt. 1, contains the following decisions: "On a proper construction of Article 27(3) of the Convention of 27 September 1968 […] a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought". See Hess 2008, p 518 ff.

5.4.3 Territorial Justification of Relief under Article 35

Precautionary measures issued on grounds of Article 35 Brussels Ibis Regulation are not able to cross the borders of the issuing State and, in particular, they may not be imposed on the judge who has "wider" jurisdictional power since he or she is responsible for a decision on the merits of the dispute. Logically, the first shall not interfere with or impose a measure on the second.

> In *Van Uden*,[38] one of the parties had already initiated proceedings before arbitrators, thus there was no longer any possibility of accessing a court empowered with jurisdiction on the substance of the dispute. Therefore, the only judge available for provisional measures was the judge empowered with jurisdiction by his or her national law, a jurisdiction that could be exercised for the purposes of Article 24 Brussels Convention (and now 35 Brussels Ibis Regulation).

One problem concerns cases in which the interim relief decision is issued *ex ante* and no European judge has exclusive jurisdiction concerning the dispute.[39] In most of these cases, by virtue of the special rules on jurisdiction that add facultative *fora* to the *forum rei*, jurisdictional authority lies in the hands of more than a European judge. Normally, the judge issuing the interim relief will be deemed to have jurisdiction on the substance.[40] As a consequence, the issued relief measure shall be able to circulate within the Brussels I system.

However, a problem will appear if the judge—even though *a priori* empowered with jurisdiction concerning the dispute—is not seized *a posteriori* by the claimant.

What if the claimant, having obtained the interim relief in State A, then having succeeded in obtaining its enforcement in State B, subsequently starts proceedings in State B and not in State A?

And what if the claimant, having obtained the interim relief in State A, then having succeeded in obtaining its enforcement in State B, subsequently starts proceedings in State C?

What could possibly justify the choice of addressing a judge who has no power to decide on the merits of the case or no authority to enforce the relief sought?

Significantly, the EAPO Regulation excludes the possibility that a judge not empowered with jurisdiction as to the substance may ever issue an EAPO. As a logical consequence, if the national interim relief is an EAPO issued prior to the commencement of proceedings and if such following proceedings are initiated in a

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[38] *Supra* (note 29).

[39] On the concept of exclusive jurisdiction in the Brussels I system see Mari and Pretelli 2013/2014, p. 218.

[40] Dickinson 2010, p. 546, Garcimartín 2014/2015, p. 61, Heinze 2011, p. 608, Layton and Mercer 2004, para 23.019, Leible 2010, Article 31, No. 18. Note that Honorati 2012, p. 539, contends that the judge may only take *ex ante* measures under Article 35 Brussels Ibis Regulation.

jurisdiction which is different from the one which had issued the EAPO, the latter must be revoked (Article 33-1 of the EAPO Regulation).[41]

Similarly, the majority of authors argue that the measure *ex ante* taken by the judge empowered *in abstracto* but having "lost" jurisdiction as a consequence of the claimant bringing the case elsewhere "should be revoked or cease to have effect".[42]

5.4.4 No Enforcement Abroad of Ex Parte Measures by Surprise

The Recast differentiates the regime for the enforcement of *ex parte* measures in line with the *Denilauler* decision[43] from the recent provisions adopted for the EAPO regime. Article 2(a) includes in the definition of "decision" for the purposes of Chap. 3 on recognition and enforcement: "provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter"; but excludes any "provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, *unless* the judgment containing the measure is served on the defendant prior to enforcement".

Article 42-2(c) adds to the formal requirements for the enforcement of provisional measures, including protective measures, a specific condition for *ex parte* measures. Such a condition "codifies" the *Denilauer* case.[44]

> Couchet Frères, the creditor of Denilauler, had obtained from the *Tribunal de Grande Instance* of Montbrison a freezing order based on Article 48 of the French Code of civil procedure and named *saisie conservatoire*. Under French procedural law, a *saisie conservatoire* may be ordered at the request of the creditor and without the debtor having been summoned to appear. The order authorised the creditor to freeze the account of the debtor at a bank in Frankfurt am Main. It was declared provisionally enforceable and, on that basis, the creditor started proceedings in Germany in order to obtain, on the one hand, an *exequatur* of the *saisie conservatoire* and, on the other, a *Pfandungsbeschluss*: the German order allowing the seizure of the account. The order was enforced and later served on the debtor who immediately appealed against it before the *Oberlandesgericht* Frankfurt am Main. Upon the request of the latter, the ECJ concluded that "Judicial decisions authorizing provisional or protective measures, which are delivered without the party against which they are directed having been summoned to appear and which are

[41] Article 33 reads: "Remedies of the debtor against the Preservation Order—1. Upon application by the debtor to the competent court of the Member State of origin, the Preservation Order shall be revoked or, where applicable, modified on the ground that: (a) the conditions or requirements set out in this Regulation were not met; […]".

[42] Garcimartín 2014/2015, p. 62.

[43] Case 125/79 Bernard Denilauler—SNC Couchet Frères, ECLI:EU:C:1980:130, see *infra* at 3.2.2.

[44] *Supra* (note 43).

intended to be enforced without prior service do not come within the system of recognition and enforcement provided for by title III of the Brussels Convention".[45]

In connection with this dispute the ECJ determined the following principles: Article 24 Brussels Convention (just as Article 35 Brussels Ibis Regulation today) does not prevent the creditor from obtaining a freezing order by surprise without the other party having been summoned to appear. Neither does Article 24 Brussels Convention (just as Article 35 Brussels Ibis Regulation today) prevent enforcement abroad of *ex parte* measures issued by the Court empowered with jurisdiction on the merits. However, the surprise effect can only be pursued within the borders of the legal order issuing the interim relief. In sum, in *Denilauler*, the creditor should have directly requested an *ex parte* freezing order in Germany, had he wished to freeze those assets by surprise.

As a consequence, the Recast prescribes, for *ex parte* measures to circulate, that the claimant, in addition to providing the Court with a judgment and the related certificate, include proof of service of that judgment, precisely because the "surprise effect" is not exportable. The logic of this exclusion was further explained in connection with the decision in the case of *Hengst Import*: the system is based on the fact that a failure to respect the rights of the defence is (as was the case in the Brussels Convention) a ground for refusal, pursuant to Article 45, n. 1 letter b) Brussels Ibis Regulation.[46]

Despite this rationale and the need of guaranteeing consistency in the system in force, some authors have criticised the development of the Recast, observing that proof of service does not guarantee respect for the principle of *audi et altera parte* on which the ECJ had based its decisions in *Denilauler* and *Hengst*, but it merely frustrates the surprise effect.[47]

5.5 Conclusions

If the ECJ has remedied, in connection with its case law, the *lacunae* of the Brussels I system that are due to the absence of a European comprehensive legal order, the codification of ECJ case law often results in fragmentary definitions and rules. This is visible, for example, in the definition of interim relief given by

[45] See the operative part of *Denilauler* (note 43).

[46] Case C-474/93 Hengst Import BV—Anna Maria Campese, ECLI:EU:C:1995:243 at pt. 16 "it must first be noted that the provisions of the Convention as a whole, both in Title II on jurisdiction and in Title III on recognition and enforcement, manifest an intention to ensure that, within the scope of the objectives of the Convention, proceedings culminating in judicial decisions are conducted in such a way that the rights of the defence are observed". The case concerned the enforcement in the Netherlands of the Italian *Decreto Ingiuntivo,* an *ex parte* measure that is served on the defendant in order to allow him or her to challenge it in order to avoid subsequent imminent enforcement.

[47] Garcimartín 2014/2015, p. 68, von Hein 2013, p. 108 and Domej 2014, p. 546.

Recital 33 giving excessive attention to the characterisation of measures for the taking of evidence instead of attempting to sketch a comprehensive and systematic concept. A closer look reveals, however, that, the problem is merely one of legislative technique, since the philosophy of the system does appear logically coherent.[48]

Provisional, including protective, measures are all those national measures of interim nature, so by definition temporary, limited in time and reversible. The concept that emerges from the aforementioned ECJ's decisions is clarified by the logic of the system: the anticipatory or satisfactory character of European interim relief measures is irrelevant, since their essence lies in their instrumentality to the main cause of action. In this respect, their protective nature and whether they intervene *ante* or *post causam* is not of paramount importance, when compared to the existence of a *periculum in mora*, a criterion frequently recalled to assess the provisional character of measures aiming at the taking of evidence.

In line with the ECJ case law, the option of classifying each national measure, in order to assert its characterisation as interim relief, has not been taken up by the Recast. In light of the above, an abstract *a priori* characterisation of typical national measures is definitely unnecessary. Rather, attention must be paid to the true function of the measure in every given dispute.

Provisional measures benefit in the Recast of a specific procedure of enforcement. Article 42-1 prescribes specific formalities for the certificate accompanying the decision. These include a certification that: "(i) the court has jurisdiction as to the substance of the matter; (ii) the judgment is enforceable in the Member State of origin". Moreover, a specific rule now exists for *ex parte* measures taken *inaudita altera parte.* For these measures to be enforced abroad, the claimant needs to serve the judgment prior to the enforcement of the measure.

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