Brussels I Review – Provisional Measures

The next topic considered in the Green Paper is the treatment of provisional and protective measures under the Regulation. In the Commission's view:

> *The report describes several difficulties with respect to the free circulation of provisional measures.*
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> *With respect to ex parte measures, it might be appropriate to clarify that such measures can be recognised and enforced on the basis of the Regulation if the defendant has the opportunity to contest the measure subsequently, particularly in the light of Article 9(4) of Directive 2004/48/EC.*
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> *Further, the allocation of jurisdiction for provisional measures ordered by a court which does not have jurisdiction on the substance of the matter may be approached differently than it is today under the existing case law of the Court of Justice. In particular, if the Member State whose courts have jurisdiction as to the substance of the matter were empowered to discharge, modify or adapt a provisional measure granted by the courts of a Member State having jurisdiction on the basis of Article 31, the "real connecting link" requirement could be abandoned. The role of the court seized of the request would be to assist the proceedings on the merits by "lending remedies", particularly when effective protection is not available in all the Member States, without interfering with the jurisdiction of the court having jurisdiction on the substance. When such assistance is no longer needed, the court having jurisdiction on the substance may set aside the foreign measure. Again, a communication between the courts involved may be helpful. This would allow applicants to seek efficient provisional protection where this is available in Europe.*
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> *With respect to the required guarantee of repayment of an interim payment, it might be desirable to specify that the guarantee should not necessarily consist of a provisional payment or bank guarantee. Alternatively, it might be considered that this difficulty will be adequately resolved through case law in the future.*

> *Finally, if exequatur is abolished, Article 47 of the Regulation should be adapted. In this respect, inspiration may be drawn from Article 18 of Regulation (EC) No 4/2009.*

The Commission asks:

> *Question 6:*
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> *Do you think that the free circulation of provisional measures may be improved in the ways suggested in the Report and in this Green Paper? Do you see other possibilities to improve such a circulation?*

The significance of provisional measures in cross-border, commercial litigation must not be underestimated. The grant of such measures, even if "provisional" in the sense in which that term has been defined by the ECJ in its case law, may create an irresistible imperative for a defendant to settle a case. Equally, their refusal may compel the claimant to consider settlement on less advantageous terms, or abandon his claim entirely.

It is, therefore, essential that the limits on the application of Art. 31 of the Brussels I Regulation, and its place within the framework of the Regulation, should be clear. The ECJ's decisions in *Denilauler*, *Van Uden* and *Mietz* create traps for the unwary and it would be useful, therefore, to amend the Regulation to confirm (or, as appropriate, reject) the principles established in those cases. The following amendments, in particular, are suggested:

a. "Provisional, including protective, measures" should be defined in the Regulation (perhaps in a Recital) along the lines of the definition favoured by the ECJ, i.e. "measures which are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from" another court (*Van Uden*, para. 37). Further elaboration of that definition with respect to particular measures (e.g. interim payments) should be left to Member State courts and the ECJ.

b. The distinction drawn in *Van Uden*, influenced by the language of what is now Art. 31 of the Regulation, between cases in which the court granting the measure *has jurisdiction over* the substance of the case, and cases in which it does not, is unhelpful and should be rejected in favour of a test based on the question

whether measures are sought in support of proceedings issued or to be issued in that Member State or a non-Member State (Art. 31 restrictions should not apply) or in support of proceedings in another Member State (Art. 31 restrictions should apply).

c. The requirement of a "real connecting link" to the territorial jurisdiction of the Member State court granting the measure (*Van Uden*, para. 40) does not appear on the face of Art. 31, is difficult to apply and may be argued to be unnecessary. It should either be incorporated into the text of Art. 31 or, preferably, removed. A Recital could be introduced, emphasising that (a) the definition (above) of "provisional, including protective, measures" does not necessarily require the existence of such a link, and (b) in deciding whether to grant, renew, modify or discharge a provisional measure in support of proceedings in another Member State, Member State courts should take into account all of the circumstances, including (i) any statement by the Member State court seised of the main dispute with respect to the measure in question or measures of the same kind, (ii) whether there is a real connecting link between the measure sought and the territory of the Member State in which it is sought, and (iii) the likely impact of the measure on proceedings pending or to be issued in another Member State.

d. The effect of the decision in *Denilauler* should be clarified by expressly bringing provisional measures within the definition of judgment in Art. 32, at least in situations in which it has been possible for the defendant to challenge the measure (whether or not he has done so).

The Commission's suggestion that the court seised of the main dispute should have the power to revoke a provisional measure granted by another Member State court is objectionable on proportionality grounds, as it unduly impinges upon national judicial sovereignty, and has constitutional implications. Greater co-ordination of "primary" and "secondary" proceedings relating to the same subject matter in two Member States could, however, be improved by facilitating communication between Member State courts and by a Recital (such as that suggested above) requiring a court dealing with provisional measures to take into account the views of the court dealing with the substance of the case.

Accordingly, the answer to be given to Question 6 should be that, in view of the significance of provisional measures in cross-border commercial litigation, the limits on the application of Art. 31 and its place within the Regulation should be

clarified, having regard to (but not necessarily following) the reasoning of the ECJ in Van Uden and other cases.