

ANNEX F (ii)**SOME THOUGHTS ON ARTICLE 13**

Following the excellent paper presented by Andrea Schulz at the Ottawa meeting and the discussion that followed, I tried to summarise the options available. This summary was considered to be helpful. This paper seeks to repeat those options for guidance in future discussions. It must be noted that I am not putting forward any preferred solutions.

As I said in Ottawa, there appeared to be three options:

1. Keep Article 13 but in an amended form reflecting the problems with the existing text identified by Andrea Schulz.
2. Keep Article 13 in an attenuated form, mainly to allow a court other than the court seised of the substantive matter to exercise ancillary jurisdiction; and
3. Do away with Article 13 altogether and leave the question of provisional and protective measures to national law.

I will now discuss those options in more detail.

Option A Revise Article 13

Andrea Schulz identified a number of problems with the existing text.

She pointed out that Article 17 which provides for the exercise of jurisdiction based on national law was expressed to be subject to, *inter alia*, Article 13. She correctly concluded that the effect of this provision is that national law (or "status quo") jurisdiction is excluded in relation to provisional and protective measures. The effect is that the courts of member states will be confined to the jurisdiction as defined in Article 13. This was the conclusion reached by the Rapporteurs at p. 70 of their Report. She asked, with justice, whether this was justified in a "mixed" convention.

This is indeed an issue that must be re-considered. Although it can be said that the restriction in Article 17 reflects the earlier aim of a "double convention", the reference to Article 13 in Article 17 was confirmed at a relatively late stage when the fundamental decision to aim for a "mixed convention" had already been taken. The decision may have been taken in "a fit of absent-mindedness". It may be best to re-visit it in a discussion purely focused on the consequences of restricting this head of jurisdiction under the Convention when the general approach has been to maintain the status quo under national law as much as possible.

Andrea Schulz also rightly points out that Article 18 would have to be reconsidered if it is decided to "free" Article 13. In particular, Article 18.2(a) could be interpreted to restrict the exercise of protective and provisional jurisdiction under national law if based on the presence of property within the jurisdiction. Sub-paragraph (e) may also present problems in cases where it has the effect of restraining certain activities by the defendant pending the hearing.

Another issue raised by Andrea Schulz concerns Article 13, paragraph 1. In her paper she points out that 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 be seised.

I would make one correction to that statement. It was, in my view, not the intention of excluding the court actually seised from exercising jurisdiction under Article 13.1. That would have led to the strange result that the court most likely to issue such orders would not be able to do so. What was decided was that it need not be the court which has actually been seised. As we say in our Report at p. 69 "it is not necessary for the court exercising jurisdiction under paragraph 1 to be seised or about to be seised of the substantive dispute". Indeed, I assume that the statement in the paper is "a slip of the pen" not intended by the author.

The real concern of the author is about the wide scope given to other courts which could be seised of the substantive merits but in fact are not. She points to the decision of the European Court of Justice in *Van Uden Maritime BV v Deco Line* No C-391/95, decided on 17 November 1998 as authority for the proposition that the jurisdiction must actually be available on the merits in the individual case. Thus, if other courts with potential jurisdiction over the merits are actually precluded in a particular case from exercising that jurisdiction because of a choice of forum clause in Article 4 or because of the operation of Article 21, the exercise of jurisdiction by the excluded court or courts will be prevented.

It must be said at the outset that a decision of the ECJ on the interpretation of the Brussels Convention is not per se relevant to the interpretation of the proposed Hague Convention, even if the relevant provisions are similar. This is the case because there will be some fundamental differences between the two conventions, most notably that between a double and closed convention and the "mixed" and open proposed Hague Convention. The answer to the question posed by Andrea Schulz must therefore be found in the Draft Preliminary Convention itself.

The rapporteurs agree with her that the jurisdiction on the merits under Article 13.1 must actually be available. At p. 69 they state:

The reference is to the merits of the case, that is to say, the actual dispute between the parties. Hence if the jurisdiction of a particular court in respect of that dispute is excluded by reason of a choice of court agreement under Article 4, the provisions of Articles 7,8 or 11(1), or the provisions for exclusive jurisdiction under Article 12, that court is precluded from exercising jurisdiction under Article 13, paragraph 1, even though in an abstract sense it might have had jurisdiction over a dispute of that kind.

This makes it clear that the actual dispute must be looked at and the jurisdiction of the particular court in respect of that dispute. To that extent our conclusion accords with that reached by the ECJ. We point out, however, that, even if jurisdiction is precluded under paragraph 1, it remains available under paragraphs 2 and 3 which are not limited to courts having jurisdiction in respect of the substantive matter.

The question of preclusion through the operation of Article 21 is more complex. The rapporteurs have taken the view that Article 21 only applies as between courts who are seised of the substantive proceedings. The purpose of the provision is to prevent conflicting judgments that are capable of being recognised under the Convention. An order made under Article 13.1 does fall, by virtue of Article 23(b) within the definition of "judgment", but, unless it has the effect of *res judicata* in the State of origin, it cannot be recognised under Article 25.2, although it may be entitled to enforcement under Article 25.3. Thus, a prior application for provisional and protective measures to one court, should not prevent another court from becoming seised of the substantive proceedings. It was on this basis that the rapporteurs concluded that the exercise of jurisdiction by another court under Article 13.1 would not fall foul of Article 21.

However, as Andrea Schulz has rightly pointed out, jurisdiction under Article 13.1 depends on the other court having jurisdiction on the merits in the actual case. She questions whether such jurisdiction would be available if another court is already seised of the substantive dispute. This issue was not addressed by the rapporteurs at p. 70 of the Report. However, the answer is that Article 21.1 does not deprive the second court of jurisdiction at once. It merely requires the suspension of proceedings. Only when the conditions in Article 25.2 are fulfilled is there an obligation to decline jurisdiction. In the meanwhile the court first seised may under Article 25.7 decline in favour of the court second seised, or it may be able to proceed under Article 25.3: see the discussion in the Report at p 87. Thus the court in which application is made under Article 13.1 either before or after the substantive proceedings are instituted elsewhere, remains a "court having jurisdiction under Articles 3 to 12" as set out in Article 13.1, even though the exercise of that jurisdiction is suspended.

Having made this point, there is a question of policy to be considered. Should one confine the jurisdiction under Article 13.1 which is the only jurisdictional basis given recognition under the Convention, to orders made by the court that is seised or about to be seised of the substantive case? If the answer to that question remains in the negative, is it the intention that all courts potentially seised should be available for such measures:

- a) even where one court is the chosen forum under Article 4, and/or
- b) one court has already been seised of the substantive case?

If the answer to either a) or b) or to both, is in the positive, it may be necessary to make amendments to the draft provisions to make the provision clearer. As explained above, at present the answer given by the rapporteurs to issue a) is negative, and that to issue b) is positive.

Article 13.2

Andrea Schulz correctly analyses Article 13.2 as being limited to measures in respect of property situated within the State ordering the protective and provisional measures. It has only a very limited extra-territorial potential and this will depend on recognition under national law since recognition under the Convention is precluded. In those circumstances she asks what the purpose of this provision was.

She surmises that this was due to Article 17 which, in its present form, excludes jurisdiction in respect of provisional and protective measures under national law and the original intention to provide for a "double convention". That certainly is how it looks now, but, as pointed out earlier, the insertion of the reference to Article 13 in Article 17 came later. As the discussion in Ottawa showed, the purpose of Article 13.2 was to overcome the limitation imposed by the Privy Council on appeal from Hong Kong in *Mercedes Benz AG v Leiduck* [1996] 1 AC 284 to the effect that jurisdiction to order provisional and protective measures cannot rest on the presence of the assets sought to be preserved alone; there must be jurisdiction in respect of the substantive matter. This ruling has been reversed in England by statute, but still applies in certain Commonwealth jurisdictions, including New Zealand and Australia. Those countries may be entitled to their peculiarities for their own residents, but as the German plaintiff found out in Hong Kong, they harm foreigners. For such reason such a provision is needed even in a "mixed" convention. Furthermore, there is the restriction in Article 18(2)(a) already referred to which, on a literal interpretation, might extend the *Leiduck* rule even to countries which do not have it at present, unless there was an express provision in Article 13.2.

Another aspect of Article 13.2 is that it is not limited by the requirement that the forum in which the measures are sought be actually available for determination of the merits of the dispute. Thus, it can be invoked even though another forum has been selected under Article 4 or proceedings are pending elsewhere in a prior forum. This too may overcome restrictions that some national laws may impose.

Consideration should therefore be given whether Article 13.2 should be retained in some form even if Article 13.1 is not. But it is probably best to consider Article 13.3 first.

Article 13.3

This provision, as Andrea Schulz rightly points out, is only concerned with jurisdiction. Any recognition is expressly excluded by the provision itself. This does not quite exclude extra-territorial effect. If a person is within the jurisdiction and the order can be enforced against him or her in that place, there is nothing to prevent a court from ordering that person to do, or not to do, something outside the jurisdiction. The restriction only means that a foreign court cannot enforce an order made under paragraph 3. The provision has some of the same advantages as Article 13.2, namely it is free from the restrictions imposed by Article 13.1 and has the wider advantage that there is no need for assets to be present within the jurisdiction. This can be important where one is dealing with, say, intellectual property which it is difficult to locate or one wants to restrain activity that could prejudice the substantive proceedings.

On the other hand, as the rapporteurs have pointed out at pp 71-2, the condition found in sub-paragraph b) of Article 13.3 limits the content of the measures that can be ordered. Thus paragraphs 2 and 3, while they overlap are not concentric. Each covers an area that the other does not. Even if the condition set out in sub-paragraph b) were to be extended to both (or to the Article as a whole, see below), there would still be a difference as to extra-territorial effect, albeit minimal for practical purposes.

Leaving aside the question of content, consideration should be given whether paragraph 3 might not suffice in lieu of paragraph 2. However, in that case, it should be made clear that Article 18.2(a) does not prevent the making of orders in respect of local property.

Content

Andrea Schulz has rightly raised the issue of the content of orders to be made under Article 13. These are not defined for the purposes of paragraphs 1 and 2, but are defined for the purpose of paragraph 3. As she points out, the limitations found in sub-paragraph b) of paragraph 3 are in conformity with the jurisprudence of the European Court of Justice. Again, that in itself is not a conclusive argument in favour of such a definition, but the fact remains that in Ottawa the brief discussion disclosed some highly variable definitions of “provisional and protective measures” ranging from the US practice of pre-trial discovery of evidence to the French institution of the *referé provision*. The rapporteurs have pointed out at pp. 68-9, that essentially the content is for national law to define, although they ruled out of consideration such measures as pre-trial discovery (specifically rejected by the Special Commission) and anti-suit injunctions. They also pointed out that measures under paragraphs 1 and 2 could be taken post-judgment to preserve assets.

In contrast, paragraph 3 is limited to measures “to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party”. This, as the rapporteurs point at p 72, is more restrictive. It excludes post-judgment measures and notably, procedures for summary judgment, including the *referé provision*. This caused some controversy in Ottawa.

Consideration should be given to the question whether the definition in sub-paragraph b) should be retained and, if it is to be retained, whether it should apply to the whole of Article 13.

Recognition

In connection with recognition, Andrea Schulz has raised another interesting point which certainly could not have been intended by the Special Commission. This is that paragraph b) of Article 23 – definition of “judgment” – by specifically referring to “decisions ordering provisional and protective measures in accordance with Article 13, paragraph 1” by necessary implication includes the territorial limitations in Article 2.1, namely that the provision of Article 13 (found in Chapter II) shall not apply if all the parties are habitually resident in the Contracting State where the exercise of jurisdiction is sought. All other judgments are described in very wide terms in paragraph a) as “any decision” without reference to specific Articles.

It could be argued therefore that an order made under an Article 13.1-like jurisdiction when all parties are habitually resident in the same Contracting State A is not a “judgment” to which Chapter III applies. That this was not intended by the Commission is clear from Article 25.1 where the words “or is consistent with any such ground” specifically extend to Article 13. A sensible court may well come to this conclusion. But a literalist court could take a different approach. The point therefore should be clarified.

Assuming that Article 13 remains in its present form (or a more simplified version thereof which amalgamates paragraphs 2 and 3) it may suffice to simply delete paragraph b) in Article 23. Paragraphs 2 and 3 have no, or a very limited, extra-territorial recognition and “any decision” will be wide enough to cover paragraph 1. As the rapporteurs have pointed out at p. 95, the provision in paragraph b) appears to have been included with the aim of excluding 13.2 and 13.3 from recognition. As Andrea Schulz has shown, this was not necessary. The only other purpose (see Report at p. 94) would be to remove doubts about provisional and protective orders being “judgments”. In so far as it is relevant, such a doubt

does not appear to have arisen under the Brussels Convention: see *De Cavel v De Cavel (No 1)* [1979] ECR 1055.

It must be pointed out that in any event the recognition and enforcement of provisional and protective orders under the Convention will be limited. Since few will have the status of *res judicata* under the law of origin, recognition will be precluded. The purpose of many of them is to make and execute them without notice to the respondent. Enforcement of orders at that stage may be refused under Article 28.1(d). If the respondent (who need not of course be the defendant to the substantive suit) appears after the seizure of the goods etc, to have it set aside, or, as frequently happens, to negotiate a more limited order, then, of course, that order will be entitled to enforcement. But, in the meanwhile, the assets may have been removed.

There is further the general issue of whether the recognition and enforcement provisions of the Convention should be limited to monetary orders. If so, most provisional and protective orders will not qualify for enforcement.

Consideration should be given to the question of whether paragraph b) of Article 23 is really necessary. Perhaps the wider question should be looked at whether enforcement of provisional or protective measures should be provided for at all under the Convention (as opposed to national law). In that case a reference to Article 13 should probably be made in Article 24.

Option B – An ancillary provision

It may be sufficient to insert a provision along the lines of Article 31 of the Brussels Regulation in the Hague Convention. This article provides that protective and provisional measures provided for under the law of a Member State may be requested from the judicial authorities of that State, even if the court of another member State has jurisdiction over the substance of the dispute under the Regulation.

This overcomes a number of the problems earlier referred to.

- There is no jurisdictional pre-requisite: each Contracting State could be requested to exercise jurisdiction, whether or not it has potential jurisdiction over the merits and regardless of property being situated within the jurisdiction.
- What measures are available would be a matter for the national law of the requested court. The ECJ has sought to define what are “provisional and protective measures” and so have the rapporteurs in a very general sense by saying what is not. But ultimately national courts will decide for themselves.
- It is quite clear that the fact that another court has jurisdiction, even exclusive jurisdiction, in respect of the merits of the dispute will not exclude the jurisdiction to order provisional and protective measures.
- Conversely, it is also clear, that a court may make provisional and protective orders even though no substantive proceedings can, or are likely to be, commenced in that court.

On the other hand, it will raise the question of recognition and enforcement. It is most unlikely that other Contracting States will be willing to enforce whatever the State of origin considers to be a “provisional or protective measure”. They can interpose their own definitions but this may lead to uncertainty. Either a definition

as found in the present Article 13.3(b) would have to be inserted, or enforcement (under the Convention, at least) should be precluded. This would still leave a helpful provision allowing national courts to act in aid of each other.

Option C – No provision at all for provisional or protective measures

This is the simplest solution of them all. It would leave it to national law to determine whether such relief could be granted under national jurisdiction and to define what it means. Recognition and enforcement would be left to national law which in practice means there would be none. The drawback, of course, is that some international plaintiffs may find themselves at a disadvantage, particularly in jurisdictions that still apply the *Leiduck* rule. But it may be that those jurisdictions are not very important.

Care should, however, be taken that Article 18 will not inhibit the exercise of national jurisdiction, particularly Article 18.2(a) and possibly (e).

Method of discussion

In preparing these comments, I have followed the paper by Andrea Schulz. However, I would suggest that the best method of discussing the options is to start with the last – C. If that is accepted, further time should not be wasted in discussing the others.

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