The Subtle Interpretation of the Case Law of the European Court on Provisional Remedies

The Subtle Interpretation of the Case Law of the European Court on Provisional Remedies

Claudio Consolo*

During the last twelve years, several judgments of the European Court of Justice have dealt with the issue of provisional measures under Art. 24 of the Brussels Convention[1] (now Art. 31 of Regulation no. 44/2001).[2] The purpose of this article is to give an assessment of major changes brought about by those decisions. In particular, this paper will pay special attention to the determination of the jurisdiction of the courts and the recognition of «judgments» as far as provisional measures are concerned.

The first case concerning the issue of provisional measures after *Denilauler* in 1980 (Case no. 125/79)[3], was *Reichert e Kockler* v. *Dresdner Bank II* (Case no. C-261/90), decided by the European Court of Justice on March 26, 1992. The Court had to rule on the question whether the so-called *actio pauliana*, an action on the merits for revoke a sale of goods even if ancillary to the action to enforce the debtor's obligation, falls under Art. 24 of the Brussels Convention. In answering in the negative the Court stated: «The expres-

---

* Professor, University of Padua.

1 The issue has been thoroughly discussed in Italy, e. g., by Salerno, La giurisdizione italiana in materia cautelare, Padua 1993; Di Blase, Provvedimenti cautelari e convenzione di Bruxelles, in: RDI, 1987, p. 5; Giardina, Provisional Measures in Europe: Some Comparative Observations, in: DCI, 1993, p. 791. See also Consolo, La tutela sommaria e la convenzione di Bruxelles: la «circolazione» comunitaria dei provvedimenti cautelari e dei decreti ingiuntivi, in: RDIPP, 1991, p. 593.

2 Since March, 1st 2002, Regulation (EC) no. 44/2001 of 22 December 2000 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters, has replaced the Brussels Regulation of 1968. The latter, however, still applies to Denmark. The wording of Art. 24 of the Brussels Convention is exactly the same as Art. 31 of Regulation no. 44/2001.

3 In that case the European Court of Justice stated, inter alia, that the forum executionis is the most appropriate in which to give a decision on provisional measures under Art. 24 of Brussels Convention; in particular, see paragraph n. 16: «the courts of the place or, in any event, of the contracting state where the assets subject to the measures sought are located, are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought (. . .)».

sion ‹provisional, including protective, measures› within the meaning of Art. 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.» (para. 34).

By this definition, the Court apparently excluded from the scope of Art. 24 those provisional measures which are not strictly «protective», but tend «to anticipate» a judgment on the merits of the case, even if actio pauliana is truly not so anticipatory because the assets sold by remain to the buyer even if the future condemnation (sought in an other proceeding) will be able to be enforced also on those assets.

The Commission constantly referred to this restrictive notion of provisional measures during the work on the revision of the Convention: although it did not result into a new wording of Art. 24, now Art. 31 of Regulation no. 44/2001; the ILA *Committee on International civil and commercial litigation* (*Second Interim Report*; see para. 37) made reference to this concept of interim relief in its Principles, during the Helsinki Conference of 1996.[4]

Surprisingly enough, however, the Court gave a different definition of «provisional measures» falling under Art. 24 of the Convention, in its decision of November 17, 1998, *Van Uden* v. *Deco Line* (case C-391/95). While this decision is widely known to the public because of its relevant practical implications, the language used by the Court is far from clear and therefore deserves, in our opinion, a thorough and unfortunately even complex analysis[5], together with the following decision Van Mietz.

In *Van Uden* the requested measure was the Dutch *kort geding*, a provisional measure very similar to the French *référé-provision*, as it lacks the instrumental character which gives a provisional measure only a temporary life (typical e. g. of Italian or Spanish provisional measures). The *kort geding*, instead, becomes more than four times out of five a definite measure, without ever being followed by a proceedings on the substance of the matter. Unlike the *référé*, however, the *kort geding* maintains, if not the juridical and logical structure, at least the *function* of provisional measures. For it to be granted in fact the urgency of the protection needs to be proved; on the contrary, the

4 Principle 1 concerning interim decisions provides as follows: «Provisional and protective measures perform two principal purposes in civil and commercial litigation: (a) to maintain the status quo pending determination of the issues at trial; or (b) to secure assets out of which an ultimate judgement can be satisfied».

5 As Hartley, Interim measures under the Brussels Jurisdiction and Judgments Convention, in: European Law Review, 1999, p. 678, *frankly* puts it: «This judgment raises almost as many questions as it answers».

mere existence of a controverted right as the subject matter of the dispute is insufficient.[6]

Quite surprisingly, in *Van Uden*[7] the Court comes to the conclusion that the «provisional measures», that Art. 24 refers to, are not only *lato sensu* protective measures, but also autonomous anticipatory measures, thus overcoming the requirement of their mere protective and temporary function in accordance with the definition originally given in Reichert.

This conclusion was confirmed, almost with the same wording, five months later, with some further developments, in the judgment of 27 of April 1999, *Mietz* v. *Intership Yachting* (Case no. C-99/96).[8]

In 2002, in the judgment of June 6, 2002, *Italian Leather SpA v. Weco Polstermöbel GmbH & Co* (Case no. C-80/00), the European Court of Justice went further: after having underlined the essential characters of temporariness and instrumentality of measures under Art. 24, stressed in *Van Uden* and

---

6 On the lack of instrumentality between the référé and the judgment on the merits, see Silvestri, Il sistema francese dei référés, in: Foro it., 1998, V, p. 9, in particular at 24. Generally, for a clear analysis of the *référé-provision*, see Jommi, Per un'efficace tutela sommaria dei diritti di obbligazione: il référé-provision, in: Riv. dir. civ., 1997, p. 121. See also Besson, Arbitrage international et mesures provisoires, Zurich 1998, p. 198, for the view that the référé is essentially characterized by two elements: the fact that it does not require urgency and gives the claimant the opportunity to obtain «une provision à cent pour cent». This author quotes some French cases dealing with the matter and underlines that French case law is generally oriented to consider the *référé-provision* as falling under Art. 24 EuJC (206). For the opinion that the *référé-provision* may be consider a «provisional measure» within the meaning of Brussels Convention, see the greater part of the French case-law, especially, Tribunal Grande Instance Nanterre October 9, 1978, in: Rev. crit. dr. int. privé, 1979, p. 128; Cour d'Appel Versailles June 27, 1979, in: Gaz. Pal., 1979, II, p. 453 ff.; Cour d'Appel Chambery March 2, 1992, in: JDI, 1994, p. 173; on the other hand, for the opposite view, see Cour d'Appel Rennes November 4, 1992, in: JDI, 1994, p. 173; Cour d'Appel Aix en Provence, ord. May 4, 1981, in: Rev. crit. dr. int. privé, 1983, p. 110 (for a survey of this case-law, see Merlin, Le misure provvisorie e cautelari nello spazio giudiziario europeo, in: Riv. Dir. Proc., 2002, p. 777, footnote 41).

7 For an analysis of the case see Normand, in: Rev. crit. dr. int. privé, 1999, p. 353, especially 361; see also Marmisse-Wilderspin, Le régime jurisprudentiel des mesures provisoires à la lumière des arrêts Van Uden et Mietz, ibidem, p. 669; Querzola, Tutela cautelare e Convenzione di Bruxelles, in: Riv. trim. dir. e proc. civ., 2000, p. 805; Hartley (footnote 5), p. 674. The decision is reported in International Litigation procedure 10, 1999, p. 73; RMUE 4/1998, p. 168; EuZW 10, 1999, p. 413; RIW, 45, 1999, p. 536; RCDIP, 88, 2/1999, p. 340; ZZPint, 4, 1999, p. 205 (with a note of Spellenberg and Leible). See also the comment by Huet, in: JDI – Clunet, 1/1999, p. 613.

8 The decision is reported in International Litigation Procedure, 10, 1999, p. 541; Revue du marché unique européen, 3/1999, p. 315; EuZW 10, 1999, p. 727; European Current Law Yearbook, 1999, p. 144; RCDIP, 88, 4/1999, p. 212, cit.; an abstract can be found in Revue des Huissiers de Justice, 1/1999, p. 817. See also the comment of Laferrière, in: JDI – Clunet, 2/2001, p. 682, and Bruneau, La reconnaissance et l'exécution des décisions rendues dans l'union européenne, in: La semaine juridique JCP, 17/2001, p. 802.

Mietz with reference to anticipatory provisional measures, the ECJ, implicitly referring to *Denilauer*, reaffirmed that the recognition and the enforcement regime set out in the Brussels Convention apply not only to decision on the merits, but also to interim measures. In particular, stating on a matter of irreconcilability between two different provisional measures (the first one granted by the court competent on the substance and the second one by the court competent under Art. 24) ruled that, as Art. 27 (3) of the Brussels Convention, following the example of Art. 25, refers to «judgments» without further specification, decisions on interim measures are subject to the rules laid down by the Convention concerning irreconcilability, in the same way as the other «judgments», on interim measures or on the substance, covered by Art. 25.

Finally, on April 28, 2005, in the *St. Paul Dairy Industries NV v. Unibel Exser BVBA* case (case no. C-104/03) the European Court of Justice pronounced its first decision as regards to the possibility to refers the notion of «provisional» or «protective» measure also to a measure of a preliminary taking of evidence, in particular the hearing of a witnesses. In this decision, however, taking into account the circumstances of the case, the Court sustained that Art. 24 of Brussels Convention must be interpreted as meaning that such a measure, granted only to asses the chances or the risks of a future proceedings, cannot be covered by the concept of «provisional measure».

I. Anticipatory Provisional Measures

1. Is the forum executionis becoming obsolete? A critical appraisal

That anticipatory measures, by their very nature, may preempt the decision on the substance of the case poses the risk that they may be used in order to circumvent the rules of jurisdiction laid down by the Convention. For the purpose of minimizing such a risk, the Court stressed the *provisional* function of provisional measures, so as to distinguish them from a judgment on the substance of the matter. Following the «practical» approach which is typical of the Court's case-law, the Court has circumscribed the notion of provisional measures falling under Art. 24 especially with a view to their recognition and enforcement in the State having jurisdiction on the merits, or in another State in accordance with the special provisions set out in the Convention.

Where a court of a State, which has no jurisdiction as to the substance of the matter, is seized as the *court of the place where the measure is to be enforced*, «anticipatory» provisional measures do not constitute provisional measures within the meaning of Art. 24 *unless*, «first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, *second, the measure sought relates only to specific assets of the defendant located or to be located within the con-*

fines of the territorial jurisdiction of the court to which application is made» (*Van Uden* and *Mietz*, also relating to *kort geding*, paragraphs 47 and 42, respectively, emphasis added).[9] It is thus created a new rule on jurisdiction, in addition to the rules already set out in the Convention.

Here probably lies the most relevant, and dubious at the same time, aspect of the Court's decisions, where the Court seems to go much further than in *Denilauler*.[10]

The proposition has also been advanced that these decisions mark the end to the *forum executionis* as an autonomous rule of jurisdiction.[11] According to this opinion, under Art. 24 an application might be made to the courts of *any State* under the law of which a provisional measure may be available,[12] irrespective of the grounds of jurisdiction and thus including municipal rules that ought to be regarded as rules of «exorbitant» jurisdiction in accordance with Art. 3 of the Convention.

However, the only line in *Van Uden* which could open the way to the admissibility of rules of «exorbitant» jurisdiction – provided that the assets subject

---

9 The judgment given in Van Uden case has been quoted to define the meaning of provisional measures under Art. 24 also in the following European Court case-law, see the judgement, June, 6 2002, Italian Leather Spa v. Weco Polstermöbel GmbH & Co (Case no. C-80/00), para. 39, and also St. Paul Dairy Industries NV v. Unibel Exser BVBA (case no. C-104/03), of 28 of April 2005, paragraphs 13 and 14. For the subsequent case-law of national courts, see, for instance, Cour d'Appel d'Orléans, November, 7, 2002, VetroBalsamo v. Société Cave des producteurs de Vouvray, reported in: Rev. crit. dr. int. privé, 2003, with a note of Ancel.

10 Very few authors have so far focused on this issue. See e. g. Mari, Il diritto processuale civile della Convenzione di Bruxelles. I. Il sistema della competenza, Padua 2000, p. 730; Kennett, Enforcement of judgments in Europe, Oxford 2000, p. 140, albeit with a short remark. See also Hess/Volkommer, Die begrenzte Freizügigkeit einstweiliger Massnahmen nach Art. 24 EuGVÜ, in: Iprax, 1999, p. 220, especially at 224; these authors give a particular interpretation of the Court's decisions, which they try to apply in relation to German procedural law, which distinguishes Leistungsverfügungen, Leistungsverfügungen auf Geldzahlung, Arreste and Unterlassungsverfügungen; for an analysis of those remedies, see, for instance, Caponi, La tutela cautelare nel processo civile tedesco, in: Foro it., 1998, V, c. 26 ff.

11 Merlin, Le misure provvisorie e cautelari, paper presented at the XXIII National Conference of Italian Civil Procedural Lawyers, Perugia, September 27–28, 2001. Following this author it is possible to infer this conclusion from para. 42 of the Van Uden where the Court states that: «The prohibition in Art. 3 of reliance on rules of exorbitant jurisdiction does not apply to the special regime provided for by Article 24». As a consequence the author deduce that an application for an interim relief under Art. 24 of the Convention may be made not only to the «forum executionis» but also to every court having jurisdiction on provisional measure under national law.

12 See Kessedjian, Note on provisional and protective measures in private international law and comparative law, Prelim. Doc. n. 10, October 10th 1998, esp. par. 161–164, discussing, in the context of the Hague Conference, the proposal advanced by the European Commission for a new wording of Art. 24: «the first paragraph of Article 18a clearly confers jurisdiction on the court of the place where the measure is to be enforced, as will in practice apply in the great majority of cases».

to the measures sought are clearly i*dentified* – is the following: «the granting of provisional or protective measures on the basis of Art. 24 of the Convention is conditional on, *inter alia*, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought» (para. 40). By using the word «subject-matter» in this paragraph, the Court did not clarify whether it meant the *property referred to in the request itself* (so that the measure will then be executed only with regard to that property in other States) or the property over which the measure can be enforced (in the requested State). This point was, however, clarified in *Mietz*, which is plainly intended to draw inferences from the principle expressed in *Van Uden*: «Article 24 of the Convention expressly provides that a court has jurisdiction *under its national law* to grant an application for such measures, even if does not have jurisdiction as to the substance of the matter». The jurisdiction *ratione executionis* is not even mentioned, but the Court strictly refers to Art. 24 literal wording. To infer from this concise statement (especially from the words we have underlined) a radical change of the position of the Court, however, would be to go too far. Contrary to some authors' view, in *Mietz* the Court simply follows the principle stated in *Van Uden*, showing no clear intention of shaping a new formulation. This would be tantamount to destabilizing the whole system of the Convention, and in our view, the Court's decisions offer too little literal or systematical grounds to come to such a conclusion.

2. *The first requirement according to Van Uden: conflicting languages and interpretative differences*

As mentioned above, *Van Uden* sets out two requirements, which must be complied with for a provisional measure to come within the purview of Art. 24, in cases where the court has no jurisdiction as to the substance of the matter.[13] It is worth noting that both requirements had been already indicated,

13 Those requirements do not apply where the court granting provisional measures has jurisdiction as to the substance of the matter, see Van Uden, para. 19: «(. . .) a Court having jurisdiction as to the substance of a case in accordance with Articles 2 and 5 to 18 of the Convention also has jurisdiction to order any provisional or protective measures which may prove necessary» and Van Mietz, para. 46. On the same issue, see also Cour d'Appel d'Orléans, November, 7, 2002, VetroBalsamo v. Société Cave des producteurs de Vouvray: «Le juge des référés, lorsque sa competence est fondée sur une clause attributive de juridiction relevant de l'article 17 de la Convention de Bruxelles, peut ordonner toute mesure conservatoire ou provisoire prévue par le droit français, sans être sujet aux limitations affectant les mesures susceptibles d'être accordées sur le fondement exclusif de l'article 24 de cette Convention et notamment à l'exigence d'effectivité, mêmê si un juge étranger est mieux placé pour prescrire les mesures sollecitées».

two years before the *Van Uden* judgment, in the Helsinki Principles referred to above (for more details, see *infra*).

The first requirement implies that an application may be made only to the court of the place where the measure is to be enforced, so as to limit the possibility of *forum shopping* (or even worst, considering the great variety of remedies available under national laws, of *«remedy shopping»*). As a consequence, the determination of the place of enforcement is strongly connected to the territoriality principle: this requirement will be met in principle only if the assets which are the object of the requested measure are located or to be located within the confines of the territorial jurisdiction of the court to which application is made.

This requirement could, however, result *much looser* and wide – going far over *Denilauler* – if one took into account the German version of that crucial passage, which refers to *«Vermögensgegenstände des Antraggegners, die sich im örtlichen Zuständigkeitsbereich des angerufenen Gerichts* befinden *oder befinden müßten»*). Indeed, under the German text, which uses the conditional form (the object *«sich befindet oder sich befinden müsste»*), an application for provisional measures could also be made to the courts of those States in the territory of which the property *ought to be located*, although it is not there at the time when the application is made nor is it likely to be there in the future. In our view this reading of the *dicta* of the Court ought to be rejected. The French text, which is very similar to the Italian one, is also cast in the indicative form *(«avoirs déterminés du défendeur se situant ou devant se situer dans la sphère de compétence territoriale du juge saisi»)*. The Spanish and Portuguese texts contain different languages: while the first speaks of assets that are or should be located *(que estuvieren situados, o debieran estar situados)* in the territory of the court, the Portuguese text uses the indicative form: assets that *«se situam ou se devam situar . . .»*. This is but one instance where the translation of complex juridical texts in multiple languages creates, for different reasons and especially in procedural matters, conflicting interpretations (one could think, for instance, of Art. 21, 24 or 25 of the Convention).[14] Our suggestion is to give the statement of the Court the meaning which results, notwithstanding KIRCHBERG's sibylline words, from its plain reading (which is also not very different from the one proposed by Commission: see Art. 18 and 18bis). Summing up:

14 Some German authors have developed – from the conditional form of the text «müsste» – a series of presumptions, based upon the different German provisions: HESS/VOLKOMMER (footnote 10), p. 224–225.

a) the claimant can apply for «anticipatory» provisional measures (provided that the second requirement – *i. e.* that they are temporaries – is also met, see *infra*), where the court has no jurisdiction on the merits and irrespective of the municipal rules on jurisdiction, if and to the extent that he or she can prove that there exists a realistic and significant possibility that the measure sought is enforceable in the State of that court (as it had been already pointed out – in our opinion, even in a clearer way – in *Denilauler*).

b) More specifically, where the provisional measure sought has as its object movables or credits (money or bank accounts), the «additional» ground of jurisdiction provided for Art. 24 requires those properties actually be in that State at the time of the application or likely to be there located *in the near future*. The assessment here is a *prognostic* one, based on socioeconomic and factual, likelihood, not a *deontological* one (in short, the concept is better expressed by the famous verb «to locate» in the future or in the subjunctive form; German authors, instead, have too rashly relied on an occasional *nuance* of their text. Among UK commentators, KENNETT (footnote 10), p. 140, has raised the question whether jurisdiction should also be deemed to exist for the case postponed execution, till the arrival of the property. In principle the answer should be in the affirmative).

The interpretation which has been given is fully confirmed not only by the language used by the Court, but also by the particular circumstances of the case: in *Van Uden*, the President of the Rechtbank of Rotterdam – who had been seized for interim relief – applied the *prognostic* test previously referred to, by deciding that, since the defendant, a German firm, was engaged in international trade and would thus become a creditor in the Netherlands, a judgment against it could be enforced there (para. 13).

Our thesis is also fully consistent with *Principle 17* of the Helsinki Principles, where it makes clear that when the court has no jurisdiction on the merits and has only been seized for interim relief, *«its jurisdiction shall be restricted to assets located within the jurisdiction»* (emphasis added; whether the assets are located within the jurisdiction is then determined under the law of that State).

The court seized for provisional relief will make the above said assessment for the measure sought, after a summary inquiry, provided that, if granted, this measure can *not* circulate – as we shall see – and therefore it won't be re-examined by the courts of any other «State». The measure, as not meant to circulate abroad, will not necessarily be given after full argument by both sides (so as to favor the «arrival» of the assets in the State, which would, in all probability, be impaired following full argument by the parties).

c) The «anticipatory» provisional measure thus granted couldn't be enforced in other States (not even in those States where the property or financial assets have been transferred after the application for provisional relief). Its enforcement can only take place only *infra moenia*, that is within the confines of the territorial jurisdiction of the State of the court to which application is made.[15] Therefore, in case assets are located in a plurality of jurisdiction, several parallel applications for provisional measures are to be made to the courts of all the States where the relief sought must (or may) take effect. This why someone fears that multiple applications for provisional-measure might determine

15 Therefore, in our view, the circulation regime of provisional measures differs if the Court to which application is made has the jurisdiction on the substance of the matter or under Art. 24 of Brussels Convention. For the view that interim relief granted under Art. 24 cannot circulate, see also Mari, Autorizzazione e riconoscimento di provvedimenti cautelari in base alla convenzione di Bruxelles del 1968, in Dir. com. scambi int., 1981, p. 241, who, considering that avoiding of exequatur is the aim of Art. 24, concludes consistently that provisional measures granted by virtue of that provision cannot be recognised and enforced over the confines of the territorial jurisdiction of the State of the court to which application is made. See also Gaudemet/Tallon, Les Conventions de Bruxelles et de Lugano, Paris 1996, p. 197, and Honorati, La cross-border prohibitory injunction nel diritto olandese in materia di brevetti: sulla legittimità della inibitoria transfrontaliera alla luce della Convenzione di Bruxelles del 1968, in: RDIPP, 1997, p. 330 ff. On the contrary, measures ordered under Art. 24 can circulate according to Salerno (footnote 1), p. 265 (who limits the circulation to interim relief granted after full argument by the parties), Maher, Rodger, Provisional and protective remedies: the British experience of the Brussels Convention, in: International and Comparative Law Quarterly, 1999, p. 302 ff., and Gerhard, La compétence du juge d'appui pour prononcer des mesures provisioires extraterritoriales, in: Revue suisse de droit international, 1999, p. 97 ff., especially at p. 135: «lorsque la mesure est prise à un for ordinaire général des Conventions de Bruxelles et de Lugano, alors il est justifié de pouvoir lui conferer un effet extraterritorial. Lorsque la mesure est prise à un for désigné par le droit national l'extraterritorialité ne devra être admise que si remplissent la condition du lien suffisant ou, maintenant, réel». In particular no limits to the circulation regime of provisional measure can result from the Mietz case, according to Leclerc, in: JDI, 2001, p. 689, who states that from para. 46 can be deduced that «(si) la compétence ait été exercée dans les limites prévues à l'article 24, la mesure provisoire ou conservatoire pourra être déclarée exécutoire dans un autre Etat contractant nonobstant l'incompétence de la jurisdiction d'origine», and Merlin (footnote 6), p. 798–801. (differently, Muir Watt, Note to Cour d'Appel de Paris – 5 octobre 2000 et 14 juin 2001 – et Cjce – 6 juin 2002, in: Rev. crit. dr. int. Privé, 2002, p. 721). Finally, a different view on this issue seems to come from the European Court that, in the Italian Leather case, affirms: «it is unimportant whether the judgments at issue have been delivered in proceedings for interim measures or in proceedings on the substance. As Art. 27(3) of the Brussels Convention, following the example of Art. 25, refers to ‹judgments› without further precision, it has general application» (para. 41); on this point, see Biagioni, Interferenze tra provvedimenti provvisori o cautelari e decisione di merito nella Convenzione di Bruxelles, in: Riv. dir. int., 2002, p. 714, in particular, footnote 15. The survey of the above said case-law and authorities is based on the works of Merlin (footnote 6), p. 759 ff., Giorgetti, Antisuit, cross-border injunctions e il processo cautelare italiano, in: Riv. dir. proc., 2003, p. 512, in particular, footnote 92, and Biagioni (footnote 15), p. 714, in particular, footnote 15.

«un morcellement du litige international, qui met à mal la réunion du provisoire et du principal devant la même juridiction».[16]

A parallel may here be drawn – from a functional point of view – between this possibility of «multiple» (or «sliced») applications for provisional relief and that established by the Court (see the fundamental, and much debated, *Shevill* decision)[17] in matters relating to tort, delict or quasi-delict, under Art. 5, para. 3, of the Convention, when the harmful event occurs in more than one State, as it is the case of defamation or where a patent right is infringed: as one can start as many actions as the States affected by the infringement, in the same way, if assets are «plurilocated», he or she can make an application for provisional measures to the court of each State where the measure sought could be enforced. Only one application will instead be sufficient, because recognition is allowed, if it is made to the courts of the State having jurisdiction as to the substance of the matter (as it also is the case with the courts for the place where the core of the damaging fact occurred[18]).

It is suggested that, in order to contain the risk of multiple applications for provisional measures, the possibility should be given to apply only to the courts of the State where a *reasonable* or *crucial* amount of assets is located (this State could be identified as the *«principal» forum executionis*, normally the State where the defendant has the majority of his or her properties) so as to obtain provisional measures *enforceable* also in those States where other, albeit minor, assets are located *(«secondary» fora executionis)*.

If the provisional relief which is granted by the courts of the State which is the principal *forum executionis* can be recognized and enforced also in the *secondary fora executionis*, there is no risk of *«morcellement»* (DE VAREILLES SOMMIÈRES recognizes, however, without, giving a full explanation, that, after all, there is no such a major risk: *«il n'y a là rien de choquant»*). But this is my personal view.

d) If the provisional measure is granted by the courts of the State having jurisdiction as to the substance of the matter – on the basis of a rule of jurisdic-

16 DE VAREILLES SOMMIÈRES, La competence internationale des tribunaux français en matière de mesures provisoires, in: Rev. crit. dr. int. privé, 1996, p. 425; the risk of an «injustifiable pressure of multiple proceedings» against the defendant is stressed also by KENNETT (footnote 10), p. 138, who fears, in particular, that the choice of «imperious» places of jurisdiction – as the English one – may deeply alter the content of the relief sought: for instance, by way of an order for «disclosure» addressed to a third party (footnote 26 and corresponding text).

17 See the judgment of 7 of March 1995, in the case C-68/93, Fiona Shevill v. Press Alliance.

18 The parallel is pointed at also by HESS/VOLKOMMER (footnote 10), p. 225; on this point, for a construction before Van Uden, see PERTEGÁS SENDER, Art. 24 of the Bruxelles Convention: a particolar Reading for Patent Infringement Disputes?, in: Fentiman/Nyuts/Tagaras/Watté (eds.), The European Judicial Area in Civil and Commercial Matters, Bruxelles, 1999, p. 277.

tion established *per relationem* under Art. 24 – there is no doubt that this measure can «circulate», in accordance with the wide language of Art. 25, which allows recognition and enforcement of measures given after a proceedings even more summary than those ending with a provisional relief, such as for instance a monitory decree (see *Klomps* v. *Michel*, judgment of June 16, 1981 and *Capelloni e Aquilini* v. *Pelkmans*, judgment of October 3, 1985).[19]on this basis, it is arguable whether, in this case, full revocability or temporariness of the measure is needed, in accordance with what we shall say *infra*).

It could happen, however, that the measure doesn't say the rule of jurisdiction on the basis of which it has been given, therefore it cannot be excluded that jurisdiction was established only *ratione executionis*. It's our view that in this case, the court to which enforcement is sought may *exceptionally* review the existence of jurisdiction of the court of the State of origin as to the substance of the matter, instead of the competence of the court of origin, on the basis of the additional rule(s) of jurisdiction *executionis causa*. In the alternative, in such a case, it should just be assumed that the court did not even intend to implicitly establish its jurisdiction on the merits. In this case, the measure couldn't «circulate». In our opinion, this second option is certainly to be preferred as it doesn't clash with the general rule provided for under Art. 28, according to which the jurisdiction of the State of origin may not be review. Furthermore, in *Mietz* case the Court of Justice – with a view to avoiding the rules of the Convention be circumvented – suggested to move from this same assumption, namely that a provisional measure, unless it is expressly stated otherwise, is given by a court of a State with no jurisdiction as to the substance of the matter and therefore is not enforceable abroad. In fact, at para. 55, the Court of Justice ruled: «So, where the court of origin is silent as to the basis of its jurisdiction, the need to ensure that the Convention rules are not circumvented (see, in this respect, para. 47 of this judgment) requires that its judgment be construed as meaning that that court founded its jurisdic-

19 A confirmation of the extraterritorial character of provisional measures granted by the court competent on the merits can be found in Cour d'Appel d'Orléans, November, 7, 2002, Vetro-Balsamo v. Société Cave des producteurs de Vouvray, concerning both a decision in personam and a measure in rem to be enforced in Italy; on the same point see also, Cour de Cassation (1ère Chambre civile) June 30, 2004, M Wolfang Stolzenberg v. CIBC Mellon Trust Company and others, in: Rev. crit. dr. int. privé, 2004, p. 815 ff. which, with regard to a «mareva injunction» granted by the High Court of London, competent as to the substance, stated: «L'injonction litigeuse, mesure conservatoire et provisoire de nature civile comportant une interdiction faite à la personne du debiteur de disposer en tout lieu de ses biens (...) ne porte atteinte (...) mêmê indirectement à une prérogative de souveraineté étrangère, n'affectant pas notamment, à la difference des injoctions dites ‹anti-suit›, la compétence juridictionnelle de l'Etat requis et peut ainsi être reçue dans l'ordre juridique français, (...) dès lors que sont réunies les autres conditions de la reconnaissance et de l'execution».

tion to order provisional measures on its national law governing interim measures and not on any jurisdiction as to substance derived from the Convention». In that regard, the traditional reference to the jurisdiction based *«on its national law»* ought to be understood – following *Denilauler*[20] – as a reference to the jurisdiction of the court of the place where the assets, which are the object of the provisional measure, are located, that it – broadly speaking – the *forum executionis*.

e) In the end, the whole discussion about the «true» provisional measures (see also *infra* as regards their character of revocability or temporariness) is only relevant in order to determine if an application for provisional measure may be made, under the said conditions, on the basis of the *«additional» rule of jurisdiction of the court of the place where the measure sought is (likely) to be enforced*, irrespective of any jurisdiction as to substance of the matter. That discussion, instead, is of no relevance as to the «circulation» of provisional measures: indeed, if the court of origin has jurisdiction as to the substance of the matter (and this result from the measure given), the measure can «circulate» with no limit (obviously, in accordance with the nature of the measure granted under the national law of the court of origin), by virtue of the «generous» system, resulting from the provisions of Title III of the Convention – in particular Art. 25 and 26 (now Art. 32 and 33 of the Regulation no. 44/2001) – according to which neither a judgment after full argument by both parties nor *res judicata* are required.

3. *The determination of the property which is the object of the requested measure: nonexistence of an autonomous notion of «EC provisional measure»*

In the light of what has been said, it is arguable that the necessity for the applicant to locate the assets, which are the object of the measure sought, is justified with a view to identify the court having jurisdiction or – to say it with the words used by the Court in *Van Uden* – of the *«territorial jurisdiction of the court to which application is made»*. The determination of the assets located on the territory of the court (at the time when the application is made or in the future) has no bearing on the nature of the measure sought. An auton-

---

20 Or at least its prevalent lecture; see, for instance, Drooghenbroeck, Les compétences internationales et territoriale du juge du provisoire, in: Les mesures provisoires en droit belge, français et italien, Bruxelles, 1998, espec. p. 510 (with a vast – but almost entirely Dutch and French – bibliography); see also Kessedjian (footnote 12), par. 147–164, in part. par. 161 with criticism.

omous concept of «provisional measure» under the Brussels Convention does not yet exist.[21]

In other words, in our view[22] the determination of the defendant's assets is nothing but a consequence of the transnational character of the matter, not a *modus essendi* of the measure itself. The measure sought will have to conform to all and only to the requirements provided for under the national law of the court seized for provisional relief.

4. *Determination of the court having jurisdiction as regards provisional measures in personam (so called worldwide Mareva injunctions)*

It is worth mentioning that if one follows the thesis – that is here rejected – according to which the *forum executionis* is becoming obsolete[23], the determination of the assets located in the territorial jurisdiction of the court to which application is made as required in *Van Uden*, has a different meaning. Following the said opinion the subject-matter of the measures ought to be intended not as a *res*, but as the *right for which provisional relief is sought*. According to this view, under Art. 24 of the Convention applications could be made *everywhere* not only for provisional measures relating to specific assets, but also for measures with an «exorbitant extraterritorial reach», such as measures *in personam* (e. g. a *worldwide Mareva injunction*), provided that the assets are specifically indicated. In such a case, the defendant – against whom provisional relief is sought – must be (or be likely to be in the future) in the *territorial reach of the Court* (and thus subject to the power of *contempt of court*). This would ensure that the traditional principle of proximity is respected.

The inherent incoherence of such a thesis is clearly evident: in our different view, that the injunction is *worldwide* does not mean that the *defendant* can be reached *everywhere* by such a measure, but only that the defendant's

---

21 For a different view, see Querzola (footnote 7), p. 805; see also Salerno, La Convenzione di Bruxelles e la sua revisione, Padua, 2000, p. 112, according to whom provisional measures within the meaning of Art. 24 have been given a «uniform notion» by the Court's case-law. This opinion appears correct in so far as it is intended to describe Kirchberg's interpretation of the wording of Art. 24, but not to the extent that it attempts to construe the notion of «provisional measure under the Bruxelles Convention» as an autonomous tool, distinct from the measures already available under national laws. Tarzia, L'ordine europeo del processo civile, in: Riv. Dir. proc. 2001, p. 902, espec. 917 ff., has pointed out that the realization of a really European procedural law involves the creation of autonomous juridical notions, i. e. of a common concept of «provisional measures». The same author had already expressed his criticism to Van Uden in: Les mesures provisoires en droit belge, français et italien, Bruxelles, 1998 (review: Clerici, in: RDIPP, 2001, p. 806). For an opinion similar to that expressed in the text, see Giorgetti (footnote 15), p. 513.

22 See also Pertegás Sender (footnote 18), p. 284.

23 See supra, para. 1.

properties can be located *everywhere*. In other words, since the subject-matter of the measure sought is not, in this case, a *res*, but a natural or juridical *person*[24], the *real connecting link* required by the European Court of won't be given by the location (within the territorial jurisdiction of the Contracting State of the court before which those measures are sought) of the defendant's assets, but by the possibility to reach the defendant him or her self. Even in the light of the *Mietz* decision, we don't believe that the view that the *forum execution* is being overcome is correct. It's our view that what is needed instead is new «formulation» of the traditional view, so that it may properly satisfy the need of a reasonable «connecting link» to the *forum executionis* also when *in personam* protective measures are sought.[25]

The problem thus becomes that of a potential *ubiquity* of the courts, which may enforce the measure sought. As far as *natural persons* are concerned, the *forum executionis* is the court of the place where the defendant is substantially present, an occasional or sporadic presence being insufficient. With regard to *juridical persons* instead the *forum executionis* will be the courts of the State where the relevant businesses of the company, or presumably – in accordance with EC Regulation no. 1346/00 (Art. 3) on insolvency – the corporate domicile, are located. As a result, the jurisdiction will lie, not with the courts of the place of *principal* execution, as it is the case with *in rem* provisional measures, but with the courts of the State where the measure sought may be *effectively* enforced.

Not only does the opposite view give rise to a clear departure from the principles which underlies the system of the Convention, but also – from a practical point of view – to the risk the judgment as to the substance of the matter being affected (especially where it is, as usually happens, given by an arbitral court). The factor conditioning the judgment, indeed, will flow from the fact that a provisional measure has already been granted – by the court freely chosen by the applicant by virtue of «generous» municipal rules of jurisdiction – on the basis, not of a simple *fumus boni iuris* (or the simple allegation of an *arguable case*), but after a true evaluation of the validity of the claim (by way of a summary – or even a documentary – inquiry), so as to give it anticipatory full satisfaction. This is exactly what happens with regard to the *référé-provison* and the *kort geding*, which are therefore very invasive

24 See infra what the implications of such a distinction are.

25 This conclusion finds support in the judgment of the London Court of Appeals of May–June 1997, in the case Crédit Suisse v. Cuoghi, reported in: All. E. R., 1997, p. 724. As regards the determination under Art. 24 of the courts having jurisdiction for the sole purpose of giving provisional measures, the Court – maybe recalling the theory of forum non conveniens – stated that «the text is one of expediency», so establishing also for the world-wide Mareva injunctions, the jurisdiction of the forum executionis and not of the fora of exorbitant jurisdiction.

measures (even if their *cross-border* enforcement is excluded) for the defendant who may be summoned before a «non-natural» court for the purpose of an anticipated (certainly not neutral, especially in the arbitrator's eyes) judgment as to the substance of the matter.

5. *The notion of «provisional measures» and the determination of the requested property*

Moreover, from the necessity of determining the assets which are the subject-matter of the measures sought in accordance with Art. 24, it does not follow that only measures with a «specified-object» measures may be requested.[26] This conclusion steams from the fact, mentioned above, that the determination of the assets is related to the modalities of the *application*, not to the *measure* itself, which remains the one provided for under the national law of the court to which the application is made, so depending on the specific right for which a provisional relief is sought and the kind of *periculum* by which it needs to be protected.

Similarly, the effort[27] to classify the requirements set out by the Court, by distinguishing «requirements relevant to the reconstruction of the notion of ‹provisional measure›» and «requirements for the determination of the jurisdiction in accordance with Article 24», is not fully satisfying. Although it can be appreciated as an attempt to clarify the somewhat enigmatic Court's case-law, it fails to make it clear that the notion of «provisional measures» is only relevant to the purpose of determining the court having jurisdiction, while it has no bearing at all on the kind or nature of the measures which will be granted by the court seized for provisional relief. The distinction is also of no relevance to *admissibility* of the measure sought, which will instead depend exclusively from the requirements provided for under the national law of the court to which the application is made. There is no doubt, however, that the risk of misunderstandings is very high. In this respect, *de iure condendo*, a better wording of Art. 24 of the Convention would have certainly been more suitable. Only then, a double typology of «anticipatory» provisional measures, with or without a structural autonomy, could have been created for transnational litigation cases (see *infra*).

---

26 In Italy an example of such measures is the so-called sequestro giudiziario. Following our view, Art. 24 would refer also to the sequestro conservativo of sizeable assets (which remain unspecified by the measure) and the provisional measure provided for under Art. 700 of the Italian code of civil procedure, by means of which a court may make an order for payment of a sum of money: both measures are to be executed upon assets to be determined a posteriori, not necessarily at the moment the measure is granted.

27 Mari (footnote 10), p. 713.

New Regulation No. 44/2001 (so-called Bruxelles I), however, hasn't brought about any change, provided that the proposal of the Commission for a new formulation of now Art. 31 was rejected.

6. *The second requirement according to Van Uden: the guarantee of repayment to the defendant of the sum awarded and the doctrinal dispute about the «instrumental» nature of provisional measures*

According to the *second requirement* set out by the Court in *Van Uden*,[28] repayment to the defendant of the sum provisionally awarded must be guaranteed for the case the claimant is unsuccessful as regards the substance of its claim. The purpose is evidently to avoid a stabilization of the effects of the «anticipatory» measure, which would deprive it of the «provisional» character, essential to the Court definition of measures falling under Art. 24 of the Convention. Putting aside linguistic differences,[29] Art. 24's measures, unlike those falling under Art. 25, must be *provisional* (*i. e.* temporary) and therefore some how non-autonomous, if not of a strictly ancillary nature (see *Van Uden*, in particular para. 37).

This requirement also helps to clarify the nature of the «instrumentality» relationship, which links proceedings for provisional measures and judgments as to the substance of the matter. In our opinion, it is not a *functional* instrumentality,[30] but a *structural-economical* one, which implies the necessity to start a judgment on the merits, because of both the presence of a deadline (whose non-observance determines the measure's ineffectiveness) and the need for a correct (also from a quantitative point of view) determination of interests due, which are only approximately and partially determined in the proceedings for provisional relief. We believe, on the contrary, that the notion of «functional instrumentality» is the result of a wrong view of the matter while the mentioned «structural-economical non autonomy» notion would be more suitable. The possibility to obtain in the future, by way of the final judg-

---

28 But the same requirement had already been pointed at in Denilauler, par. 16.

29 And, in the Italian version, apart from the discrepancy between the title of Section IX – with the conjunction «e» – and the rest of its unique Article – with the disjunctive «o».

30 See Mari (footnote 10), p. 715; this author is, however, correct in seeing an allusion of the Court also to the caution's hypothesis. The French counter-claim has been studied by Jommi (footnote 6), p. 121, in part. 158. This view seems to be shared also by Kennett (footnote 10), p. 131, who quotes the following passage of the Commission's communication of November 26, 1997: «A comparative survey of national legislation reveals that there are virtually no definitions of provisional/protective measures and that the legal situations vary widely. The only convergence that can be ascertained is between the function of such measures, which is to secure the subsequent enforcement of judgments on the substance of a case . . .»

ment, a restitution condemnation is not sufficient: it is necessary that the provisional measure itself contain the guarantee that it can be overturned, for example, by establishing a caution or fixing a deadline for the commencement of the judgment on the merits. As a consequence, this requirement does not apply where the measure sought is not, by its very nature, of such a nature as to anticipate the judgment on the substance of the matter.[31]

7. Concluding remarks

It must be noted that our remarks, however, only concern the determination of the court of the place where the measure sought will be executed, which has jurisdiction in accordance with Art. 24. When a provisional measure is granted by the courts of a State having jurisdiction as to the substance of the matter (in accordance with other provisions of the Convention), the measure can be enforced without any limits.

Although the Council Regulation, now taking the place of the Brussels Convention, has not modified the text corresponding to Art. 24, the situation should be as the one clearly described, *mutatis mutandis*, under Art. 20 of Regulation No. 2201/2003 (regarding jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matter of parental responsibility). Art. 20 provides for provisional measures to be granted by the *forum executionis* and – when not given by the court having jurisdiction as to the substance of the matter – unsuitable of cross-border «circulation».[32]

The same wording can also be found in Art. 38 of EC Council Regulation No. 1346/2000, regarding insolvency.[33]

---

31 One could think, for instance, about the Italian measure based on Art. 700 c. p. c.; this measure could be defined as «non autonomous». In this case, the protection of the non-wealthy claimant could be also assured without a caution, as the measure is strictly connected to the following judgment (see infra, following paragraph).

32 Art. 20 of Regulation no. 2201/2003 states: «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 para. 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»

33 Art. 38 of Regulation no. 1346/2000 concerning preservation measures, indeed, provides that: «Where the court of a Member State which has jurisdiction pursuant to Art. 3(1) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request of the opening of insolvency proceedings and the judgment opening the proceedings».

Art. 10 of Italian law No. 218/95 – according to which «In materia cautelare, la giurisdizione italiana sussiste quando il provvedimento deve essere eseguito in Italia o quando il giudice italiano ha giurisdizione nel merito» – seems to «translate» into Italian law the solution which result from Art. 24 of the Convention in the interpretation given by the Court.[34]

It is to be hoped that the Court will give a new ruling (for instance in relation to a number of *kort geding* granted in some recent cases under Art. 50 of TRIPs). However, the Court, in applying the Conventional (somewhat technical) system, can hardly function in respect of provisional measures as the well known forum deputed to the «constitutional» foundation of the European Union (as in *Factortame, Atlanta, Zuckerfabrik*[35]). Interpretative criteria are different: Art. 24 can not be invoked to allow applications for «anticipatory» provisional measures, capable to become definitive, to the courts of different States, none of which would have jurisdiction as to the substance of the matter and with no possibility to enforce the measure sought.

The whole discussion regards not only the Dutch *kort geding*, the French *référé-provision* or the German *einstweilige Verfügungen* (where a judgment on the merits is ordered by the court only *on the defendant's request ex* § 926 ZPO[36]), but also provisional measures provided for by Art. 23 of the Italian Legislative Decree no. 5 of 17 January 2003, regulating proceedings in corporate matters (concerning in particular, corporate law, concurrency or patent infringements cases, banking and listed corporations law and bankruptcy). According to the above said provision, in fact, interim relief anticipating effects of the judgement on the merits, can be granted by the court, without being necessary to fix a deadline for the commencement of the judgement on the substance. Those measures, in particular, can continue producing their effects even if a proceedings on the merits is not commenced by the parties involved.

---

34 See however for a different reading of Art. 10 of the Italian Law no. 218/1995 and Art. 24 of Brussels Convention, infra III.3.b).

35 See Trocker, La Carta dei diritti fondamentali dell'Unione europea e il processo civile, paper presented at the XXIII National Conference of Italian Civil Procedural Lawyers, Perugia, September 27–28, 2001.

36 Evidently, since the fulfilment of the parties' expectations will depend on the future judgment on the merits, negative declaratory negative actions are frequently arisen. Some authors have so criticized the «shifting the burden of proof» effect – see Hartley (footnote 5), p. 680. Apart from the general discussion on negative actions (see, ex multis, Verde, L'onere della prova nel processo civile, Naples, 1974, p. 536, and recently Merlin, Azione di accertamento negativo di crediti ed oggetto del giudizio, in: Riv. dir. proc., 1997, p. 1064), I would say that these actions – streaming from the need to restore the situation modified by a summary execution act – should be seen as substantial opposizione actions. As a consequence, the defendant in the judgment on the merits would assume the (more exigent) role of a «substantial» claimant, as usual in opposizione monitoria cases: see Garbagnati, Il procedimento di ingiunzione, Milan, 1991, p. 198.

Furthermore that issue will probably concern in the near future also Italian provisional measures in proceedings on general civil matters. This could happen in particular if the frequently advanced proposals to introduce into the Italian legal system measures similar to the Dutch *kort geding – i. e.* measures that don't make mandatory for the parties to commence a judgment on the substance of the matter – were finally accepted.[37]

Such «potentially definitive» provisional measures, however, could never be given against a defendant domiciled in the EC judicial area by an Italian court with no jurisdiction as to the substance of the matter, unless proceedings on the merits were commenced by the applicant on the basis of special rule which would depart from the general scheme and would thus have to be expressly provided for in the new law. In other words, if the claimant, who is unable to put forward worthy cautions, is to be protected, we also have to maintain the «non-autonomous» measure provided for under Art. 700 of the Italian Code of Civil Procedure: a procedural model unknown to many foreign legal systems, but which could in the future be adopt by them. Eventual proposals aiming at an harmonization of procedural laws, such as the *rapprochement* envisaged by the Storme project, should bear this in mind.[38]

Outside the conventional system, instead, this limitation doesn't apply and therefore Italian courts will be able to grant these future «anticipatory» provisional measures, provided that Italy is the *executionis forum*. In the absence of such a requirement, however, jurisdiction will be established in accordance with Art. 10 of Law No. 218/95, provided that such a new category of «anticipatory» measures is deemed fit with the notion of provisional measures within the meaning of Art. 10 as far as the loosening of the instrumentality link of such measures to the judgement on the merits is not such as to definitively alter their provisional nature.[39]

---

37 See, for example, Tarzia, Commission's working papers, The draft bill, para. 43, provided as the leading criterion «l'esclusione dell'onere della parte istante di promuovere la causa nel merito» (the exclusion of the duty, for the claimant, to start a proceedings on the merits). The text is published in: Riv. dir. proc., 1996, p. 964 (see p. 1016 for the relative Relation). See also, more recently, Art. 45 of Vaccarella, Commission's working papers according to which, with reference to the new «provvedimento d'urgenza», the subsequent commencement of the judgments on the merits is not required. For this information, see Giorgetti (footnote 15), p. 510, footnote 88.

38 For a focus on the disadvantages – especially as third-parties are concerned – created by the cross-border circulation of provisional measures and the characteristic that should be typical of a «European provisional measure», see Kennett (footnote 10), p. 145.

39 As already pointed out, taking into account that they maintain the function of neutralizing the «tardiness» danger, in: Processo cautelare: problemi aperti e linee di tendenza, in: Il nuovo processo cautelare. Problemi e casi, Turin, 1998, p. 24.

II. Recent developments on provisional measures other than autonomous anticipatory measures

1. The concept of «provisional and protective measures»

a) The concept of «provisional and protective measures»: a French interpretation

In order to analyse the notion of «provisional» or «protective» measures as applied by European national courts, it is worth mentioning a judgment given by the French Cour de Cassation in 2004.[40] The subject-matter of that decision was the recognition and the enforcement in France of an injunction ordering the defendant not to dispose of all its assets, everywhere they were located (the so called *«Mareva injunction»*). That measure was given in England after two different decisions on the merits by the court having jurisdiction on the substance of the matter. Even if the issue of the special forum under Art. 24 was not involved in this case, it is interesting to note that the Cour de Cassation has considered the above said injunction failing into the meaning of «provisional» and «protective» measure *(«l'injonction litigeuse, mesure conservatoire et provisoire de nature civile [. . .]»)*. The Cour de Cassation, in particular, gave such an interpretation although the measure seemed, not to safeguard rights the recognition of which was to be sought elsewhere from the court having jurisdiction on the merits (as stated in *Reichert and Kockler*, see *supra*), but to ensure the enforcement of a judgment already given.

Now, defining this type of measure a «provisional measure» is, in our view, a little too hazardous: in fact, in the case where decisions on the merits would become *res iudicata,* the same definitive effects would be probably produced with regard to the *mareva injuction*. And such a definitive character clashes with the temporariness and revocability character, as resulting from the notion of «provisional measure» under the European Court of Justice's interpretation.

In addition to this, some authors have underlined that including such a measure under the scope of the concept of «provisional measure» can be somewhat problematic in cases where the court sought to grant such a relief has jurisdiction exclusively under Art. 24, where principles set out in *Van Uden* case have to be applied (in particular, some problems may arise in the assessment of the requirement of the real connecting link between the subject

---

40 Cour de Cassation (1ère Chambre civile) June 30, 2004, M Wolfang Stolzenberg v. CIBC Mellon Trust Company and others, in: Rev. crit. dr. int. privé, 2004, p. 815 ff. with a note of Muir Watt.

matter of the measure sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought).[41]

That is the reason why some authors state that, in such a case, a reference for a preliminary ruling to the European Court of Justice would not have been superfluous.[42]

2. *Recognition and enforcement of provisional measures*

a) The Italian Leather case

The issue of the recognition and enforcement regime of provisional measures is the subject-matter of an important decision given, in 2002, by the European Court of Justice in the *Italian Leather* case.[43]

In the case analysed by the Court, the Italian Leather, the claimant, complained of a defective performance of a contract by its counterpart Weco. So Italian Leather, according to Art. 24 of the Brussels Convention, brought proceedings for interim relief against Weco, before the Landgericht Koblenz to restrain it from marketing products presented under its brand. The German court however dismissed the application because of the lack of procedural requirements. Simultaneously, Italian Leather, in order to obtain the same interim relief, had applied to the Tribunale di Bari, the court having jurisdiction on the merits, which, taking a different view on the condition of urgency, granted the provisional measure. With the purpose to enforce this decision, the claimant applied for the *exequatur* in Germany, where the matter was finally presented before the BGH, which decided to refer to the ECJ an interpretative question about Art. 27 no. 3. In particular, the Court has been asked to address the question whether decisions can be considered irreconcilable

---

41 In particular, see Muir Watt (footnote 40), p. 821 «Or accueillir une telle mesure (the mareva injunction – editor's note) dans la categorie dans la catégorie des mesures provisoires, c'est légitimer la compétence du forum loci pour les prendre» and also at p. 823: «Il est certainement à prevoir que, tôt ou tard, la juridiction européenne sera saisie au sujet de la compatibilité des ordres extraterritoriaux de gel des avoirs (the mareva injunction, – editor's note) avec l'ordre communautaire sous l'angle de leur conformité aux principes posés par l'arrêt Van Uden – question que la présente espèce ne posait pas puisque le for qui a prononcé l'injonction, for du domicile du défendeur compétent au fond, ne tirait pas sa compétence de l'article 24 de la Convention. En revanche dans le cas où le for appelé à prononcer la mesure exerce une compétence dérogatoire sur le fondement de ce dernier texte, l'exigence du ‹lien réel› posé par l'arrêt Van Uden est bien plus problematique. (...) Pour cette raison (...) la qualification de la Cour de cassation de celle-ci de mesure conservatoire et provisoire, qui accredite l'idée qu'elle relève de la categorie des mesures disponible devant le for dérogatoire de l'article 24, reste discutable.»

42 For this opinion see, again, Muir Watt (footnote 40), p. 818.

43 See, supra, Introduction.

under the rule provided for Art. 27 no. 3 of the Convention, «when the only difference between them lies in the specific requirements for the adoption of a particular type of autonomous provisional measure (within the meaning of Art. 24 of the Convention)».

After having stressed, by way of preliminary point, that decisions are to be considered irreconcilable in the case that they «entail legal consequences that are mutually exclusive» (para. 40)[44], the Court stated that Art. 27 no. 3 applies both to judgments given at issue of a proceedings on the merits and to judgments delivered at issue of a proceedings for provisional measures, and that, according to the fact that Art. 27 no. 3, referring to the terms of «judgments» without other specification, as set out by Art. 25, has *«general application»* (para. 41). Thus, taking into account the *Hoffmann* case[45], following which decisions can be considered irreconcilable only if their effects are conflicting, being immaterial a difference between requirements governing admissibility and procedure (para. 44), the Court recognised that the effects of a decision ordering a provisional measure and those produced by a decision refusing to grant such a relief, such as decisions at the issue of the main proceedings, are in contrast. It derives that the German court is required not to recognise the Italian judgment clashing with the former decision adopted on interim relief by the Landgericht Koblenz.

The *Italian Leather* case apparently reaffirmed principles already set out in the previous *Denilauer* where the Court stated that *«Article 24 does not preclude provisional or protective measures* ordered in the State of origin pursuant to adversary proceedings – even thought by default – *from being the subject of recognition and an authorization for enforcement on the conditions laid down in Article 25 to 49 of the Convention»* (emphasis added).[46] In fact, the *Italian Leather* case, just confirmed, that conditions set out in Art. 27 no. 3, in order to discipline the recognition of decisions, apply also to judgments granting an interim relief, as a consequence of the general application to provisional measures of the rules provided for by the Convention on the recognition and the enforcement of judgments.

Some authors, however, have expressed many doubts on that case.[47] First of all, it has been said that, far from being unimportant like sustained by the Court in that decision, a difference between procedural regulation under which a provisional measure can be granted, produces different procedural claims. Consequently, a contrast between such different claims cannot even exist.

---

44 The European Court of Justice refers to the so called Hoffmann case (C-145/86), para. 22.

45 See, supra, footnote n. 46.

46 See, Denilauer case (125/79), para. 17.

47 See, for example, Consolo/Merlin, Conflitto tra provvedimenti sommari – cautelari e diniego di riconoscimento: la Italian Leather segna una forzatura, in: Int'l Lis, no. 3–4/2002, p. 110 ff.

Secondly, even admitting that procedural conditions set out to grant provisional measures are exactly the same, it is difficult to understand how a decision *refusing* to grant an interim relief and a decision *ordering* the same (and not, on the contrary, two decisions granting provisional measures with a clashing content), following the *Hoffmann* case, could «entail legal consequences that are mutually exclusive».

Finally, some other authors have criticized the interpretation given by the Court about Art. 27 no. 3. Indeed, according to this opinion, having Art. 27 no. 3 general application, it can be even deduced that a granting of an interim relief in a contracting State can excluded not only the recognition of a foreign provisional measures producing clashing legal effects, but also the recognition of the judgment on the merits with the same conflicting legal consequences, given in another contracting State.[48]

b) Recognition and enforcement of provisional measures in European national Courts: an Italian case

In the field of the recognition and enforcement regime of provisional measure it is worth mentioning a recent interesting Italian case decided by the Court of Venice.[49] By way of preliminary point, it must however be stressed that the decision of the Italian court can be considered quite obvious.

In that proceedings, the claimant referred to the Italian court, having jurisdiction on the substance of the case, in order to obtain the revocation of an interim measure granted by a Greek court, competent under Art. 31 of the Regulation no. 44/2001 and ordering a provisional execution of a commercial agreement concluded by two companies. The legal basis of such an application was Art. 669^{decies} of the Italian Code of Civil Procedure providing for the possibility to obtain the revocation or modification of a protective measure previously granted, in case circumstances have changed.

Rejecting the defendant's observations sustaining that a grant of such a measure would infringe the provision under Art. 36 of the Regulation ruling that a re-exam in the merits of a decision given abroad by the court having to recognise it, is forbidden, the Court assumed that if, Art. 36 applies undoubtedly to definitive judgments, the same conclusion is not so clear with reference to «provisional measures». In fact, the case excluded by Art. 36 is a re-exams by the court of the recognition of the same situation decided by the Court *ab origine*; on the contrary, if circumstances change, like usually hap-

48 See, for this opinion, Biagioni (footnote 15), p. 715 ff.

49 See Tribunale di Venezia, ordinanza August 28, 2003, Aprilia World Service B. V. v. Mobility, in: RDIPP, no. 2, 2004, p. 688 ff

pens with provisional measures, Art. 36 doesn't exclude the possibility, for the court having jurisdiction on the merits, to revoke or modify a provisional measure previously given by another court, competent under Art. 31 of the Regulation.

It derives that the competence of the court of the merits in ordering provisional measures is so broad that it must be understood like including both provisional measures applied to the court for the first time and provisional measures applied to the court in order to change other interim relief already granted, even by another foreign court.

3. Measures on preliminary taking of evidence

a) The St. Paul Dairy Industries NV v. Unibel Exser BVBA case

After *Van Uden* and *Mietz*, the European Court of Justice hasn't been significantly concerned with the issue of provisional measures under Art. 24 of the Brussels Convention until a few months ago.

In fact, except for the *Italian Leather* case (C-80/00)[50] which is however mainly focused on the recognition and the enforcement of provisional measures, European authorities have dealt with the matter of interim measures, for the first time, in the *St. Paul Dairy Industries NV v. Unibel Exser BVBA* case (C-104/03), decided on April 28th, 2005.

This case referred to a preliminary ruling regarding the interpretation of Art. 24 of the Brussels Convention and, in particular, the possibility to consider the expression «provisional» and «protective measures» within the meaning of this provision, including measures such as proceedings of preliminary taking of evidence.

Questions referred to the Court have arisen in a proceedings before the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam), concerning the application of a Belgian Company (Unibel Exser BVBA) for an examination of witnesses in the Netherlands, before the proceedings having commenced on the substance of the case.

In that regard, the Court has been asked to address the question whether the measure of the «preliminary hearing of witnesses prior to the bringing of proceedings» (voorlopig getuigenverhoor) set out in Art. 186 et seq. of the Netherlands Code of Civil Procedure could come within the scope of the Brussels Convention, and if so, if this provision could be regarded as a measure under the meaning of the Art. 24 of the same Convention.

With reference to the second question, it must be stressed that the possibility to define such a measure of preliminary taking of evidence as a «provi-

50 See supra II.2.a).

sional» or «protective» measure was made somewhat «problematic» by the legislation of the Netherlands. In fact, according to the interpretation of the Hoge Raad, the «preliminary hearing of witnesses prior to the bringing of proceedings» usually can be ordered both «to enable material evidence to be taken from witnesses shortly after the facts of the dispute and, consequently, to prevent evidence to being lost» and «to provide an opportunity for persons involved in an action subsequently brought before the civil court (. . .) to obtain advance clarification of the facts (. . .), so as to enable them better to assess their position, particularly with regard to the issue of the identification of the party against which proceedings must be instituted» (para. 8).

By way of a preliminary point, the ECJ, leaving the option offered by the Dutch Court out of consideration, has pointed out that the measure sought in the main proceedings was intended only to define a strategy about the opportunity to commence proceedings before a court (para. 16). So, taking into account the fact that the sole aim justifying, in the judicial system of the Brussels Convention, the «exceptional jurisdiction» for interim relief can be «to avoid causing loss to the parties as a result of the long delays inherent in any international proceedings» (para. 12) and, referring to *Reichert* and *Van Uden* cases, that provisional measures are intended only to preserve a legal or a factual situation in order to protect rights before the court having jurisdiction on the merits could give a decision on this matter, briefly concluded that Art. 24 «must be interpreted as meaning that a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard is not covered by the notion of ‹provisional, including, protective measures› » (para. 25).

In addition, in the view of the Court including in the concept of provisional decision a measure with no purpose other than to asses the consequences of a future proceedings could raise the risks of bypassing the application of jurisdictional rules set out in the Brussels Convention[51], of multiplying the bases of jurisdiction having competence with reference to the same effective case and, last but not least, of circumventing provisions under the new Regu-

51 The same concern was pointed out with reference to anticipatory provisional measures, in Van Uden, see para. 46 and in Mietz, see para. 47. The possibility of circumventing rules set out in Art. 2 and 5 to 18 of the Convention may cause the infringement of principle of legal certainty. That principle, which constitute one of the aims of the Convention, requires that «the rules derogating from the basic principle of the Convention laid down under Art. 2, such as the case of the rule under Art. 24, be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which court, other than those of the State of domicile, he may be sue» (para. 19). Recently this principle has been reaffirmed in the Owusu case (case C-281/02) with reference to the compatibility of the doctrine of «forum non conveniens» with the Brussels Convention.

lation no. 1206/2001 on the cross-border taking of evidence in civil or commercial matters. In short, such definition could produce legal consequences conflicting with the aims regulating the European judicial area.

But what about measures of preliminary taking of evidence intended to safeguard and preserve essential evidence for the proceedings on the merits, so to avoid the risk that this evidence may be definitively lost? The ECJ's decision did not expressly address this point. Considering that it was not the case in the main proceedings[52], the Court has not pronounced a decision on this point.

However, it is not daring to regard such a measure as pursuing the aims of Art. 24 of the Convention. Furthermore, such a relief would have both the typical protective and accessory characters of provisional measures.

Moreover, the Court's decision did not expressly exclude all sorts of measures of preliminary taking of evidence from the scope of Art. 24 of the Brussels Convention. Even the reference to Regulation no. 1206/2001 was made to emphasise that Art. 24 should not be used to circumvent *«the rules governing the transmission and handling of the applications made by a court of a Member State intended to have an inquiry carried out in another Member State»*. In other words, the Court does not seem to have clearly confirmed the applicability of the Regulation instead of the Art. 24 of the Brussels Convention with reference to all types of interim relief concerning proceedings of preliminary taking of evidence.[53]

---

52 The Court indeed takes up the precedent case-law under which the sole justification for a preliminary ruling to be referred to the Court is that is necessary for the effective resolution of a real and existing dispute, being immaterial that it enables advisory opinions on hypothetical questions to be delivered (see, for example, among the more recent cases, case C-314/96 Djabali, 1998, para. 19, Case C-318/00 Bacardi-Martini and Cellier des Dauphins, 2003, para. 47 and joined cases C-480/00 to C-482/00, C-484/00, C-489/00 to C-491/00 and C-497/00 to C-499/00, Azienda Agricola Ettore Ribaldi and Others, 2004, para. 72).

53 On this point, it must be noted that Advocate General Colomer qualified the issue arisen in this case as a matter of «merely historical interest», since Regulation no. 1206/2001 has entered into force to regulate cross-border taking of evidence in civil or commercial matters. In fact, under Art. 1 of said Regulation, a court of a Member State can request the competent court of another Member State to take evidence or even take evidence directly in another Member State, provided that evidence is intended to be used in judicial proceedings commenced or simply contemplated. It follows that in this case an exequatur of a measure of preliminary taking of evidence is no longer required. For a different view, see the opinion expressed in: Int'l Lis, n. 3–4/2004, p. 120, according to which the new Regulation n. 1206/2001 does not exclude the importance of establishing whether a measure relating to the preliminary taking of evidence, especially if it is applied to preserve evidence, falls within the meaning of Art. 24 of Brussels Convention. Indeed, under this view it can derive the competence to order provisional or protective measures for the special court where the source of the evidence risking being lost is effectively located and not only for the Court having jurisdiction over the merits of the case which – by its nature – should make use of probably most efficient, but surely less rapid means of judicial co-operation.

That is the reason why, in our opinion, the proposal of the Advocate General Colomer given in his Opinion on September 9, 2004 would have better and more clearly answered the question referred to the Court. In fact, the Advocate General considered separately measures of preliminary taking of evidence granted in order to preserve essential evidence for the proceedings on the merits and measures applied for with a view to defining a judicial strategy. He suggested that the issue should be resolved as follows: an interim decision on preliminary hearing of witnesses prior to the bringing of proceedings can constitute a provisional measure under Art. 24 of Brussels Convention only if it is applied in order to preserve evidence that has to be used in a future and probable proceedings. Only this type of measure, according to the Opinion, has the protective and accessory character of measures provided for in Art. 24 of Brussels Convention. By contrast, the preliminary hearing ordered with a view to obtain clarification or to define a strategy about the opportunity to commence a proceedings before a civil court, has an autonomous and essentially definitive function that falls outside the notion of protective measures. In consequence, such a measure cannot be deemed interim relief pursuant to Art. 24 (see the Opinion, para. 47–51 and, in particular, para. 55 and 62).

In the light of the above, it follows that the *St. Paul Dairy Industries* case does not seem to give a definitive decision on the issue of the relationship between orders relating to the preliminary taking of evidence and the notion of provisional or protective measures.

b) Measures on preliminary taking of evidence in European national courts: an Italian case

The same conclusion suggested by the Advocate General Colomer in the *St. Paul Dairy Industries NV v. Unibel Exser BVBA* case was sustained in Italy in 2003, with regard to the notion of «provisional» or «protective measures» under Art. 24 of the Lugano Convention.[54]

These proceedings concerned an application for a preliminary hearing of witnesses under Art. 692 of the Italian Code of Civil Procedure (assunzione preventiva di testimoni).[55]

Under this provision, application of a preliminary hearing of witnesses can be made prior to the bringing of proceedings if there is a risk that, in the

54 In that regard, it must be noted that the wording of Art. 24 of the Lugano Convention is an exact copy of the wording of Art. 24 of the Brussels Convention, so conclusions sustained in this case-law can easily refers to Brussels Convention too, and now also to Regulation no. 44/2001.

55 See Tribunale di Venezia, ordinanza February 28, 2003, in: RDIPP, no. 1, 2004, p. 272–274.

meantime, such an evidence might be lost. In any case, this measure cannot have a definitive function until the proceedings on the merits have commenced and, consequently, such an evidence is considered as admissible and relevant to resolve the judgment as to the substance.

In order to address the question whether this type of measure could fall within the scope of the Convention, and in particular within the wording of Art. 24, the Italian court has remarked that, contrary to Art. 10 of Italian International Private Law referring exclusively to «protective measures», Art. 24 refers also to a generic notion of «provisional measures» that are characterised only by requirements of revocability and temporariness.

So the Court, implicitly referring to the precedent leading case-law of the European Court of Justice and in someway anticipating the Opinion that Advocate General Colomer would submit about an year later in the *St. Paul Dairy Industries NV v. Unibel Exser BVBA* case, concluded that a measure for the preliminary taking of evidence, such as that provided under Art. 692, undoubtedly constitutes a provisional measure under Art. 24 Lugano Convention, because it is temporary and intended to preserve important evidence in view of a future proceedings before the competent civil court.