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Provisional and protective measures

This paper is intended as a basis for further discussion. It seeks to describe the existing situation concerning provisional and protective measures in general (i. e. not specifically related to e-commerce and internet issues) under the Preliminary Draft Convention as it now stands, and it tries to indicate further options.

A. Preliminary results achieved in the Preliminary Draft Convention

1. Existing rules on jurisdiction for provisional measures

The system of provisional and protective measures, as established by the Preliminary Draft Hague Convention on Jurisdiction and the Recognition of Judgments, is – like the whole Preliminary Draft Convention – twofold: It concerns on the one hand cross-border recognition and enforcement of provisional and protective measures, and, prior to this stage, jurisdictional rules for such measures.

In order to analyse the system established by the Preliminary Draft Convention properly, however, such analysis must start with the provisions on recognition and enforcement. Only from this angle it becomes clear why certain provisions on jurisdiction have been included into the draft.

According to Article 23 b), only provisional and protective measures taken in accordance with **Article 13, paragraph 1** are covered by the notion of "judgment" for the purposes of the chapter on recognition and enforcement. In other words, only provisional and protective measures *ordered by a court having jurisdiction under Articles 3 to 12 to determine the merits of the case* are eligible for cross-border recognition and enforcement under the Preliminary Draft Convention.

> The Special Commission decided by vote that the court "having jurisdiction on the merits under the Convention" must
>
> - not be one which has actually been seised,

- but one which could at least still be seised.

The meaning of the latter condition has been put into question by the European Court of Justice (ECJ) which ruled in Van Uden Maritime BV versus Deco Line, No. C-391/95, judgment of 17 November 1998 for the context of the Brussels Convention (BC) that a provisional and protective measure may only be based on a rule providing for jurisdiction on the merits (and not on Article 24 BC together with national law) if, in the individual case, that jurisdictional basis was **actually available** for a claim on the merits. In the Van Uden case, the case on the merits could not be brought in the forum concerned because of an arbitration clause. Therefore, the ECJ ruled that no provisional measure could be requested from that court with reference to its "jurisdiction on the merits".

The Nygh/Pocar-Report (p. 70), on the other hand, states that the fact that substantive proceedings (on the merits) are pending in another Contracting State will not prevent a court from exercising jurisdiction under Article 13 paragraph 1. In such case, however, jurisdiction **on the merits** would in practice no longer be available in any other Contracting State because of Article 21 (1).

So, maybe it should be re-examined whether, in addition to the cases mentioned on p. 69 of the Nygh/Pocar-Report (Articles 4, 7, 8 or 11 (1)), a jurisdiction on the merits provided for by the Convention would nevertheless not be available for provisional measures under Article 13 (1) in a particular case if, in the case concerned, such jurisdiction on the merits under Articles 3 to 12 is only theoretical

- because the parties have agreed on an arbitration clause for the merits of the case (as decided for the Brussels Convention by the ECJ in Van Uden), or
- because of the lis pendens-rule in Article 21, if a court of another Contracting State has already been seised with the case under the conditions set out in that article.

Article 13, paragraph 3, although being a jurisdictional rule, is quite explicit about the possibility of cross-border recognition and enforcement of measures taken under this paragraph. The latter is simply excluded because one of the conditions set out for the jurisdiction of a court under this paragraph is that the *enforcement of the measure in question is limited to the territory of the State where it is taken*. Therefore, in this case, jurisdiction and cross-border enforcement are inseparably linked. *Jurisdiction* only exists in cases where no cross-border *enforcement* is to follow.

Article 13, paragraph 2 is situated in between the previous two solutions. It confers jurisdiction to the courts of a State in which property is located, but such jurisdiction is limited to measures in respect of that property. Like in paragraph 3, cross-border enforcement seems to be excluded at first sight because the property which forms the basis for jurisdiction is located within the territory of that same State.

However, a cross-border element may come into play if the property on which jurisdiction was based is being transferred to another contracting State after the

measure has been ordered. In such a case, jurisdiction to order the measure did exist under Article 13, paragraph 2. Nevertheless, given the limited definition of "judgments" eligible for cross-border recognition and enforcement under Articles 23 et seqq., no cross-border recognition and enforcement under the Convention is possible. Nevertheless, such measure may be recognised and enforced under the national law of the requested State.

2. Reasons for these rules

If two of the three paragraphs of Article 13 contain jurisdictional rules which do not lead to recognition and enforcement under the Convention, what is the use of including these provisions in the chapter on jurisdiction?

As long as the working hypothesis still was a "double convention", but also after the agreement on the structure of the Convention as being a "mixed" one, the explicit inclusion of a jurisdictional rule into the Convention (i. e. as a "white" ground) automatically led to the benefit for this decision of recognition and enforcement under the Convention. On the other hand, where a judgment is based on a basis of jurisdiction which is neither mentioned in the "white list" nor prohibited by Article 18 (the "black list"), cross-border recognition and enforcement depends on national law (the "grey zone").

In Article 13, paragraphs 2 and 3, we are now faced with a new category. Jurisdiction does exist under the Convention ("white list"), but, however, cross-border recognition and enforcement are explicitly excluded (paragraph 3) or left to national law (paragraph 2).

Why were these jurisdiction rules included in the Preliminary Draft Convention, then?

The answer to this question is provided by Articles 17. This article delineates the "grey zone". It defines to which extent States are still free to make use of rules of jurisdiction as provided by their national law within the scope of application of the Preliminary Draft Convention as defined by Article 2, paragraph 1. Article 17 only permits States to apply rules of jurisdiction under their national law "subject to Article 13" and certain other Articles.

This means that States are no longer free – within the scope of the Convention – to use their own national jurisdictional bases for provisional and protective measures. Therefore, at present, even though Article 13, paragraphs 2 and 3 do not allow for cross-border recognition and enforcement under the Convention, they are nevertheless necessary as jurisdictional rules because no recourse to national law is permitted by Article 17.

Leaving the provisions as they stand would mean that, in cases covered by Article 2 paragraph 1 of the Convention (i.e. in cases where not all the parties are habitually

resident in the same Contracting State), measures based on grounds of jurisdiction which are not covered by Article 13 of the Convention would (without being explicitly mentioned in Article 18) practically be "black-listed". They may simply no longer be taken.

> This could apply to a Mareva injunction taken in the **UK** (and other Commonwealth countries) concerning property located outside the forum State in cases where the defendant (1) is either present in the forum State and can accept service of the order there or (2) has a connection going beyond the mere presence of assets with that State, and the court accepts discretionary jurisdiction (cf. Prel. Doc. 10, paragraphs 10, 19, 27). The **French** courts have assumed jurisdiction for attachment and protective measures concerning property located in France, even where they have no jurisdiction for the merits of a case (Prel. Doc. 10, paragraph 100).

This "double-convention"-approach is the reason why the jurisdictional bases in Article 13 have been defined in such a comprehensive way, even where they do not lead to cross-border recognition and enforcement.

3. Possible content of provisional measures under the Preliminary Draft Convention

However, a similar thoroughness is lacking as to the possible **content** of these provisional and protective measures. So far, the only danger envisaged by the drafters was that the jurisdictional rules of the Convention might be circumvented if provisional measures were too easily available in a forum not having jurisdiction on the merits under the Convention. Therefore, jurisdiction of a court having jurisdiction on the merits under the Convention was (under Article 13 paragraph 1) not restricted in any way as to the content of the order, simply because it was a "white list jurisdiction" under the Convention.

> This generous approach might have to be reconsidered if, as the Nygh/Pocar Report suggests at present, a court theoretically having jurisdiction on the merits under the Convention might nevertheless be a court which – for legal reasons equally deriving from the Convention – can never actually be seised with the merits (arbitration clause, lis pendens).

In addition to courts having jurisdiction on the merits under the Convention, Article 13 paragraph 2 grants the courts of a State in which property is located jurisdiction in respect of that property. Once again, the Convention only limits the possible reach of such measures by the requirement of the relation to the property in question. The content of the measure to be ordered is in no way defined or limited.

However, the looser the jurisdictional contact gets, the more the content of the possible measures is being restricted by the Convention. Article 13 paragraph 3 grants jurisdiction to

courts of a State where neither jurisdiction on the merits nor property which is the object of the measure in question exist. In this case, only certain kinds of measures may be ordered:

- Their enforcement must be limited to the territory of that State, and
- their purpose must be to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party.

These limitations take account of the Resolution adopted by the International Law Association at its Helsinki meeting in 1996 (cf. Prel. Doc. No. 7 of April 1997, Annex I). The ECJ has recently reiterated and elaborated of them in the judgments Van Uden (see above) and Mietz versus Intership Yachting Sneek BV, No. C-99/96, judgment of 27 April 1999. In particular where preliminary performance is at issue, such performance may according to the ECJ only be ordered in favour of the creditor if, in case of a different outcome of the proceedings on the merits, restitution to the debtor is guaranteed.

B. Possible options for further work on provisional and protective measures

1. Jurisdiction

- If States feel that they now have (national) bases of jurisdiction for provisional and protective measures at their disposal which would no longer be available because of the reference to Article 13 in Article 17, **a possible solution would be to delete that reference**.
- In this case, as far as the creation of jurisdictional bases is concerned, national bases would again be open.
- This would lead to the deletion of Article 13, paragraphs 2 and 3, which would probably become superfluous if national bases were once again available.
- If these changes were adopted, the “black list” (Article 18) might have to be re-examined with respect to provisional measures. Otherwise the deletion of Article 13 (2) and (3) could restrict the range of fora available instead of enlarging it because many of the jurisdictional bases existing under national law which would thus be available again would fall under the black list (see the examples above under A. 2).

  In particular, it might be desirable to exclude the applicability of Article 18 (2) (a) to provisional measures. Otherwise a provisional seizure of property would not be possible if the claim in the merits is only for payment. It would only be possible if “the dispute” (i.e. the dispute on the merits) is for surrender of specific property.

2. Possible content of provisional and protective measures

As to **jurisdictional bases available under national law** for provisional and protective measures (which would fall into the grey zone if the points set out under B.1 were followed), **recognition and enforcement** would be left to the **national law** of the requested State. Therefore this amounts to a preservation of the **status quo**.

Measures taken under Article 13, paragraph 1, however, would benefit from recognition and enforcement under the Convention. Given the fact that, at present, also a court which may well have jurisdiction under the Convention theoretically but which can never actually hear the case on the merits, may order provisional and protective measures under this provision, the benefit seems very generous. Therefore it could be considered to create restrictions –

- either on the level of **jurisdiction**, i. e. limiting Article 13, paragraph 1 to a court which still is in the legal position to actually exercise jurisdiction on the merits because there is no arbitration clause or lis pendens elsewhere or other reason preventing such exercise,
- or on the level of the possible **content** of the measure. Here it could e. g. be considered to either exclude measures ordering performance to the creditor, or at least to make performance orders subject to some safeguards and guarantees which make sure that, in case of a different outcome on the merits, the debtor gets back what he had paid on a preliminary basis. This could mean bank guarantees or other safeguards.

  It could also be considered whether it is necessary to state in the Article itself that procedural interim measures (such as measures related to the taking of evidence or other procedural steps) are not covered by this provision. At present this is said on p. 69 of the Report.

  Further details of this point depend, of course, also on whether the Convention as a whole will be limited to money judgments. If not, it may have to be examined whether restrictions on other provisional and protective measures taken under Article 13, paragraph 1 (and which are therefore eligible to cross-border enforcement) are desirable, depending on the nature of the measures.

3. Recognition and enforcement

Irrespective of the adoption of any such amendment, a further problem has to be resolved concerning the transfrontier recognition and enforcement of provisional measures taken under Article 13 (1).

- According to Article 2 (2), Chapter III applies to the recognition and enforcement in a Contracting State of a judgment rendered **in another Contracting State**.
- Article 23 (b) includes into the definition of "judgments" for the purposes of that chapter any decision ordering provisional or protective measures in accordance with Article 13 (1).
- Article 13 (1) is part of Chapter II on jurisdiction. According to Article 2 (1), the application of Article 13 (1) by the courts of a Contracting State would therefore presuppose that **not all the parties are habitually resident in that State**.
- This means that at present a provisional measure could only be based on Article 13 (1) if not all the parties are habitually resident in the forum state. If they are, the measure falls outside the scope of Article 13 (1) and is therefore neither included into the definition of "judgment" under Article 23 (b) nor entitled to be recognised under the Convention.
- This does not apply, however, for decisions on the merits. Article 23 (a) in its definition of "judgments" does not make any reference to Chapter II and its scope. Therefore, even if jurisdiction is not based on Chapter II because it was a purely domestic case with all parties habitually resident in the same State, such decision would fall under the scope of Chapter III: Under Article 25 (1), the court in the State where recognition and/or enforcement is sought then has to examine whether the judgment was based on a ground of jurisdiction consistent with the ones provided for in Articles 3 to 13.

If the amendments to the jurisdictional rules discussed above under B. 1. were adopted (which would mean that the Convention would only deal with provisional measures under Article 13 (1)), a possible solution could be to delete the reference to Article 13 (1) in Article 23 (b). It would then no longer be necessary because, in any case, provisional measures taken in accordance with Article 13 (1) would be the only ones which would fall under the Convention.

However, this solution is only sufficient as long as no limitations concerning the content of provisional measures are adopted because this would, at the enforcement stage, not only require the court in the State where recognition and enforcement is sought to control the **jurisdiction** of the court of origin but also whether the **content** of the measure was consistent with Article 13 (1).