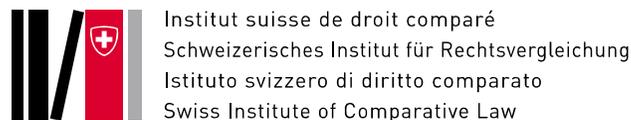


Consistencies and Inconsistencies in the Regime of Provisional and Protective Measures in European Union Private International Law



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Practical importance of provisional measures

- The procedural power to grant provisional or protective measures is a general principle of law which exists in the law of all Member States
- Provisional or protective measures often have an influence on the proceedings on the substance of the dispute
- Provisional or protective measures may be used to impact the jurisdiction on the merits
- Provisional or protective measures are not provided in the same cases and under the same conditions in each Member State



Concept of provisional measures

- The regime of provisional or protective measures varies considerably from one Member State to another
- It is therefore difficult to define precisely the concept of provisional or protective measures
- There is no definition of provisional or protective measures in European private international law instruments
- Recent private international law conventions exclude provisional or protective measures from their scope (e.g. The Hague Choice of Court Convention [2005], The Hague Judgment Convention [draft])



Categories of provisional measures

- Provisional or protective measures may serve the function or purpose:
 - of protecting the rights vindicated in proceedings on the merits (e.g. freezing assets of the debtor, injunction ordering a particular act or abstention)
 - of protecting evidence (e.g. gather evidence which may disappear before trial)
 - of preparing enforcement (e.g. order to disclose assets)
 - of granting early satisfaction to the creditor (e.g. order provisional payment of a non-disputable debt)
 - of preparing trial (e.g. appoint an expert of fact)
 - of assessing the desirability of initiating proceedings (e.g. order to disclose information/files/accounts before initiation of proceedings on the merits)

[source: Working Group on Provisional and Protective Measures of the ELI-Unidroit Project on Civil Procedure, First Report of November 2014]



Common characteristics of provisional measures

- The provisional or protective measures:
 - are issued without purporting to be final and complete adjudicatory decisions
 - are granted for reasons of urgency
 - are intended:
 - to preserve the opportunity for an eventually complete and satisfactory judicial resolution and enforcement of the claim; or
 - to provide provisional protection of a party's interest in that final outcome
- There are special constraints on the exercise of the judicial power to grant such remedies and to ensure protection of both parties, in the interests of justice and fairness

[source: Working Group on Provisional and Protective Measures of the ELI-Unidroit Project on Civil Procedure, First Report of November 2014]



The approach of European private international law

- The Brussels Convention model (Art. 24):
 - One rule of general application
 - No distinction as to the function or purpose that the measures serve
 - No list of provisional or protective measures that can be ordered
 - Lugano Convention 1988 (Art. 24)
 - Brussels I Regulation [44/2001] (Art. 31)
 - Lugano Convention 2007 (Art. 31)
 - Brussels *Ibis* Regulation [1215/2012] (Art. 35)
 - Succession Regulation [650/2012] (Art. 19)
 - Maintenance Obligations Regulation [4/2009] (Art. 14)
 - Matrimonial Property Regimes Regulation [2016/1103] (Art. 19)
 - Property of Registered Partnerships [2016/1104] (Art. 19)
- The European Account Preservation Order (EAPO) Regulation [655/2014] model
 - Scope limited to one type of provisional or protective measures

A two-track system for court jurisdiction

- The Brussels Convention model has a two-track system for determining the jurisdiction to order provisional or protective measures:
 - Jurisdiction of the court having jurisdiction as to the substance of the case
 - Jurisdiction based on one of the general heads of jurisdiction
 - e.g. Art. 4 §1 Brussels *Ibis* Regulation (courts of the State of the domicile of the defendant)
 - Jurisdiction of courts not having jurisdiction as to the substance of the case (*i.e.* jurisdiction of the place of execution of the provisional or protective measure)
 - Jurisdiction provided for in a special provision
 - e.g. Art. 35 Brussels *Ibis* Regulation

Jurisdiction of the court having jurisdiction as to the substance of a case

- The jurisdiction of the court having jurisdiction as to the substance of a case is universally accepted
 - Jurisdiction to order provisional or protective measures after *or* before the case has been filed as to the substance of the matter
- This jurisdiction is implicit in the Brussels Convention model
 - No specific provision
 - “[I]t is accepted that a court having jurisdiction as to the substance of a case in accordance with Articles 2 and 5 to 18 of the [Brussels] Convention also has jurisdiction to order any provisional or protective measures which may prove necessary” (Case *Van Uden*, 17.11.1998, C-391/95, pt. 19)
 - This jurisdiction is subject to no further conditions (Case *Van Uden*, 17.11.1998, C-391/95, pt. 22)
- The Service Regulation [1393/2007] is an exception
 - Art. 19 §3 of the Service Regulation: “the judge may order, in case of urgency, any provisional or protective measures”

Jurisdiction of courts not having jurisdiction as to the substance of a case

Art. 31 of the Brussels I Regulation:
“Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.”

- Brussels Convention (Art. 24)
- Lugano Convention 1988 (Art. 24)
- Brussels I Regulation [44/2001] (Art. 31)
- Lugano Convention 2007 (Art. 31)
- Brussels *Ibis* Regulation [1215/2012] (Art. 35) [except “under this Regulation”]
- Succession Regulation [650/2012] (Art. 19)
- Maintenance Obligations Regulation [4/2009] (Art. 14)
- Matrimonial Property Regimes Regulation [2016/1103] (Art. 19)
- Property of Registered Partnerships [2016/1104] (Art. 19)

Jurisdiction of courts not having jurisdiction as to the substance of a case

- There is abundant case law from the Court of justice about the jurisdiction of the courts which do not have jurisdiction as to the substance of a case to order provisional or protective measures
- Case law has clarified the notion of provisional or protective measures within the meaning of Art. 24 of the Brussels Convention:
 - “Provisional or protective measures” must be understood as an autonomous concept
 - “Provisional, including protective measures, within the meaning of Article 24 [of the Brussels Convention] must [...] 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.” (Case *Reichert*, 26.03.1992, C-261/90, pt. 34)
 - Reference should be made to the function or purpose pursued by the measure to identify its provisional or protective nature

Jurisdiction of courts not having jurisdiction as to the substance of a case

- The provisional or protective measures are primarily intended to preserve the *status quo* pending the determination of the merits of the dispute and, in particular, to “freeze” the assets that may be used to satisfy the creditor's claim (Case *Reichert*, 26.03.1992, C-261/90)
 - Measures aimed at obtaining evidence in order to assess the chances or risks of proceedings are not provisional measures (Case *St. Paul Dairy*, 28.04.2005, C-104/03)
 - *Action paulienne* under French law is not a provisional measure (Case *Reichert*, 26.03.1992, C-261/90)
 - An order for interim payment of a contractual consideration (e.g. *référé-provision* under French law, *kort geding* under Dutch law) is a provisional measure only if the repayment to the defendant of the sum awarded is guaranteed if the plaintiff would not succeed on the merits and the measure sought relates only to specific assets of the defendant located within the territorial jurisdiction of the court to which application is made (Case *Van Uden*, 17.11.1998, C-391/95; Case *Mietz* 27.04.1999, C-99/96)
 - The issuance of an injunction aimed at excluding the defendant from the proceedings (debarment injunction) or of an injunction ordering the defendant to disclose information and documents within the prescribed deadline under threat of exclusion from the proceedings (disclosure injunction) are provisional measures (Case *Gambazzi*, 02.04.2009, C-394/07)
 - An injunction aimed at prohibiting a person from initiating or continuing proceedings in the courts of another Member State (anti-suit injunction) is not a provisional measure (Case *Turner*, 27.04.2004, C-159/02)
 - The courts of a Member State ordering an anti-suit injunction on the ground that proceedings before a State court would be contrary to an arbitration agreement, is incompatible with the Brussels I Regulation (Case *Allianz*, 10.02.2009, C-185/07)

Jurisdiction of courts not having jurisdiction as to the substance of a case

- Art. 24 of the Brussels Convention is not a rule on jurisdiction per se:
 - The jurisdiction of the court of the place of execution must be based on a rule of internal jurisdiction (Case *Van Uden*, 17.11.1998, C-391/95)
 - Jurisdiction may be based on a rule of exorbitant jurisdiction of the domestic law (Case *Van Uden*, 17.11.1998, C-391/95, pt. 42)
 - All existing places of jurisdiction under the laws of the Member States can therefore be claimed in order to impose provisional or protective measures
 - The jurisdiction of the courts of the place of execution can also be based on a rule of jurisdiction provided for in the Brussels Convention (Case *St. Paul Dairy*, 28.04.2005, C-104/03)
 - “the mere fact that proceedings have been, or may be, commenced on the substance of the case before a court of a Contracting State does not deprive a court of another Contracting State of its jurisdiction under Article 24 of the [Brussels] Convention” (Case *Van Uden*, 17.11.1998, C-391/95, pt. 29)
 - The general heads of jurisdiction found in the Convention can therefore be claimed in order to impose provisional or protective measures even when the action on the merits is not (yet) filed
 - Applicable even when the jurisdiction of the court of a Contracting State is exclusive (Case *Solvay*, 12.07.2012, C-616/10, pt. 50)

Jurisdiction of courts not having jurisdiction as to the substance of a case

- Scope of Art. 24 of the Brussels Convention:
 - The jurisdiction of the court of the place of execution is a generally accepted exception to the jurisdiction of the court hearing the case on the merits
 - This special jurisdiction is justified by the gain in time (no recognition and enforcement procedure requested)
 - This jurisdiction is limited to the situations when there is a real connecting link between the subject of the measures and the territorial jurisdiction of the State of the judge hearing a request for provisional or protective measures (Case *Van Uden*, 17.11.1998, C-391/95, pt. 40)
 - This jurisdiction is justified by the fact that the courts of that State are in a better position to appreciate the circumstances which may lead to the grant or refusal of the measures requested (Case *Denilauler*, 21.05.1980, 125/79)
- The provisional or protective measures ordered by a court which does not have jurisdiction will not, in principle, be recognised and enforced in another State

Quid of the Brussels Ibis Regulation [2201/2003]?

Some Analogies:

- The procedural power to grant provisional or protective measures in family law is also a **general principle of law** which exists in the law of all Member States
- Provisional or protective measures often have an **influence on the proceedings on the substance** of the dispute and sometimes a decisive one
- Provisional or protective measures may be **used to impact the jurisdiction on the merits**
- Provisional or protective measures are very diverse both as to the **cases and conditions** under which they are granted and as to their **regime**
- There is **no definition** of provisional or protective measures in European private international law instruments
- Brussels Ibis Regulation [2201/2003] also builds on a **two-track system** where both the Court having jurisdiction as to the substance and the Court of any place where a provisional measure may (or needs to) be enforced can successfully issue a provisional measure

The Two-track System

As we have seen within the Brussels Convention model, the Brussels *Ibis* Regulation makes it possible for a MS Court to order provisional or protective measures:

- If the MS Court has jurisdiction as to the substance of the case
 - Jurisdiction based on one of the general heads of jurisdiction
 - e.g. Art. 8 §1 Brussels *Ibis* Regulation (habitual residence of the child in matters of parental responsibility)
- Jurisdiction of the court of the place of enforcement of the provisional or protective measure
 - Jurisdiction provided for in a special provision
 - e.g. Art. 20 Brussels *Ibis* Regulation

Differences: Categories of Provisional Measures in Family Law

Provisional or protective measures may serve the function or purpose:

- of protecting the rights vindicated in proceedings on the merits (e.g. freezing assets of the debtor, injunctions)
- of protecting evidence (e.g. gather evidence which may disappear before trial)
- ✓ of preparing enforcement (e.g. appoint a guardian to a minor)
- ✓ of granting early satisfaction to the creditor (e.g. order provisional maintenance)
- ✓ of preparing trial (e.g. award custody of a child to her referential parent)
- of assessing the desirability of initiating proceedings (e.g. order to disclose information/files/accounts before initiation of proceedings on the merits)

[elaborated from the list prepared by the Working Group on Provisional and Protective Measures of the ELI-Unidroit Project on Civil Procedure, 2014 Report]



Jurisdiction of Courts Having Jurisdiction as to the Substance of a Case

- The jurisdiction of the court having jurisdiction as to the substance of a case is universally accepted
 - Jurisdiction to order provisional or protective measures *ex ante*, during, or after a case has been filed
- As in the Brussels Convention model, it is implicit
 - No specific provision
 - “The fact that a court of a Member State is seised in the context of proceedings to obtain interim relief [...] and there is nothing in the action brought [...] which indicates that the court seised for the interim measures has jurisdiction within the meaning of Regulation No 2201/2003 does not necessarily preclude the possibility that [...] there may be an action as to the substance of the matter which is linked to the action to obtain interim measures and in which there is evidence to demonstrate that the court seised has jurisdiction within the meaning of that regulation.” (Case *Purrucker II*, 9.11.2010, C-296/10, pt. 86)

Jurisdiction of Courts Not Having Jurisdiction as to the Substance of a Case

Art. 35 EU Reg. 1215/2012

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.

Art. 20 EU Reg. 2201/2003

1. In urgent cases, the provisions of this Regulation **shall not prevent** the courts of a Member State from taking such provisional, including protective, measures **in respect of persons or assets** in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.
2. The measures referred to in paragraph 1 **shall cease to apply** when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

Implicit and Explicit Conditions

- Case law from the Court of justice about the jurisdiction of the courts which do not have jurisdiction as to the substance of a case to order provisional or protective measures only deals with provisional measures to protect children, especially victims of parental cross-border child abduction
- Within this framework, the CJEU (Case A, 2.4.2009, C-523/07) has stated that: “A protective measure, such as the taking into care of children, may be decided by a national court under Article 20 of Regulation No 2201/2003 if the following conditions are satisfied:
 - the measure must be urgent;
 - it must be taken in respect of persons in the Member State concerned; and
 - it must be provisional.”

CJEU Teachings

- The need for and **urgency** of definitive measures must be determined having regard to the child's circumstances, his likely development and the effectiveness of the provisional or protective measures adopted (Case A, C-523/07)
- “[T]he courts of a Member State where a child is **present** may, subject to certain conditions, take such provisional, including protective, measures as may be available under the law of that State, even if, under the Regulation, a court of another Member State had jurisdiction as to the substance of the matter.[...] In that it is an exception to the system of jurisdiction laid down by the Regulation, that provision must be interpreted strictly” (Case *PPU Health Service Executive*, C-92/12, pt. 130)
- The court of the MS where the child is present take action **only to the extent that the court having jurisdiction as to the substance** doesn't do it (Case *Detiček*, C-403/09 PPU)
- The administrative nature of an **order of placement** taken by a public body under the law of a MS does not entail that such order falls outside the scope of the Brussels *Ibis* Regulation (Case A, C-523/07)
- The rule on ***lis pendens*** (Art. 19) do not apply to interim reliefs taken on grounds of art. 20 (Case *Purrucker II*, C-296/10, pt. 16)
- Article 21 et seq. on **recognition and enforcement** of judgements do not apply to provisional measures, relating to rights of custody, falling within the scope of Art. 20 of that regulation (Case *Purrucker I*, C-256/09)

Inconsistent yet coherent

- The two-track system of Brussels *Ibis* has a different rationale from the one of the Brussels I system:
 - Address sensitive situations timely
 - Ensuring there is no gap in jurisdiction
- Unavailability of the *acquis* of the Brussels I system:

“those [...] texts differed too much in their objectives and in other provisions to permit the application, in the context of Regulation No 2201/2003, of any solutions adopted in the context of the Brussels Convention or Regulation No 44/2001” (Case *Purrucker II*, C-296/10, pt. 62)

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