JURISDICTION, RECOGNITION AND ENFORCEMENT OF PROVISIONAL AND PROTECTIVE MEASURES UNDER REGULATION 44/2001

(INTERNATIONAL COOPERATION IN CIVIL MATTERS)

Bulgaria

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§ 1. Introduction

Interim measures of protection exist in all types of court proceedings. Their aim is usually to safeguard the interests and rights of the party, which has started the case, for the duration of the proceedings. They may also protect other interests – of third parties, who may be affected by the proceedings, or the interests of justice. For instance, a preliminary order of the court on parental responsibility or maintenance for the duration of the respective matrimonial dispute is also a type of interim measure (and protective to some extent), which safeguards not only the interests of the parent, but also these of the child). In administrative proceedings the stay of the execution of the appealed administrative act is also an interim measure (in cases where the administrative act becomes effective regardless of its appeal in court). Even the detention of a defendant in criminal proceedings is an interim measure, imposed in the interest of justice and for the protection of the society, which ensures that the future judgement against such defendant may be executed. Interim measures are also granted by the European Court of Justice (ECJ).

In this wide range of interim measures available in different types of proceedings, the focus of our report, within the topic of international cooperation in civil matters, shall be the interim measures in civil proceedings and more precisely the ones related to civil and commercial disputes. Interim measures relating to matrimonial matters and to the taking of evidence are also included in the analysis of the jurisprudence of the ECJ to the extent necessary to give the overall idea of the Court's interpretation of the legal framework.

The proceedings for granting interim measures of protection are one of the important parts of civil procedure. The proceedings of bringing a civil action before the court usually delay the actual protection of the plaintiff's rights. Frequently in these cases the defendant can frustrate the enforcement of a judgement favourable for the claimant.

One of the remedies for the plaintiff against such bad practices is to safeguard his rights by putting in place certain interim measures of protection for the duration of the main proceedings. During any stage of the proceedings, the plaintiff may approach the court before which the case is pending with a motion to grant such interim protective measures. Even before

the action is brought before the court, interim measures may be sought. This procedure is effected through a number of different protective measures*.

Although from legal perspective this is not the intention, in practice often protective measures are used as means to put pressure on the defendant to perform its obligations. In such cases the dispute may be "solved" on a pre-trial level. Thus the imposition of certain provisional measures saves time and money to both parties.

Considering the importance of the protective measures our attempt is to outline their current regulation in the field of European cooperation in civil and commercial matters.

§ 2. Proceedings for Granting Interim Measures in General

Generally European legal systems contain provisions allowing a claimant (or a future claimant) to protect its rights under a future court decision in its favour by imposing provisional measures. These measures in civil and commercial cases are mostly with respect to the defendant's property (immovable property, movables, receivables) which may provide a source for the realization of the claimant's rights. For example, the Bulgarian *Civil Procedure Code* (in its Article 397 provides a non-exhaustive list of protective measures, which the court may grant to the plaintiff:

1) attachment of immovable property;

2) attachment of movables and receivables;

3) suspension from operation of a motor vehicle;

4) stay of enforcement proceedings.

The law also provides that the court may grant any other provisional measures that it seems appropriate†.

Usually the courts would grant protective measures, when certain prerequisites are met. For example, under Article 391 of the Bulgarian *Civil Procedure Code* protective measures shall

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* In this report we use the terms "protective measures", "interim measures" and "provisional measures" as synonyms with the meaning of an action taken by the (future) claimant to safeguard the future effect of the court decision. For detailed definition – see below – § 5. The "Protective Measures" Defined.

† This seemingly broad authority of the court to introduce various provisional measures could lead to potential issues in their enforcement abroad – see below – § 7, c).

be granted where without them it will be impossible or difficult for the plaintiff to realise the rights under the judgment and if:

a) the action brought (or to be brought) by the claimant is admissible;

b) the action is *prima faciae* grounded, which is determined by the court either on the basis of convincing written evidence, provided by the claimant with its motion to the court, or by asking the claimant to provide security in an amount determined by the court;

c) the protective measure, asked by the claimant, has to be necessary for protecting its interests and rights under the future judgement; and

d) the particular protective measure has to be proportional to the claimant's interest (i.e. the claimant cannot ask for an interim measure which would restrict the defendant's rights more than it is necessary to ensure the future enforcement of the judgement).

The court may obligate the plaintiff to provide security in the form of money, government bonds or mortgage in an amount determined by the court. The amount of the security is determined on the basis of the amount of the direct and immediate damages, which the respondent may incur by the protective measure if the action is unfounded. Such interim measures may be granted even when the proceedings are stayed.

When the particular case, brought before a national court, is purely domestic, the granting of interim measures would be governed solely by the rules of the respective state. However, European integration and international business provide for a great number of international cases, where the enforcement of the judgement is sought outside of the country where it has been rendered. Since the protective measures are aimed at safeguarding the rights under the judgement, they have to be enforced in the place, where the judgement itself will ultimately be enforced. This would inevitably lead to conflicts of jurisdictions – regarding the court competent to impose the protective measure, as well as to conflicts of different national procedural laws – with respect to the prerequisites for allowing provisional measures and the types of provisional measures.

What happens in cross-border cases? In many member states protective measures are confined to assets located in the state of origin, or are difficult to implement in another member states. What if the defendant is a Bulgarian trade company and its motor vehicles are registers in Germany under German law? And what if the immovable property owned by the same Bulgarian

legal entity is located in France? Which court has the jurisdiction to issue the injunctive order (decision)? What are the rules (laws) under which this could happen?

The present report will try to answer these questions through the interpretation of the legal framework regarding the protective measures in cross-border civil and commercial cases within the European Union.

§ 3. Basic Problems

The EU law is increasingly focused on the unification of international civil procedure rules. There are regulations about jurisdiction and recognition and enforcement of judgements on civil and commercial matters[‡] and on matrimonial matters[§], service of documents[**], taking of evidence[††], international insolvency[‡‡].

However, the legal framework under EU law of the recognition and enforcement of protective measures is not particularly detailed. As in other fields of EU law the jurisprudence of the ECJ has developed further the legal framework and has provided some guidance as its interpretation. Some aspects are still not particularly clear though and this is yet another reason why this topic is particularly live.

The main problems, which can be outlined in this respect, are:

1) Which measures can be considered as interim and falling under the relevant EU law?
2) When does a national court have jurisdiction to grant interim measures?
3) How are interim measures enforced in a member state different form the one in which they have been granted?

[‡] See *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*

[§] See *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.*

[**] See *Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents).*

[††] See *Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matter.*

[‡‡] See *Regulation (EC) No 1346/2000 on insolvency proceedings.*

§ 4. Legal Framework

There are only two provisions under the *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*[§§] which address directly the issue of interim and protective measures – Article 31 and Article 47[***].

> Article 31: "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."
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> Article 47: "1. When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required. 2. The declaration of enforceability shall carry with it the power to proceed to any protective measures. 3. During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought."

Article 31 of Regulation 44/2001 reproduces the text of Article 24 of the *Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*[†††], and most of the case law of the ECJ is based on the Convention[‡‡‡]. Of course the

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[§§] Hereinafter "Brussels I Regulation" or "Regulation 44/2001".

[***] See **Berglund, M.** Cross-border enforcement of claims in the EU: history, present time and future. Stockholm: Kluwer Law International. 2009, p. 203-206.

[†††] Hereinafter "the Brussels Convention" or "the Convention".

[‡‡‡] See **Magnus, U., P. Mankowski.** (ed.) European Commentaries on Private International Law. Brussels I Regulation. Sellier – European Law Publisher. 2007, p. 527.

above-cited provisions are not the only ones regulating interim measures. Other provisions regarding the rules on jurisdiction and enforcement of judgements also apply to the jurisdiction on granting interim measures and their enforcement. For the purposes of the present report we shall analyse the jurisprudence of the Court and explain the nature of the protective measures.

§ 5. The "Protective Measures" Defined

Some important decisions on preliminary rulings, rendered by the ECJ, focus on the interpretation of Article 24 of the Convention. Their significance shall be regarded in the aspect of construction given by the Court of the term "provisional including protective measures" for the purposes of Article 24 of the Convention (respectively Article 31 of Brussels I Regulation). Article 24 of the Convention grants exclusive power to the courts of a contracting state to order provisional measures ***"as may be available under the law of that state"*** even if the courts of another contracting state have jurisdiction as to the substance of the matter. The wording of the text points out that the type of provisional measures is determined by the national law of the court to which application is made i.e. these measures have to meet all requirements for admission of such measures provided by the national law. ***Per argumentum a fortiori*** (explicitly para. 22 *"Van Uden"* Case and Case C-261/90 "*Reichert and Kockler"*) the court having jurisdiction as to the substance of a case under one of the heads of jurisdiction laid down in the Convention also has jurisdiction to order provisional or protective measures, without that jurisdiction being subject to any further conditions.

The definition of the notion is given by the ECJ in Case 261/90: "The expression "provisional, including protective, measures" within the meaning of Article 24 must therefore be understood as referring to measures which, in matters within the scope of the Convention, ***are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter***". Based on the abovementioned definition and function of the provisional measures, the ECJ ruled in this case (C-261/90) that an action such as the "***action Paulienne***" under French law enables the creditor's security to be protected by preventing the dissipation of his debtor's assets, it does not seek to preserve a factual or legal situation pending a decision of the court having jurisdiction on the merits. Its purpose is that the court may vary the legal situation of the assets of the debtor and that of the beneficiary by ordering the revocation as against the creditor

of the disposition effected by the debtor in fraud of the creditor's rights. It cannot, therefore, be considered as a provisional or protective measure within the meaning of Article 24 of the Convention.

Similar conclusion is made in Case 143/78 *"De Cavel v. De Cavel"* where the ECJ held that provisional or protective measures may serve to safeguard a variety of rights, their inclusion in the scope of the Convention is determined not by their own nature but by the nature of the rights which they serve to protect. In line with this concept is the Court's reasoning in Case 125/79 *"Denilauler v. Couchet Frères"* (paragraphs 15 and 16) that an analysis of the function attributed under the general scheme of the Convention to Article 24 leads to the conclusion that, where such types of measures are concerned, special rules were contemplated so as to take account of the particular care and detailed knowledge of the actual circumstances required by the granting of this type of measure as well as the determination of procedures and conditions intended to guarantee the provisional and protective character of such measures.

It may be concluded from the ECJ's decisions that ***"provisional, including protective, measures" are judicial measures characterised by efficiency and speed, and aimed at protecting the future enforcement of a judgment or to maintain the status quo or to safeguard certain rights***.

§ 6. Specific Issues Relating to the National Courts' Jurisdiction on Provisional Measures

a) Arbitration and Territorial Connection of the Provisional Measures

Article 24 of the Convention cannot justify provisional or protective measures relating to matters which are excluded from the scope of the Convention (Case 143/78 *"De Cavel* v *De Cavel"*, para.9). The ECJ has examined several cases regarding legal matters falling outside the scope of the Convention. The milestone case is the *"Van Uden"* case (C-391/95) concerning the so-called *kort geding* procedure previewed in German law. The core of the case refers to the payment of debts arising under a contract containing an arbitration clause. Under Article 1, second paragraph, point 4, of the Convention (which is now Article 1, para 2, letter (d) of Regulation 44/2001), arbitration is expressly excluded from its scope. By that provision, the contracting parties intended to exclude arbitration in its entirety, including proceedings brought before national courts (para 18 of Case C-190/89 *"Rich v Società Italiana Impianti"*) as well as

proceedings ancillary to arbitration proceedings, such as the appointment or dismissal of arbitrators, the fixing of the place of arbitration or the extension of the time-limit for making awards. However, the ECJ concluded that ***the provisional measures "are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect".***

So, there is a principal connection between the provisional measures and the right which they are intended to protect or, as resumes the Court "the granting of provisional or protective measures on the basis of Article 24 of the Convention of 27 September 1968 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."

The same idea is reproduced in Case C-261/90 *"Reichert and Kockler v Dresdner Bank"* (para.32). That's why the Court considers that interim payments do not constitute a provisional measure, unless two cumulative conditions are available: 1) the repayment to the defendant is duly guaranteed if the plaintiff's claim is found unjustified, and 2) ***the measure relates only to specific assets of the defendant located, or to be located, within the confines of the territorial jurisdiction of the court to which the application is made.***

On the contrary, where the subject-matter of an application for provisional measures relates to a question falling within the scope *ratione materiae* of the Convention that Convention is applicable and ***Article 24 thereof may confer jurisdiction on the court the application is submitted to, even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.***

In this respect the ECJ states in the "*Hagen"* case (C-365/88, para.17) "the object of the Brussels Convention is not to unify the procedural rules of the Contracting States, but to determine which court has jurisdiction in disputes concerning civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments".

b) Limits to the Jurisdiction for Granting Interim Measures

In "*Mietz*" case (C-99/96) the ECJ deals again with the Dutch *kort geding* procedure related to the consumer contract (named by the parties "contract of sale") and its conformity with Article 24 requirements. Under Article 289 of the Netherlands Code of Civil Procedure, *kort geding* may be instituted at very short notice and, in accordance with Article 295 of the Code, an appeal must be lodged within two weeks, on pain of being declared inadmissible. The German Supreme Court referred preliminary ruling whether the interim payment of contractual consideration may be granted by virtue of Article 24 of the Convention.

The ECJ repeated its conclusion on "*Van Uden*" case that it is not necessary for the court hearing an application for provisional or protective measures to have recourse to Article 24 of the Convention where it has, in any event, jurisdiction as to the substance of a case in accordance with Articles 2 and 5 to 18 of the Convention i.e. ***the jurisdiction on the merits of the case implicitly includes the authority to order provisional measures without being subject to any further conditions.***

The jurisdiction of the courts to grant interim measures must be exercised within the limits set out in Article 24 of the Convention with regard, in particular, to the granting of measures ordering interim payment. In the relevant case a contract having the characteristics enumerated in the court's decision shall be classified as a contract for the supply of services or of goods within the meaning of Article 13, first paragraph, point 3, of the Convention but the national court ordered interim payment as provisional measure referring to Articles 289 to 297 of the Netherlands Code of Civil Procedure. The ECJ argued that "if the court of origin had expressly indicated in its judgment that it had based its jurisdiction on its national law in conjunction with Article 24 of the Convention, the court to which application for enforcement was made would have had to conclude that the measure ordered — namely unconditional interim payment — was not a provisional or protective measure within the meaning of that Article and was therefore not capable of being the subject of an enforcement order under Title III of the Convention". That is why the provisional measures granted under the national law could not be regarded as provisional measures in the meaning of Article 24 of the Convention although the matter (consumer contract) falls within *ratione materiae* scope of the Convention.

The conclusion from this decision of the ECJ is that recognition and enforcement of a provisional measure can be denied when the court, which has granted it, has gone outside of the

jurisdiction under Article 24 of the Convention (Article 31 of Brussels I Regulation). As the ECJ noted in the *"Mietz"* decision: "it is important to ensure that ***enforcement, in the State where it is sought, of provisional or protective measures allegedly founded on the jurisdiction laid down in Article 24 of the Convention, but which go beyond the limits of that jurisdiction, does not result in circumvention of the rules on jurisdiction as to the substance set out in Articles 2 and 5 to 18 of the Convention***".

c) Hearing of Witness

Particular case interpreting the hearing of witnesses as a "provisional, including protective, measure" according to the wording of Article 24 of the Convention is Case C-104/03. Starting point of ECJ's argumentation is the aforesaid concept of provisional measures which are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case and the incumbent on the ordering court "particular care, detailed knowledge of the actual circumstances in which the measures are to take effect". The principle of legal certainty, which constitutes one of the aims of the Convention, requires that defendant reasonably be able to foresee before which courts, other than those of the State in which he is domiciled, he may be sued. The Court pointed out that such measure — hearing, before a court of a contracting state, of a witness resident in the territory of that State, is intended to establish facts on which the resolution of future proceedings could depend and in respect of which a court in another contracting state has jurisdiction. Its only aim is to enable 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. This result taking into consideration solely the applicant's interest could not justify the proper application of Article 24 of the Convention. On these grounds the ECJ ruled that ***"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"***.

d) Matrimonial Relationships

The decision rendered by the ECJ in Case 143/78 concerns matrimonial relationship. Judicial decisions authorizing ***provisional protective measures — such as the placing under seal or the freezing of the assets of the spouses — in the course of proceedings for divorce do not fall within the scope of the Convention as defined in Article 1 thereof if those measures concern or are closely connected with either questions of the status of the persons involved in the divorce proceedings or proprietary legal relations resulting directly from the matrimonial relationship or the dissolution thereof.*** The term "rights in property arising out of a matrimonial relationship" within the meaning of Article 1, second paragraph, resumes the Court, includes not only the property arrangements exclusively envisaged by certain national legal systems about the marriage but also any proprietary relationships resulting directly from the matrimonial relationship or the dissolution thereof.

e) Exclusive Jurisdiction and Protective Measures

Article 22 of Brussels I Regulation provides several areas where the courts of the respective member state have exclusive jurisdiction. According to Article 35, para 1 of the Regulation infringement of the rules on exclusive jurisdiction is a ground for refusal to recognise and enforce the judgement. Generally the rules for recognition and enforcement of judgement also apply to protective measures[§§§]. However, it is not particularly clear whether certain protective measures, related to the exclusive jurisdiction of the courts, can be granted only by the courts having such jurisdiction.

Exclusive jurisdiction is related to certain matters, the judgements on which will be executed in the same member state, which courts have exclusive jurisdiction. Such matters are connected with immovable property or the state's public authorities (such as public registers and other state bodies). These are areas of particular importance to the state, which justifies the exclusive jurisdiction of its courts.

The jurisdiction of the courts in such member state to grant interim measures is unquestionable. This conclusion may also be seen in ECJ's decision in the "*Van Uden*" case, discussed above. On the other hand, Article 31 of Brussels I Regulation clearly states that any court of a member state seized with a motion for granting interim measures has jurisdiction to

[§§§] See below – § 7, a).

authorise such measures, regardless of the fact that under the Regulation, the courts of another Member State may have jurisdiction as to the substance of the matter. The provision does not differentiate between the rules on exclusive jurisdiction and the other jurisdictional rules in the Regulation.

However, considering the importance to the states of the matters, governed by the exclusive jurisdiction rules, any violation of such rules (including for the provision of protective measures) can be regarded as being manifestly contrary to the public policy of the respective state, which is a ground for refusal to recognise and enforce such measures under Article 34, para 1 of the Brussels I Regulation. Failure to observe the rules of exclusive jurisdiction is also a ground for refusal of the enforcement of the protective measures under Article 35, para 1 of the Regulation. However under Article 42 of the Regulation both of these grounds have to be invoked by the defendant on appeal against the declaration of enforceability. Therefore the Regulation lacks clear grounds on which a court, which does not have exclusive jurisdiction, can declare inadmissible a motion on granting of protective measures, which fall within the exclusive jurisdiction of another member state's courts. Still, such inadmissibility could be derived from the application of the exclusive jurisdiction rules *mutatis mutandis* to the interim measures (such as the attachment of immovable property). The rules governing exclusive jurisdiction have precedence over any other jurisdictional rules, including over Article 31. This conclusion also follows from the fact that the exclusive jurisdiction rules are regulated in the same Chapter II of Brussels I Regulation, as the rule, governing jurisdiction on interim measures.

§ 7. Enforcement of Protective Measures Granted in another Member State

a) Rules, Governing the Enforcement of Protective Measures

The rules governing the enforcement of judgements (Article 38 *et seq.* of the Brussels I Regulation) generally apply also to the enforcement of provisional measures in a member state other than the one in which they have been granted. An important principle in this respect is declared in the *"Italian Leather SpA"* case (C-80/00) that ***"it is unimportant whether the judgments at issue have been delivered in proceedings for interim measures or in proceedings on the substance.*** As Article 27, para 3 of the Brussels Convention (Article 34, para 3 of Brussels I Regulation), following the example of Article 25 (Article 32 of the Brussels I Regulation), refers to "judgments" without further precision, it has general application.

Consequently, decisions on interim measures are subject to the rules laid down by the Convention concerning irreconcilability in the same way as the other "judgments" covered by Article 25". The ECJ states that it makes no difference that procedural rules regarding the interim measures vary from one contracting state to another to a greater degree than rules governing proceedings on the substance.

This general conclusion, drawn by the Court, complies with Article 32 of Brussels I Regulation, which states that "for the purposes of this Regulation, 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court." Following the argumentation of the ECJ in Case 80/00 and the disposition of the Brussels I Regulation it is apparent that the act ordering provisional including protective measures falls within the meaning of "judgment" and that its recognition and enforcement shall be those provided for judgments in Chapter III "Recognition and Enforcement" of Brussels I Regulation.

The application of the general rules for recognition and enforcement of judgements under the Brussels I Regulation to decisions, orders or other acts of the courts, granting protective measures, may sometimes (or indeed most of the times) be contrary to the nature of the protective measures. As mentioned above in the definition of protective measures[****], they are characterised by efficiency and speed. Often protective measures are granted in *ex parte* proceedings where the respondent is not even notified until the moment the measure is in place and has been executed. In this respect Article 396, para 2 of the Bulgarian *Civil Procedure Code* specifically provides that if the court of first instance refuses to grant the interim measure, a copy of the appeal against this decision is not served to the respondent. In order to ensure the efficiency of such proceedings Article 396, para 3 of the Bulgarian *Civil Procedure Code* states that an appeal against the granted protective measure does not stay the measure's execution.

The above characteristics of the protective measures, which are reflected in the proceedings for their authorisation and execution, follow from their nature and purpose – in order to preserve and protect the plaintiff's rights and to ensure that the judgement will be executed, the protective measures must be granted and executed swiftly and without the

[****] See above – § 5.

respondent being aware of them. Otherwise the respondent may try (sometimes successfully) to dispose of its assets and render the protective measures superfluous.

These considerations show that the application of the general rules on recognition and enforcement to provisional measures is not particularly adequate. Article 42, para 2 of Brussels I Regulation provides that the declaration of enforceability has to be served to the respondent, whereas Article 43, para 3 refers to the rules governing appellate proceedings for the appeal against the declaration. Normally the launch of an appeal suspends the execution of the decision being appealed. In this respect the Bulgarian *Civil Procedure Code* in Article 623, para 3 expressly provides that declaration of enforceability may not be subject to preliminary enforcement (in case of an appeal). Therefore the application of the general rules on recognition and enforcement to the protective measures means that the respondent will be notified of the measure against him, before such measure has been executed. This is clearly contrary to the above-described principles, nature and purpose of protective measures.

b) Certain Restrictions on the Enforcement of Protective Measures

An important principle is declared by the ECJ in its judgment in Case 148/84 *"Deutsche Genossenschaftsbank* v *Brasserie du Pêcheur"*: the Convention merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments and does not deal with execution itself, which continues to be governed by the domestic law of the court in which execution is sought. Consequently, ***a foreign judgment for which an enforcement order has been issued is executed in accordance with the procedural rules of the domestic law of the court in which execution is sought, including those on legal remedies.***

This principle has two important correlated consequences: **1)** the interested parties have on their disposal the legal remedies provided by the national law of the state where the execution take place; and **2)** the legal remedies available under national law must be precluded when an appeal against the execution of a foreign judgment for which an enforcement order has been issued is lodged by the same person who could have appealed against the enforcement order and is based on an argument which could have been raised in such an appeal (Case 145/86 *"Hoffmann v. Krieg"*).

Since the above principle also applies to the enforcement of interim measures, this means that the claimant may only rely on the provisional measure he has obtained to the extent such measure is enforceable in the state, where it will be executed[††††].

In *"Italian Leather SpA"* case (C-80/00), mentioned above, the ECJ has also interpreted one of the grounds on which the national courts may refuse the enforcement of a protective measure – under Article 27, para 3 of the Brussels Convention (Article 34, para 3 of Brussels I Regulation) – if such measure is irreconcilable with a decision on interim measures given in a dispute between the same parties in the member state in which recognition is sought. The ECJ attempted to define the meaning of **irreconcilable decisions** in the case at stake as follows: "***a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought***". The irreconcilability lies in the effects of judgments. It does not concern the requirements governing admissibility and procedure which determine whether judgments can be given and which may differ in one state to another. Accordingly, concluded the Court, where a court of the state in which recognition is sought finds that a judgment of a court of another contracting state is irreconcilable with a judgment given by a court of the former state in a dispute between the same parties, it is required to refuse to recognise the foreign judgment. It is obvious that this rule is unconditional. As the Court pointed out, Article 27 para 3 of the Brussels Convention sets out a ground for refusing to recognise judgments which is mandatory.

It should be mentioned that any grounds for refusal of the enforcement of interim measures or judgements may only be brought forward by the defendant. Article 41 of Regulation 44/2001 provides that "the judgment shall be declared enforceable immediately on completion of the formalities in Article 53[‡‡‡‡] without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application". Therefore the grounds for refusal of the enforcement (including

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[††††] This principle also raises the question about the possibility of national courts to deny the enforcement of provisional measures from other countries on grounds of public policy – see below – § 7, c).

[‡‡‡‡] The party, seeking enforcement, must produce a copy of the court order granting the interim measure and a certificate of enforceability, issued by the court, which has granted the measure.

irreconcilability with other interim measures granted or even contradiction with the state's public policy) may only be relied upon on the appeal of the enforcement order.

Article 36 of the Convention (Article 43 of Regulation 44/2001) regulates the appeal against the enforcement of the foreign judgement. In the opinion of the ECJ Article 36 of the Convention must be interpreted as meaning that ***a party who has not appealed against the enforcement order referred to in that provision is thereafter precluded, at the stage of the execution of the judgment, from relying on a valid ground*** which such party could have pleaded in the appeal against the enforcement order, and that this rule must be applied of their own motion by the courts of the state in which enforcement is sought (Case 145/86 *"Hoffmann v. Krieg"*).

c) Public Policy Related Restrictions on the Enforcement of Protective Measures

As mentioned above, the grounds for refusal of recognition and enforcement of any judgement (under Article 34 of Brussels I Regulation) also apply to provisional measures. That is why the enforcement of a provisional measure may be refused if such enforcement is manifestly contrary to public policy in the member state in which it is sought (Article 34, para 1 of the Regulation).

Public policy in the context of international civil proceedings is usually construed narrowly and limited to the breach of the right to a fair trial under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, in the field of protective measures, the public policy exception could be interpreted somewhat more broadly. It was mentioned above that under the public policy rules could be justified the refusal to enforce foreign protective measures which relate to matters falling within the exclusive jurisdiction of the member state in which enforcement is sought[§§§§].

Public policy could also be the ground for refusal to allow the enforcement of protective measures, for which there are no enforcement rules in the member state in which enforcement is sought[*****]. The lack of appropriate national enforcement procedural rules for a particular protective measure usually would mean that the legal order of such state does not recognise such

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[§§§§] See above – § 6, e).

[*****] See above – § 7, b).

a protective measure. In some situations such protective measure may be manifestly contrary to basic legal principles in the state where enforcement is sought and thus contrary to public order.

Although protective measures vary from one member state to another, the differences are most clearly seen between civil law and common law countries. The anti-suit injunctions are readily granted in the UK. Such injunction prohibits the party, against whom it is issued, to start proceedings in another state. Generally a court in one state has no jurisdiction to order the court in another state to take or decline jurisdiction. The recognition of protective measures under the Brussels I Regulation, however, raises the question if such measure is possible to be recognised in another member state.

In the *"Turner v. Grovit"* case (C-159/02) (a case under the Brussels Convention) the ECJ ruled that "a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. ***Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.***" The Court does not expressly state that such injunction would be incompatible with the contracting states' public policy, because this is a question of national law. However, it may be argued that in its interpretation the ECJ elevates the provisions of the Convention to supermandatory principles, which could be considered as forming part of the contracting states' public policies. The main goal of the Court is to prevent the national courts of one state to impose restrictions on the courts of another state, which may lead to the circumvention of the jurisdictional rules set out in the Convention. The Court also emphasises on the mutual trust, which must exist between the courts of the different contracting states.

In its decision in the Case *"Allianz v. West Tankers Inc."* (C-185/07) ECJ further adds that anti-suit injunctions cannot be used in order to prevent a court, competent to review the validity of an arbitration agreement under the Convention, to adjudicate on such dispute, regardless of the fact that the dispute is related to an arbitration agreement and arbitration falls outside the scope of the Convention.

The Mareva injunction is another type of protective measure, typical for common law jurisdictions, the enforcement of which may be refused in other member states on grounds of public policy. The Mareva injunction (also known as a freezing order) blocks all assets of

respondent in the whole world and prevents him from dissipating them. This measure clearly is intended to safeguard the plaintiff's interest and to ensure the enforcement of the future decision on the dispute. It does not impose any restrictions on the jurisdiction of the courts in other member states and therefore does not contradict the Brussels I Regulation.

Under Bulgarian procedural rules however, a protective measure must be proportionate to the claimant's interest. It must also be clearly specified. The reason behind this is to protect the defendant's interest and to ensure that the claimant will not abuse the protective measure, which could be devastating for the defendant. The Mareva injunction clearly contradicts these fundamental principles of Bulgarian procedural law and thus its enforcement in Bulgarian could be denied on grounds of contradiction with the Bulgarian public policy rules.

§ 8. Conclusion

Regulation 44/2001 (as the Brussels Convention before it) does not provide sufficiently detailed rules on the jurisdiction, recognition and enforcement of protective measures. Indeed the member states seem reluctant to introduce changes in this area, which could probably be attributed to the considerable differences in their legal systems. However, the development of international civil proceedings and the growing number of cross-border disputes would eventually lead to changes in the regulation of the fasted and effective relief which the protective measures provide. One of the main objectives of such future changes should be the easier enforcement of the protective measures – without notification to the defendant and without possibility to stay the enforcement on appeal. A step towards the achievement of these objectives would be the adoption of the European order on attachment of bank accounts. For the time being, though, the parties seem to prefer to apply for protective measures to the court in the member state, where such measures will be executed, as this is the most secure approach.