

JUDGTRUST CONFERENCE

Enforcement of Provisional Measures under the Brussels Ibis Regulation

Professeur Dr. Gilles Cuniberti
Université du Luxembourg

The Hague, 22 April 2022

Introduction

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Provisional measures still raise a number of issues

- Concept of provisional/protective measure
 - ▣ For the purpose of Art 35
 - ▣ Debates and variations in France for appointment of judicial experts
- Relationship between various heads of jurisdiction
 - ▣ Should a hierarchy be introduced?
 - Case C-580/20, *Toto*: no

Introduction

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Circulation of provisional measures

- Concepts of regulation apply to interim measures
 - ▣ Judgment, proceedings, *lis pendens*
 - ▣ CJEU *Italian Leather*, *Purrucker II*

- Provisional measures may thus be recognised and enforced
 - ▣ Subject, however, to a number of requirements

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Specific Requirements

- A) Jurisdiction of the Issuing Court
- B) Prior Service on Defendant
- C) Finality?

A) Jurisdiction of Issuing Court

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- Brussels Ibis Regulation, art. 2(a), art. 42(2)
 - ▣ Judgments enforceable under the Regulation include
“Provisional ... measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter.”

- Origin: Case C-391 /95 *Van Uden*
 - ▣ As interpreted by European lawmaker

A) Jurisdiction of Issuing Court

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What is the rationale of this limitation?

- Avoiding bypassing jurisdictional rules of Regulation
 - ▣ By seeking quasi final interim measures from art 35 courts
- The scope of Art 35 should be limited
 - ▣ By limiting it to genuinely provisional measures
 - ▣ By avoiding extra-territoriality?

A) Jurisdiction of Issuing Court

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When does a court have jurisdiction on the merits?

- “by virtue of this Regulation” (art. 2(a))
 - ▣ No discernible rationale
- Can jurisdiction be potential?
 - ▣ Where several courts have jurisdiction on the merits
 - But none was actually seized
 - ▣ Rationale of limitation suggests positive answer

A) Jurisdiction of Issuing Court

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- Should subsequent seizure on the merits of another court matter?
 - ▣ Principle: jurisdiction to be assessed at time of initiation of relevant proceedings
 - ▣ 2011 Proposal for EAPO Regulation:
Art. 6(2): Where more than one court has jurisdiction for the substance of the matter, the court of the Member State where the claimant has brought proceedings on the substance or intends to bring proceedings on the substance shall have jurisdiction.

A) Jurisdiction of Issuing Court

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- Can provisional measures can trigger *lis pendens*?
 - Case C-296/10, *Purrucker II*
 - Yes if: *the claim relating to provisional measures and the claim brought subsequently relating to matters of substance constitute a procedural unit*
 - Case C-29/16, *Hanseyaachts*
 - No if: *independence and (...) very clear distinction between the [interim] proceedings (...) and any substantive procedure*

A) Jurisdiction of Issuing Court

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Is jurisdiction reviewable by the required court?

- Origin: Case C-99/96, *Mietz*
- Art. 45 clearly limits review of jurisdiction
- Was *Mietz* overturned?

B) No Prior Service on Defendant

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- Brussels Ibis Regulation, art. 2(a), art. 42(2)
 - ▣ Judgments enforceable under the Regulation exclude “a 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.”

- Origin: Case C-125/79 *Denilauler*

B) No Prior Service on Defendant

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Criticism: requirement excludes any surprise effect

- Commission proposed already its abolition in 2010
 - ▣ Rejected during legislative process

- New circumstances?
 - ▣ EAPO Regulation

B) No Prior Service on Defendant

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More favorable national regimes remain applicable

- Recital 33 expressly provides so
- Case C-186/19, *Supreme Sites Services v. Shape*
 - ▣ Dutch *Ex parte* measure over assets situated in Belgium
 - ▣ Art. 53 certificate
 - ▣ Enforcement sought under BE-NE Bilateral treaty

C) Finality?

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Not a requirement under EU law of judgments

- Appealable judgments may be enforced: art. 51
- Yet, in Case C-580/20, *Toto*
 - ▣ Interim injunction issued *inter partes*
 - ▣ by court with jurisdiction on the merits
 - ▣ AG Rantos: - may not be recognised for not being final
 - ▣ CJEU: - does not impact jurisdiction of Art 35 courts

Conclusion

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- Enforcement of provisional measures
 - ▣ May raise issues of transposition: art. 54

- Recognition of provisional measures
 - ▣ Includes *res judicata*
 - Cass. Fr. 2011 *Mastrogiorgis* (negative decision)
 - ▣ Raises issue of identity of applications
 - Cass. Fr. 2018 *Gorsoan*
 - different 'objet' for *Mareva* injunction & *saisie conservatoire*

Thank you for your attention

Gilles.cuniberti@uni.lu