

PROVISIONAL SECURITY OF CREDITORS IN CROSS-BORDER CIVIL AND COMMERCIAL MATTERS

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Abstract Provisional measures can be of utmost importance to creditors especially in relationships with a cross-border element. The Regulation 1215/2012 is the legal source that provides rules regarding the jurisdiction to issue a provisional measure but also offers imperfect provisions regarding the recognition and enforcement of foreign provisional measures issued in other Member States of the European Union. Due to the inadequate regulation, CJEU case law has played an important role, but nevertheless the article finds and opens new questions that have not yet been answered.

1 Introduction

Provisional measures are of the utmost importance to creditors because they either secure the effectiveness of the future enforcement of the creditor's claim or provide temporary regulation of the legal relation in dispute. In either case, they help minimize the creditor's risk of the claim not being (effectively) satisfied. This risk is even higher when the dispute includes a cross-border element: either the debtor and the creditor are domiciled in two different countries or they are in the same country but the debtor's property (which is the subject of the enforcement) is in another one. For disputes in civil and commercial matters in which the cross-border element is of a European nature, the procedural rules of the European Union (EU) regarding the jurisdiction, recognition, and enforcement of court decisions have to be respected. The relevant provisions are determined by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹ (Regulation 1215/2012), which is the successor of Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters² (Regulation 44/2001). In addition to final court decisions, the Regulation 1215/2012 also regulates provisional measures. Unfortunately, these provisions are not as detailed as needed in practice. For example, there currently is no system of rules on jurisdiction for the issuance of provisional measures in disputes with a European element (as is the case for proceedings as to the substance of the matter) and there is no special regulation of the recognition and enforcement of these provisional measures in other Member States. When deciding on these measures and their cross-border effects, a more flexible approach is therefore needed.

While many scholarly articles have been written that have addressed and analysed the rules of the Regulation 1215/2012, the goal of this article is to combine theory of EU legal sources, together with court practise of the CJEU and national courts of EU Member States, and to trace the development of the regulation and the problems of the national courts when using it in practice. In the second chapter, the article explains the phrase "provisional, including protective, measures" and the

¹ OJ L 351, 20. 12. 2012, p. 1. The Regulation 1215/2012 has applied for actions filed since from 10 January 2015.

² OJ L 12, 16. 1. 2001, p. 1.

problems related to the different meanings of the phrase in different national languages of the EU Member States. The third chapter presents the rules regarding the jurisdiction of the court to issue a provisional measure. The division is made between the jurisdiction of the court pursuant to the Regulation 1215/2012 as to the substance of the matter and the jurisdiction of the court according to national law. A comparison also is made between both possible sources of jurisdiction and both the advantages and disadvantages of using each of them. At the same time, national decisions of the courts of various EU Member States are used to demonstrate problems that the courts face when applying Regulation 1215/2012 in practice. The end of the third chapter studies jurisdiction for a provisional measure in the context of arbitration agreements, including cases in which the main dispute is decided in arbitration. The fourth chapter deals with cross-border recognition and enforcement. It thoroughly describes the regulation of the Regulation 44/2001 and articulates the changes brought about through Regulation 1215/2012. The fifth chapter of the article contains concluding remarks, realising that the work in the field of provisional measures has not been finished, and suggests legislation that can improve upon what exists currently.

2 The term “provisional, including protective, measures”

In order to apply the respective articles of the Regulation 1215/2012, it is necessary that the proposed measure is deemed to be a provisional and/or protective measure in terms of the Regulation 1215/2012. The English version of the Regulation 1215/2012 refers to “[p]rovisional, including protective, measures”, which indicates a larger group of provisional measures, one part of which is the smaller group of protective measures. The same section title can, for example, be found in the German (*Einstweilige Maßnahmen einschließlich Sicherungsmaßnahmen*), Croatian (*Privremene mjere, uključujući i mjere osiguranja*) and Slovenian (*začasni ukrepi, vključno z ukrepi zavarovanja*) versions of Article 35. However, there are national versions that speak of these two groups of measures in a different manner. The Italian (*Provvedimenti provvisori e cautelari*), French (*Mesures provisoires et conservatoires*), Dutch (*Voorlopige maatregelen en bewarende maatregelen*), and Portuguese (*Medidas provisórias e cautelares*) versions of the Regulation 1215/2012, for example, refer to provisional *and* protective measures. A deviation regarding the meaning of the measures therefore exists already on the general level and is a consequence of the disunity among the different language versions of the same text.

Doubts then pile up due to the absence of definition of these measures in the Regulation 1215/2012 itself. Since these same ambiguities existed in the predecessors of the Regulation 1215/2012, the case law of the Court of Justice of the European Union (CJEU) has played an important role in defining the phrase “provisional, including protective, measures”. When assessing individual cases, the CJEU has avoided developing rigid classifications or categories on the basis of which some national measures are deemed to fall within the scope of the Brussels regime and while others do not, and instead has opted for a more flexible approach. The crucial factor in deciding whether an individual measure fits into the phrase “provisional, including protective, measure” of the Regulation 1215/2012 is its function. The measures in the frame of Article 35 of the Regulation 1215/2012 are understood as those that are intended to *preserve a factual or legal* situation so as to safeguard rights whose recognition is sought elsewhere than the court having jurisdiction as to the substance of the matter.³ The main function of provisional measures in the frame of the Regulation 1215/2012 is therefore to preservation the status quo. However, a provisional measure must also be of a temporary nature⁴ and reversible. The CJEU also decided that the French measure *action paulienne* does not seek to preserve a factual or legal situation pending a decision of the court having jurisdiction as to the substance of the matter⁵ because it gives final effects and not provisional protection (Pretelli, 2017: 103–104). However, the CJEU decided that the Dutch *kort geding* is a provisional measure in the frame of the Regulation 1215/2012 if additional requirements are fulfilled.⁶ Similarly, national decisions can be found that have found that a *kort geding* falls under the Regulation 1215/2012.⁷

³ Case C-261/90, Mario Reichert, Hans-Heinz Reichert, and Ingeborg Kockler v Dresdner Bank AG, ECLI:EU:C:1992:149 (*Reichert*), para. 34. Arguments can be found in legal theory that such a definition/interpretation is valid only for provisional measures issued by courts having jurisdiction according to the national law (see Heinze, 2011: 603).

⁴ In C/10/507937/KG ZA 16-923, dated 10 October 2016 (available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2016:8083> (accessed: 29. 8. 2020)), a court (Rechtbank Rotterdam) therefore decided that a proposal for the withdrawal or reduction of a bank guarantee has a final character and is therefore not a protective measure. The interesting thing about this specific case is the fact that a bank guarantee was previously offered in exchange for lifting a provisional measure (the content of which was the seizure of a ship that at the time was located in Rotterdam), which was issued by the Dutch court on the basis of Article 35 of the Regulation 1215/2012. In the respective procedure, i.e., C/10/507937/KG ZA 16-923, dealing with the proposal to withdraw or reduce such bank guarantee, the Dutch court decided that its jurisdiction had to be re-established and independently of the fact that the Dutch court did have jurisdiction on the basis of Article 35 of the Regulation 1215/2012 when replacing a provisional measure with a bank guarantee.

⁵ See the case *Reichert*.

⁶ Case C-391/95, Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another, EU:ECLI:C:1998:543 (*Van Uden*) and case C-99/96, Hans-Hermann Mietz v Intership Yachting Sneek BV, EU:ECLI:C:1999:202 (*Mietz*).

⁷ The decision of a Dutch court (Rechtbank Rotterdam), 512578/KG ZA 16-1226 of 11 November 2016 (available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2016:8738> (accessed: 4. 9. 2020)).

The national courts of EU Member States continued to use the above-mentioned “Reichert” definition of provisional measures and interesting national decisions abound. For example, the proposal for the measure by which the plaintiff asked the court to order the defendants to disclose to the plaintiff accounting and financial information relating to its stocks of goods and to refund funds to the plaintiff’s account, as well as return his stocks of goods, was held not a provisional measure in terms of the Regulation 1215/2012.⁸ However, in another case, a measure ordering an intervention in an expert investigation, having the goal of obtaining and securing evidence, was. Such a measure, therefore, is a provisional or protective measure in the frame of the Regulation 1215/2012.⁹

3 Jurisdiction

3.1 Introduction

The only article of the Regulation 1215/2012¹⁰ that explicitly governs provisional measures has almost identical¹¹ wording to the previous Regulation 44/2001¹² and the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 26 January 1968¹³ (Brussels Convention).¹⁴ Hence, we

⁸ Cour d’appel de Paris, no. 17/07253, 14 June 2018 (available at www.doctrine.fr/d/CA/Paris/2018/C49D864C933E0C076C12A (accessed: 29. 8. 2020)).

⁹ A Belgian court Court of Cassation, Judgment no. C.17.0387.N, 3 May 2018 (available at: https://lex.be/nl/doc/be/rechtspraak-juridatlocationbelgie/juridatjurisdictionhof-van-cassatie-arrest-3-mei-2018-bejc_201805034_nl (accessed: 29. 8. 2020)).

¹⁰ Article 35 of the Regulation 1215/2012 states: “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 Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.”

¹¹ The one obvious, but materially unimportant, difference among the articles is the change in the words “Contracting State” to “Member State”. The only possibly material difference among the relevant articles in all three acts is the phrase “under this Regulation” and “under this Convention”, which was omitted in the Regulation 1215/2012. As it is formulated now, it is possible that the courts of another Member State can have jurisdiction as to the substance of the matter that is based on other rules (i.e., national rules, or a bilateral or multilateral agreement with a third country) and not the Regulation 1215/2012.

¹² Article 31 of the BU I states: “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.”

¹³ UL C 27. Article 24 of the Brussels Convention states: “Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, *under this Convention*, the courts of another Contracting State have jurisdiction as to the substance of the matter.”

¹⁴ The same diction can be found in the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Lugano Convention), OJ L 339, 21 December 2007, and its predecessor, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ L 319, 25 November 1988.

can deduce the same rules regarding jurisdiction.¹⁵ There is no unified system of rules on jurisdiction for provisional measures,¹⁶ but jurisdiction to grant a provisional measure is two-track. As envisaged in Article 35 of the Regulation 1215/2012, a creditor has the option to either apply for a provisional measure at a court that has jurisdiction pursuant to the Regulation 1215/2012 as to the substance of the matter, or at a court whose jurisdiction (to issue a provisional measure) is determined according to the national law of this Member State. In both situations, the provisional measure is granted to support the main procedure and to ensure the creditor the security of his claim. In both situations, the rules of the issuing Member State are applied regarding the type of measure that can be issued and the requirements for its issuance.¹⁷ The creditor is the one who chooses in which Member State he¹⁸ will apply to for the security (Rauscher, 2011: 693, para. 22; Magnus, Mankowski, 2016: 792, note 6, para. 32, and 796, para. 41). When choosing the jurisdiction, the creditor can take into consideration different circumstances, e.g., the remoteness of the court, the geographic position of the property, and also the requirements of the national regulations for issuing a provisional measure. Each of these factors play a significant role on whether the proposal sought will be achieved. This multi-option system is therefore definitely in the creditor's interest. However, using either of the two options regarding jurisdiction has a number of specific characteristics.

¹⁵ Due to the nearly identical dictions of the articles on provisional measures, the relevant ECJ case law on the BU I and the Brussels Convention can also be applied to provisional measures in the frame of the Regulation 1215/2012.

¹⁶ The criticism of this can be found in legal theory. Magnus, Mankowski (2016: 785), emphasise that independent regulation of international jurisdiction to order provisional measures would be a better solution. This would fulfil the idea of Recital 4 of the Regulation 1215/2012, according to which the rapid and simple recognition and enforcement of judgments given in a Member State are essential, and this can be achieved by means of provisions unifying the rules on a conflict of jurisdiction in civil and commercial matters.

¹⁷ When issuing a provisional measure, a court decides on the basis of national legislation. Due to the differences in requirements needed for a security to be granted in a specific Member State, comparing case law from different national backgrounds would be senseless. For example, in the Maltese case no. 762/2016, dated 7 July 2016, (available at: www.asser.nl/brusselsibis/GetFile.ashx?ItemID=956 (accessed: 30. 8. 2020)), the court found that the Italian courts had jurisdiction as to the substance of the case, but that the Maltese court had jurisdiction on the basis of its national procedural rules and therefore could issue a provisional measure on the basis of Article 35 of the Regulation 1215/2012. The proposal was finally refused because the right was *prima facie* not established, which is one of the requirements of the Maltese national law for issuing the provisional measure. While the court in this specific case did use the Regulation 1215/2012 to establish its jurisdiction, the specific court decision is not useful for our discussion.

¹⁸ Please note that all generic uses of male pronouns herein signify male or female.

3.2 Jurisdiction of the court pursuant to the Regulation 1215/2012 as to the substance of the matter

A creditor can always apply for a provisional measure at a court that has jurisdiction pursuant to the Regulation 1215/2012 as to the substance of the matter. When using this rule, there is no need for there to be any (special) connection between the specific provisional measure and the jurisdiction of the court/Member State. Such jurisdiction, deriving from the Regulation 1215/2012, exists even if at the same time the specific court does not also have jurisdiction according to its national laws. National legislation can by no means exclude or influence the jurisdiction deriving from the Regulation 1215/2012 (Magnus, Mankowski, 2016: 791).

The court having jurisdiction as to the substance of the matter can issue a provisional measure either prior to the court procedure that concerns the main substantive claims, during such a procedure (Magnus, Mankowski, 2016: 791–792, para. 29), and even in cases where the main procedure is pending in another Member State (Rijavec in Repas, Rijavec, 2018: 240; Magnus, Mankowski, 2016: 793).¹⁹ The question arises whether a court having jurisdiction as to the substance of the matter according to the Regulation 1215/2012 can also issue a provisional measure when the main procedure is pending at the court of a third state. Some commentators opine that such a court does have jurisdiction to issue a provisional measure if its object is property located on the territory of this Member State (Magnus, Mankowski, 2016: 795–796). A potential foreign provisional measure (issued in a third state) will not be recognised and enforced in such Member State, which makes it logical that the court in the Member State in which the property is located should have the option to issue a security on such an object.

Each court potentially having jurisdiction as to the substance of the matter according to Articles 4–26 Regulation 1215/2012 can issue a provisional measure (Magnus, Mankowski, 2016: 792), even when the court procedure as to the substance of the

¹⁹ See Heinze, 2011: 607–608, for an elaboration of the advantages and disadvantages of such a standpoint. *Heinze* stresses that the CJEU in the *Van Uden* case speaks of “jurisdiction as to the substance” and not of “proceedings as to the substance (which) are pending”. Dickinson, Lein (2015: 99–102), elaborate on the opinion that the strict application of the rule on *lis pendens* and respect for the aim of the Regulation 1215/2012 to limit the categories of courts that can issue a provisional measure with cross-border effect would entail that a court otherwise having jurisdiction as to the substance of the matter cannot issue a provisional measure if the main court procedure is already pending in another Member State. Dickinson later stresses the risk of a race to the court with such an interpretation of *lis pendens*.

matter is not or will not actually be pending at that specific court. If the court has jurisdiction for something more (the substance of the matter), it also has jurisdiction for something less (a provisional measure protecting the substance of the matter) (Magnus, Mankowski, 2016: 789).

3.3 Jurisdiction of the court according to national law

However, the court having jurisdiction as to the substance of the matter is not the only court that can issue a provisional measure. A creditor can also apply for a provisional measure at a court whose jurisdiction (to issue a provisional measure) is determined according to the national law of this Member State. The Regulation 1215/2012 therefore refers to applying the national regulations of Member States. The court of a Member State can issue a provisional measure in the frame of the Regulation 1215/2012 if it finds the grounds for its jurisdiction in its national law. In this regard, it is irrelevant which Member State's courts have jurisdiction as to the substance of the matter – even if such jurisdiction is exclusive.²⁰ The fact that the main procedure at the court that has jurisdiction for such on the basis of the Regulation 1215/2012 is pending is not an obstacle to applying for a provisional measure at the court of another Member State if its national rules envisage such jurisdiction (König, 2012: 177, para. 6/13). In order to use such national jurisdiction, it is irrelevant whether the main dispute falls under the material frame of the Regulation 1215/2012 or even whether it is perhaps explicitly excluded from the Regulation 1215/2012.²¹ Rather, in order to invoke Article 35 of the Regulation 1215/2012, it is only necessary that the object of the provisional measure falls under the material scope of the Regulation 1215/2012 (Dickinson, Lein, 2015: 361).

Using a national regulation on jurisdiction can mean using the exorbitant jurisdiction of such national regulation to issue a provisional measure, which is prevented for the substance of the matter (Dickinson, Lein, 2015: 363). However, it is not possible to assess foreign national regulations on jurisdiction, on the basis of which jurisdiction to issue a provisional measure is determined (Sladič, 2018: 88). When deciding whether the court has jurisdiction to issue a provisional measure in the frame of the Regulation 1215/2012, it is not necessary that jurisdiction as to the

²⁰ Case C-616/10, *Solvay SA v Honeywell Fluorine Products Europe BV and Others*, EU: ECLI:C:2012:445, (*Solvay*). See also Magnus, Mankowski, 2016: 797.

²¹ See the case *Van Uden*.

substance of the matter is verified. To the contrary, it is sufficient that the court in fact has jurisdiction to issue a provisional measure on the basis of its national legislation. The court does not have to waste time evaluating the circumstances establishing jurisdiction as to the substance of the matter.²² Applying the relevant article of the Regulation 1215/2012 on jurisdiction and considering the relevant facts to decide whether the court at which the proposal for a provisional measure was lodged has jurisdiction as to the substance of the matter, and consequently also jurisdiction for a provisional measure, takes more time than simply deciding on the existence of jurisdiction on the basis of the court's own national rules. If the object of a provisional measure is such that the court recognizes that it is supposed to be enforced in its Member State,²³ and if the court appreciates that its jurisdiction for a provisional measure derives from its national legislation, then there is no need to waste time dealing with the rules on jurisdiction in the Regulation 1215/2012.

3.4 A comparison

Proposing a temporary protective measure in a Member State with jurisdiction as to the substance of the matter has some distinct advantages. For example, if the main procedure has already been initiated, the court is familiar with the dispute, knows the facts, and has most likely already taken (some) evidence. The creditor therefore probably needs to expend less time and effort to convince the court that the requirements for the provisional measure are fulfilled and thus the decision on his proposal for a provisional measure will be adopted more quickly and easily. However, such a measure might subsequently be subject to recognition and enforcement procedures in other Member States, which will require the expenditure of additional time and money.

Nevertheless, provisional measures can be granted in another Member State if its national rules envisage such a measure and the appropriate jurisdiction. Utilizing this option is useful mainly when the debtor's property is located in a Member State that does not have jurisdiction for the main procedure in which the measure is to be

²² Judgment of the French Court of Cassation, 16-19.731, 14 March 2018. Available at: www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036741990&fastReqId=684983039&fastPos=1 (accessed: 29. 8. 2020).

²³ In the above-mentioned judgment of the French Court of Cassation, 16-19.731, of 14 March 2018, the aim of the provisional measure was to designate an expert in France, intended to preserve or establish proof of facts, where the measure was not intended to enable the applicant to assess the probability of success of an action.

enforced and thus will not have any cross-border effects. The Regulation 1215/2012 itself does not require any nexus between the national jurisdiction and the national provisional measure that is issued in such state. Instead, it relies entirely on the demand for closeness required by national legislation when determining national grounds for jurisdiction to issue a provisional measure. When there is no such connection required in the national legislation, Article 35 of the Regulation 1215/2012 enables the creditor to obtain a provisional measure in a Member State that does not have any connection to the case – so-called exorbitant jurisdiction (Heinze, 2011: 606; Magnus, Mankowski, 2016: 798, note 6, para. 45). This enables the creditor to pursue *forum shopping* (Magnus, Mankowski, 2016: 786, note 6, para. 10).²⁴ However, pursuant to the Regulation 44/2001, other Member States were nevertheless obliged to recognise and enforce such a measure. As explained below, by disabling the cross-border flow of provisional measures issued by a court whose jurisdiction is determined according to the national law of this Member State, forum shopping is now thwarted.

3.5 Jurisdiction for a provisional measure if the main dispute is decided in arbitration

The existence of an arbitration agreement gives rise to another problem related to the issuance of provisional measures. The parties normally conclude an arbitration agreement without specifying the jurisdiction for the issuance of provisional measures. The reason for this probably is because the parties to the agreement are primarily focused upon agreeing on an arbitral tribunal that has jurisdiction for the main dispute.

When such an agreement exists, but is silent on the issue of jurisdiction for the issuance of provisional measures, the question arises as to which court, if any, has jurisdiction to issue a provisional measure related to the main procedure. The Regulation 1215/2012²⁵ and its predecessors are silent on this question, and the

²⁴ The Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) (Proposal for the BU I Recast) of 14 December 2010, COM (2010) 748 final, p. 9, para. 3.1.5., envisaged the steps required to disenabed it, but they were not included in the text of the Regulation 1215/2012 (see below).

²⁵ The proposal for the Regulation 1215/2012 included the intention to include the rule that a provisional measure may be available under the law of that Member State, even if the courts of another Member State or arbitration tribunal have jurisdiction as to the substance of the matter. The goal, therefore, was to enact the rule that was formed in the case *Van Uden*. Sadly, a clear rule as to jurisdiction to issue a provisional measure even if the arbitration

answers were therefore formed in court practice. While it is true that arbitration is excluded from the scope of the Regulation 1215/2012 (as was the case previously regarding the Regulation 44/2001 and Brussels Convention), “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.”²⁶ Consequently, the CJEU in *Van Uden* confirmed that even if the main proceedings have already been, or may be conducted before arbitrators, the Brussels Convention (now the Regulation 1215/2012) is applicable. However, one limitation has to be respected. While there is no doubt that the courts having jurisdiction according to the national law can issue a provisional measure even if the main dispute is dealt with in arbitration, an opposite opinion regarding the courts having jurisdiction as to the substance of the matter can be found. When an arbitration agreement exists, the jurisdiction to issue a provisional measure therefore does not lie with the courts having jurisdiction as to the substance of the matter.²⁷ The reason for this is the fact that the court having jurisdiction as to the substance of the matter is supposed to also have jurisdiction for provisional measures only for reason of procedural economy. The court knows the facts of the case, is familiar with the evidence, and can therefore quickly decide on a proposal for a provisional measure (Magnus, Mankowski, 2016: 807–808). If such court in a specific case does not have jurisdiction for the main proceedings due to an arbitration agreement, then it also does not have jurisdiction for a provisional measure. Based on the CJEU case law, only courts having jurisdiction on the basis of Article 35 have jurisdiction to issue a provisional measure intended to secure a claim, which is decided in arbitration. The only necessary requirement is that the claim that is to be secured by the provisional measure falls within the scope of the Regulation 1215/2012.

However, even though more than 20 years have elapsed since the case *Van Uden*, the question regarding the possibility of the court issuing a provisional measure in the event of the existence of an arbitration agreement often still arises in the case law.²⁸

tribunal decides on the merits did not make it into the Regulation 1215/2012. Nevertheless, the case *Van Uden* should therefore be applied also to the Regulation 1215/2012. For more on this, see Dickinson, Lein, 2015: 358.

²⁶ Case *Van Uden*, para. 33.

²⁷ Case *Van Uden*. This opinion can also be found in legal theory. See, for example, Stone, 2016: 313.

²⁸ See the decision of a Dutch court Rechtbank Rotterdam, 512578/KG ZA 16-1226 of 11 November 2016, in which the dispute was dealt with before an arbitral tribunal in the Netherlands, and the court decided that the Dutch courts had jurisdiction to issue a provisional measure on the basis of Article 35 of the Regulation 1215/2012

4 Cross-border recognition and enforcement

Neither the Regulation 44/2001 nor the Regulation 1215/2012 envisage special, explicit and straight-forward rules on the possibility of cross-border recognition and enforcement of provisional measures. Therefore, the extant rules dealing with judgments are used.²⁹ However, due to the specifics of temporary measures and the creditors' possibility to use exorbitant jurisdictions, the CJEU has introduced a non-negligible number of additional requirements that must be fulfilled if a measure is to have effect in another Member State. Such case law severely limited the possibility of a provisional measure crossing the border. The Regulation 1215/2012 went a step further. Not relying only on the CJEU case law, it indirectly limited the cross-border flow of provisional measures even more tightly.

4.1 Recognition and enforcement as envisaged in the Regulation 44/2001

In order to understand the rules on the recognition and enforcement of provisional measures on the basis of the Regulation 1215/2012, it is first necessary to explain the regulation as it was under the Regulation 44/2001.

(available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2016:8738> (accessed: 4. 9. 2020)). Similarly, see the court decision of the French Cour d'appel d'Aix en Provence, no. 17/12187 of 11 January 2018 (available at: www.labase-lextenso.fr/jurisprudence/CAAIX-EN-PROVENCE-11012018-17_12187 (accessed: 4. 9. 2020)). Article 35 was also used in two Romanian court decisions. In the first, no. 2688/2015 of 18 May 2015 (available at: www.asser.nl/brusselsibis/case.aspx?id=1049 (accessed: 4. 9. 2020)), the court decided that it had jurisdiction to issue a provisional measure despite the existence of an arbitration agreement that determined the jurisdiction of the ICC tribunal in Vienna. In the second, no. 456R of 11 May 2016 (available at: www.asser.nl/brusselsibis/case.aspx?id=1045 (accessed: 4. 9. 2020)), the Romanian court applied the *Van Uden* decision step-by-step, firstly by excluding the possibility of the courts having jurisdiction as to the substance of the matter issuing a provisional measure, and secondly by agreeing to the jurisdiction of the Romanian court based on Article 35. Additionally, the court required, first, that the object of the measure fall within the scope of the Regulation 1215/2012, and, second, that there existed a link between the measure and the jurisdiction of the court seised. Both originate from the *Van Uden* case, and while I completely agree with the requirement that the provisional measure be in the material scope of the Regulation 1215/2012, I am of the opposite opinion regarding the required link. The provisional measure issued on the basis of Article 35 cannot be enforced in any other Member State than in the one of its origin. Therefore, there is no need for the additional requirements that were previously needed for measures to be recognised and enforced in other Member States. For more on this, see the next chapter.

²⁹ This has been indirectly confirmed in the CJEU case law. See case C-39/02, *Mærsk Oilie & Gas A/S v Firma M. de Haan en W. de Boer*, EU: ECLI:C:2004:615, para. 46, in which the CJEU ruled that Article 25 of the Brussels Convention, which defines that for the purposes of this Convention the term 'judgment' means any judgment issued by a court or tribunal of a Contracting State, also applies to provisional or interlocutory decisions. Therefore, the same rules also apply regarding cross-border recognition and enforcement.

On the basis of the Regulation 44/2001, there was an important factor that had a decisive impact on the recognition and enforcement of a provisional measure. The first and most important requirement for a foreign provisional measure to be recognised and enforced in another Member State was the debtor's possibility to contest the measure, either in the procedure for its issuance or subsequently after its issuance, but before it was recognised and enforced in another Member State.³⁰ The rules of the Regulation 44/2001 regarding jurisdiction and enforcement could not be used if the measure was delivered without the debtor being summoned to appear and if it was to be recognised and enforced without prior service on the debtor. This requirement was therefore fulfilled if the measure was issued in an *ex parte* procedure but the decision was then served on the debtor before the procedure for the recognition of the measure had been initiated in another Member State. This requirement had to be fulfilled, irrespective of whether the court with jurisdiction for the main procedure or the court with jurisdiction according to its national law had issued the measure. This made it impossible for the creditor to surprise the debtor with a temporary security measure. If a surprise effect was needed, the creditor had to obtain the provisional measure in all Member States where he needed to secure his claim (under the condition that the individual Member State envisages an *ex parte* procedure for it to be issued), which was inconvenient, time-consuming, and expensive. As a consequence, the Proposal for the Regulation 44/2001 Recast (para. 3.1.5)³¹ envisaged a solution whereby only a provisional measure issued by a court that has jurisdiction as to the substance of the matter could be recognised and enforced in other Member States, and prior notification of the debtor would not be needed. That proposed solution would have enabled the creditor to surprise the debtor with the provisional measure. However, the adopted text of the Regulation 1215/2012 does not feature such a solution. The requirement that the defendant be summoned to appear in the procedure for the issuance of the provisional measure or that the measure be served on him prior to its enforcement is now even explicitly spelled out in the Regulation 1215/2012.³² Therefore, the case law of the CJEU is no longer the sole source of such a limitation and everything written above regarding

³⁰ The case 125/79, *Bernhard Denilauler v SNC Couchet Frères*, EU:ECLI:C:1980:130 (*Denilauler*), para. 18. At the time, the predecessor of the BU I was in use, i.e., the Brussels Convention, but the relevant provisions were comparable. See also Geimer, Schütze, 2010: 581, paras 97 and 98.

³¹ Other proposed changes regarding provisional measures and debates regarding such are not discussed further in this paper because they are no longer relevant. For more details on this, see also Report on the Application of Regulation Brussels I in the Member States (the Heidelberg Report), Study JLS/C4/2005/03. Available at: http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf (accessed: 24. 2. 2016).

³² Article 2(a) uses literally the same words and phrases as the CJEU in the case *Denilauler*, para. 18.

the requirements as to a debtor's possibility of contesting such measure is also valid for the Regulation 1215/2012.

Furthermore, the CJEU was strict as regards measures issued by the court of a Member State whose jurisdiction was based on its national law. For such measures to be recognised and enforced in another Member State according to the simplified rules of the Regulation 44/2001, the CJEU required the existence of a real connecting link between the subject matter of the measure sought and the territorial jurisdiction of the Member State of the court issuing the measure.³³ The meaning of such a link was not further specified³⁴ and was an object of interpretation in each individual case. The existence of a real connecting link in the majority of cases caused the measure to be enforced in the issuing Member State and cross-border recognition and enforcement were not needed.³⁵

However, enforcing a foreign provisional measure can be risky when the content and effects of the provisional measure are the same as those of the main claim, i.e., the issuance of a provisional measure provides the creditor with the satisfaction of the claim that he would otherwise obtain in a final judgment. The CJEU determined that two additional requirements must be satisfied in order for a provisional measure to be granted cross-border recognition and enforcement on the basis of the Regulation 44/2001.³⁶ First, the property that is the object of the provisional security measure needed to be located in the territory of the court of its issuance. As a consequence, it was most likely to happen that such measure was enforced in the Member State of origin and there was no need at all for its cross-border effects.³⁷ Second, if the creditor's claim was subsequently rejected, there was a danger that it was not possible to restore the earlier situation for a defendant against whom a provisional measure with such content had already been enforced. In order to prevent such irreversibility, the creditor had to provide the defendant with a guarantee of the repayment of the sum awarded. Such security had to be provided

³³ Case *Van Uden*, para. 40.

³⁴ Case *Van Uden*, the real connecting link was that the property of the debtor was located in the territory of the issuing Member State.

³⁵ Despite fulfilment of the requirement, it was possible to imagine situations where cross-border enforcement was needed (see Rauscher, 2011: 702, para. 38).

³⁶ Case *Van Uden*, para. 47.

³⁷ In the concrete case, i.e., *Van Uden*, the fact that the property was located in the territory of the issuing court also represented fulfilment of the requirement of a real connecting link. But the latter could be fulfilled also by some other appropriate circumstances.

already in the procedure for its issuance (Geimer, Schütze, 2010: 565, para. 15), but the CJEU did not determine any further details regarding such (i.e., the type of guarantee, its amount, etc.).

All of the aforementioned requirements only applied in the context of the Regulation 44/2001 with regard to provisional measures issued by a court whose jurisdiction was based on its national rules. The requirements needed to be fulfilled in the process for issuing a provisional measure and were reviewed by the court of the other Member State where the recognition and enforcement of such a measure was subsequently proposed. Such system of cross-border recognition and enforcement of provisional measures was too complicated and too burdensome on the creditor.

4.2 Recognition and enforcement as envisaged in the Regulation 1215/2012

When preparing the Regulation 44/2001 Recast, there were incentives to disable the cross-border effects of provisional measures issued by the court that has jurisdiction based on national law, and to simplify the recognition and enforcement of provisional measures issued by a court that has jurisdiction as to the substance of the matter, such that prior notification of the debtor would not be needed. The proposed solutions were sensible and in accordance with the principle of trust,³⁸ but were not adopted.

Even though the text of the Regulation 1215/2012 does not set forth specific rules regarding the cross-border recognition and enforcement of provisional measures, it is possible to find a solution through a combination of Article 2 (a) and Recital 33. According to the former, the rules of the Regulation 1215/2012 regarding the recognition and enforcement of court decisions can only be used for provisional measures granted by a court which, by virtue of the Regulation 1215/2012, has jurisdiction as to the substance of the matter. When in need of a provisional measure that could be recognised and enforced in other Member States, the creditor therefore

³⁸ The Proposal for a BU I Recast has repeatedly emphasised the importance of the principle of trust among Member States for the proposed abolition of the *exequatur* procedure in the Regulation 1215/2012, but it is also important when requiring Member States to recognise and enforce a foreign provisional measure under the simplified procedure. See the Proposal for the BU I Recast, pp. 6 and 7.

has to apply for such at the court that has jurisdiction as to the substance of the matter.

At the same time, the Regulation 1215/2012 does not mention the possibility of the cross-border recognition and enforcement of other provisional measures. Does this mean that such measures cannot be enforced in other Member States at all? Or can they be recognised and enforced by the national rules of an individual Member State? Do the national rules of any of the Member States even allow for the recognition and enforcement of foreign provisional measures? By a grammatical interpretation of Recital 33 it is possible to conclude two things. First, there is no possibility of provisional measures issued by a court whose jurisdiction is based on national rules being enforced in another Member State.³⁹ And second, the national rules of a Member State as to the enforcement of foreign provisional measures can only be applied when the provisional measure has been issued *ex parte* by a court that has jurisdiction as to the substance of the matter. With regard to Recital 33, it could therefore be concluded that there are three groups of provisional measures when it comes to enforcement in another Member State.

First, provisional measures issued by a court having (pursuant to the Regulation 1215/2012) jurisdiction for the main procedure. These measures are recognised and enforced in another Member State by the simplified procedure determined in the Regulation 1215/2012. However, it is necessary for the debtor to be notified of the measure – i.e., the debtor must have a chance to object thereto. However, there is no need for such a measure to have any kind of territorial or other connection (Nuyts in Dickinson, Lein, 2015: 360) with the issuing court. It is assumed that having jurisdiction for the main procedure is a sufficient reason to also have jurisdiction to issue a provisional measure whose function is to secure the right asserted in the main procedure.

Second, provisional measures issued in an *ex parte* procedure by the court that has jurisdiction for the main procedure. According to Recital 33, such measures can be enforced in other Member States only if this is envisaged in the national rules of the individual Member State of enforcement. In my opinion, this is rarely an option provided for in the national provisions regarding private international rules;

³⁹ The same in Kramer, 2013: 343–373.

therefore, these provisional measures will seldom cross the borders of the issuing Member State.

Third, provisional measures issued by a court that has jurisdiction on the basis of a national law. The Regulation 1215/2012 determines the possibility of such courts issuing a provisional measure, but limits the cross-border effects of such measures. According to Recital 33, they cannot be enforced using either the rules of the Regulation 1215/2012 or the national rules of international private law. Having such a provisional measure is therefore of no practical value for the creditor. For him, it is therefore only useful to propose a provisional measure in a Member State that has jurisdiction on the basis of its national law in which the measure will subsequently be enforced. In such situations, the issue of enforcement in other Member States would not even arise.

In my opinion, these rules of the Regulation 1215/2012 on the cross-border effects of provisional measures could also be interpreted slightly differently. They explicitly only permit the use of the simplified procedure for provisional measures ordered by a court which by virtue of this Regulation has jurisdiction as to the substance of the matter if the defendant has been summoned to appear before the court or the judgment containing the measure had been served on him prior to enforcement (Article 2(a)). There is no doubt that the procedure for cross-border recognition and enforcement as determined in the Regulation 1215/2012 cannot be used for provisional measures issued *ex parte* that had not been served on the defendant prior to enforcement, or for provisional measures issued by a court that has jurisdiction under national law. I am of the opinion, however, that for these two instances the national rules on the recognition and enforcement of foreign provisional measures could be used.⁴⁰ I do not see a reason to distinguish between these two groups and to generally make it impossible for the latter to have any effects in other Member States. Why limit the effects of such measures only to the issuing Member State even if another Member State would otherwise recognise and enforce them?⁴¹ Issuing a provisional measure that needs to be enforced abroad would therefore be impossible

⁴⁰ See also Heinze, 2011: 614, questions himself regarding this. See also: Rauscher, 2016: 937–938, para. 42.

⁴¹ Despite the fact that protective measures are strongly connected to enforcement that is subject to the jurisdiction of a Member State (regarding the principle of sovereignty, see also Article 24/V of the Regulation 1215/2012), the recognition and enforcement of foreign provisional measures are not completely unimaginable. See Kunštek, Puljko, 2013: 53.

to enforce. Could the court even deny the issuance thereof because it would not be of any value? Or would it only serve the creditor as a means to intimidate the debtor?

Regardless of which explanation is used, it is clear that provisional measures issued by a court that has jurisdiction on the basis of its national law cannot be the subject of the simplified procedure envisaged in Chapter III of the Regulation 1215/2012. As a consequence, there is no longer a risk of the creditor abusing *forum shopping* to obtain a provisional measure in a Member State that has no connection to the matter, and other Member States having an obligation to recognise and enforce it. Therefore, it is possible to conclude that the requirements determined in the case law of the CJEU for the cross-border recognition and enforcement of such measures (i.e., a real connecting link, property located within the confines of the territorial jurisdiction of the issuing court, and the guarantee of the creditor) are no longer relevant, since they cannot be enforced in other Member States on the basis of the simplified procedure as determined in the Regulation 1215/2012. However, this is not indisputable. It is possible to find opposing opinions, i.e., explicit statements that when issuing a provisional measure a court that has jurisdiction on the basis of national law still has to ensure that all⁴² or some (Wilke, 2015: 138)⁴³ of the requirements are fulfilled despite the inability of those measures to have cross-border effects, or statements (Schlosser, Hess, 2015: 195–197) not explicitly denying this conclusion.⁴⁴ In my opinion, the requirements were established to soften the obligation to recognise and enforce a provisional measure issued by a court with exorbitant jurisdiction in other Member States. However, such an obligation no longer exists and the fulfilment of those requirements will not be verified; therefore,

⁴² Nuyts in Dickinson, Lein, 2015: 363 and 369–372, (see especially p. 372, para. 12.46), claims that even under the Regulation 1215/2012 provisional measures issued by a court that has jurisdiction under national law are required to have a real connecting link to the territorial jurisdiction of the issuing court (see especially p. 372, para. 12.45). He is also of the opinion (pp. 364–367, paras. 12.25–12.33) that for provisional measures anticipating the principal claim, the requirements determined in the case *Van Uden*, are still needed.

⁴³ Wilke agrees that the requirement of a real connecting link is no longer relevant as provisional measures issued by a court whose jurisdiction is based on the national law cannot be enforced in other Member States, but at the same time illogically still requires fulfilment of the requirements determined in the case *Van Uden*, for provisional measures that anticipate a decision on the merits of the dispute.

⁴⁴ The same standpoint can be found in the case law. In Decision no. 456R of 11 May 2016 (case available at: www.asser.nl/brusselsibis/case.aspx?id=1045 (accessed: 4. 9. 2020), the Romanian court grounded its jurisdiction on the national legislation, which is in line with Article 35 of the Regulation 1215/2012. For the issuance of a provisional measure, the court then used the case *Van Uden* and required the existence of a link between the measure and the jurisdiction of the court seised, which was, in my opinion, wrong. As already mentioned, the provisional measure issued on the basis of Article 35 cannot be enforced in other Member States but in the Member State of its origin. Therefore, there is no longer any need for the additional requirements that were previously needed for measures to be recognised and enforced in other Member States.

there is no need to respect them when issuing a measure. Provisional measures can still be issued by the court of a Member State that does not have jurisdiction as to the substance of the matter (Article 35 of the Regulation 1215/2012), but their enforcement will most likely be limited to the territory of the issuing Member State.⁴⁵ These situations concern a national provisional measure, issued and subsequently enforced in accordance with the rules of the national law – all in one Member State. Additional requirements determined to prevent the abuse of the European rules (for simplified cross-border recognition and enforcement) are therefore not needed.

5 Conclusion

Provisional measures are of great value for creditors waiting for the court procedure to conclude and for a decision to be issued and subsequently recognised and enforced in another Member State. When respecting the rules of the Regulation 44/2001, with all of the limitations determined in the case law of the CJEU, it was difficult for a provisional measure to be enforced in a Member State other than the one in which it was issued. It would seem that this is even more difficult in the Regulation 1215/2012 system. The most reliable way for a creditor to obtain an effective provisional measure is to apply for one in the Member State where the security is needed, so that it can be enforced there. The other option is to apply for such a measure before a court that has jurisdiction as to the substance of the matter, which is reasonable primarily when the main procedure has already been initiated and certainly when the creditor does not need to surprise the debtor. However, the surprise effect is almost invariably essential when the creditor's claim is pecuniary. Monetary assets are extremely liquid and even the slightest indication to the debtor that the creditor will obtain a security can cause the withdrawal or transfer of such assets to the other side of the world by means of only a few clicks. The unification of not only procedural rules on recognition and the enforcement of foreign provisional measures, but also of provisional measures themselves (i.e., the requirements, the effects, the procedure for the issuance thereof), is therefore greatly needed.⁴⁶

⁴⁵ If a provisional measure issued by a court whose jurisdiction is based on national rules is to be enforced in the territory of that Member State, the requirement of a real connecting link is supposedly fulfilled anyway, but it is not reasonable to explicitly demand fulfilment of this requirement determined by the CJEU just because the dispute has a European element.

⁴⁶ A starting point of the solution is Regulation (EU) No. 655/2014 of the European Parliament and the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery

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in civil and commercial matters, OJ EU L 189/59, but the regulation only covers part of the problems and has some flaws. For more on this, see: Pogorelčnik Vogrinc, 2019: 267–280, and Pogorelčnik Vogrinc, 2017: 319–334.