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To which extent limit conflicts of provisional measures in cross-border civil proceedings their enforcement ?

A Comparative Inquiry into the British, French and German legal systems

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1 Introduction

Imagine that a Cypriot company, frustrated with the non-repayment of money borrowed to French companies, requests an order in Cyprus to order the freezing of the borrowers' assets by forbidding them from disposing of their money to the extent of the amount owed and order them to disclose their financial assets in foreign bank accounts. Unsatisfied with the continued non-repayment, the lender decides to demand a freezing of the borrowers' bank accounts in the courts of their home country. The borrowers file an appeal against the second order underlining the binding effect of the first order upon which the second court may not infringe under the notion of *res judicata*.

This factual situation was the basis for the 1st Civil Chamber of the French Court of Cassation's intriguing judgement of the 3rd of October 2018.[1] Interesting questions are raised by such complex situations involving provisional measures: How are provisional measures structured in different legal traditions? How do judges deal with foreign law and measures unknown to their own legal system? Do foreign measures limit judges' ability to order new domestic measures, and if yes, to which extent? What is the impact of the jurisdictional basis of the ordering judge? Does the internal organisation of the judicial system allow for conflicts, thereby favouring forum shopping by malicious litigants? How are conflicts between measures resolved? Can such measures be cumulated?

Throughout the following thesis, these questions will be assessed comparatively between the legal systems of France, Germany and the United Kingdom, whilst referring to the relevant EU aspects, in answering the following overarching research question:

> "*To which extent limit conflicts of provisional measures in cross-border civil proceedings their enforcement?*"

It is also this illustrative case of complex cross-border transactions, which highlights the importance of provisional measures in ensuring that creditors obtain full repayment from their debtors even if they are located in different countries, a fact which has become increasingly more common through the globalisation of the financial sector. Notwithstanding these trends, cross-border conflicts also create a potential for abusive or fraudulent judicial strategies of bad faith creditors trying to obtain multiple repayments in various countries.[2]

1.1 working definitions and delimitation of the topic

Before delving into the transnational inquiry, it is necessary to define what provisional measures are for the purpose of this thesis as well as the delimitation of the topic.

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[1] *Sociétés Crystal, Pralong et Société des hôtels d'altitude c/ Société Gorsoan Limited* [2018] Cour de Cassation 1re Chambre civile 17-20.296, 2019 Recueil Dalloz 475.

[2] Vesna Lazić (eds.) and Steven Stuij (eds.), *Brussels Ibis Regulation : Changes and Challenges of the Renewed Procedural Scheme* (1st edn, Springer 2016) 100.

Defining provisional measures is difficult, even within one legal system.[3] Not only do they serve different functions and have different names - their very core can get lost in translation.[4] Even an instrument such as Brussels I Regulation Recast (hereinafter "*Brussels I Recast*")[5] faces this challenge: Whilst the English and German versions seemingly indicate that protective measures are a sub-group of provisional measures, whereas the French version indicates the existence of two distinct alternative groups. Adding another layer of complexity, as will be seen in more detail below in section 2.1, even within a particular system it is difficult to establish an all-encompassing notion of provisional measures.

In his 1992 Hague Academy lecture, Lawrence Collins proposed a distilled definition for transnational cases based on the two main functions,[6] reformulated at their incorporation into the International Law Association's Helsinki Principles as "*(a) to maintain the status quo pending the determination of the issues at trial: or (b) to secure assets out of which an ultimate judgment may be satisfied.*" [7]

This functional definition is more closely aligned with the French version of the Brussels I Recast. Instead of relying upon this definition, the European Court of Justice (hereinafter "*ECJ*") affirmed the understanding based on the English and German versions through the development of an autonomous concept of provisional measures being those measures "*intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter*".[8] This definition will be used as working definition in answering the research question at hand, to the extent not specified otherwise. By their very notion, provisional notions therefore exclude definitive and irreversible measures, such as summarizing orders on the merits of a debt recovery, even though in practice a tendency turning provisional measures into the *de facto*

[3] Gilles Cuniberti, *Les mesures conservatoires portant sur des biens situés à l'étranger* (1st edn, LDGJ 2000) 7–11.

[4] Vesna Lazić (eds.) and Steven Stuij (eds.) (n 2) 101.

[5] 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 matters (recast) 2012 1, art 35.

[6] Lawrence Collins, 'Provisional and Protective Measures in International Litigation', *Recueil des Cours de l'Académie Droit International de la Haye / Collected Courses of the Hague Academy of International Law*, vol 234 (Brill Publishers 1993) 24–25.

[7] International Law Association, 'The Helsinki Principles on Provisional and Protective Measures in International Litigation' (1998) 62 Rabels Zeitschrift für ausländisches und internationales Privatrecht 128, para 1.1.

[8] *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG* [1992] European Court of Justice C-261/90, I European Court Reports 2175 [34].

solution of legal disputes.[9] It is worth noting that extra-territorial provisional measures exist, however their international reach does not specifically modify the findings generally applicable to all provisional measures and thus will not be dealt with more specifically in this thesis.

Due to the great complexity of the issues and the quite restricted harmonisation of domestic roles on a transnational level, provisional measures in the particular contexts of insolvency proceedings and restructuring situations, of arbitration and of evidentiary measures. Furthermore, the inquiry focuses exclusively on intra-EU proceedings with a civil or commercial subject-matter, as these fall within the harmonising scope of the Brussels I Recast, whereas disputes involving a party outside the EU not satisfying the precondition of a geographical link,[10] therefore remain outside the harmonisation and thus under the regulation of the concerned diverging domestic law.[11]

1.2 Research Methodology

To answer the research question of this thesis, the inquiry will rely methodologically on a comparative black-letter analysis of the domestic laws of the three concerned legal systems as well as the relevant aspects of European Union law. For the domestic legal systems, the research started by searching the relevant provisions within the civil procedure acts, before turning to the case-law under these provisions and their critical reception by scholars. This same approach was also followed regarding the discussed aspects of European Union law.

The choice of the legal systems of Germany, France and the United Kingdom as systems to be assessed, is due to the practical considerations of the availability of sources and their cross-border imprint as French law is closely followed in Belgium and Luxembourg, German law in Austria and Switzerland, and English law in Ireland and Cyprus.

Furthermore, it is also necessary to underline that transnational comparative legal research raises some difficulties about choosing the appropriate citation style. This is due to the fact that most styles are developed to only deal with one particular legal system taking into account its specificities. For this thesis, the citation style generally follows the 4th Oxford University Standard for the Citation of Legal Authorities, whilst incorporating particularities of the normal citation styles of the three covered systems through elements of the 2nd Universal Citation in International Arbitration style.

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[9] Bernhard Wieczorek (eds.), Rolf Schütze (eds.), and Martin Gebauer (eds.), *Zivilprozessordnung und Nebengesetze*, vol 14 (5th edn, De Gruyter 2022) art 35 (Rn. 2).

[10] Vesna Lazić (eds.) and Steven Stuij (eds.) (n 2) 99.

[11] Brussels I Recast preamble para 14.

To resolve the complex issue at hand, this thesis will proceed in two main parts before reaching a general conclusion (4). This paper starts by highlighting the different approaches to provisional measures and their structures (2.1), before assessing solutions to the problematic of how to deal with unknown measures (2.2). The focus will then turn towards the circulation of provisional measures and its delimitation on the jurisdictional (3.1) and subject-matter (3.2) level.

2 The measures as such

Provisional measures form the core of the problematic explored in this thesis. It is therefore necessary to acquaint oneself with the different approaches to provisional measures in the three assessed legal systems, to highlight the complexity of this area and identify the source of the conflicts. This will be done in 2.1. Once the divergencies pointed out, the analysis in 2.2. will proceed with how judges react to unknown foreign law measures, as to examine whether this treatment deepens or lightens the conflicts.

2.1 Different approaches to provisional measures

In this sub-part, the different approaches to provisional measures in the three national legal systems as well as the recently developed European autonomous approach will be presented.

2.1.1 The French legal tradition

The traditional French approach based on the Napoleonic codes, includes not only a clear distinction between provisional and protective (conservative) measures, but also quite a variety of different institutions which might be classified as such. As Cuniberti notes in the introduction to his doctoral thesis, the notions of these two kinds of measures are far from doctrinally unified,[12] as also highlighted by the fact that the Civil Procedure Code itself extends the borders of the judges' power to order measures under this notion to the limits of creativity by plaintiff's counsel in referring simply to "*all other provisional, including even conservational, measures*".[13] This broad power is however limited insofar as that certain measures may only be ordered by enforcing judges, intervening only after a process or a certain kind of document has been issued, and not by judges seized on the merits.[14] This differentiation between two kinds of judges, both generally deciding based on contradictory proceedings, is further supplemented by a third competence of a jurisdiction's president to order measures based on unilateral proceedings, as will be further detailed under part 3.1. Due to the limitation of the scope of this thesis, only the most frequent measures relating to prohibitions or authorisations addressed to individuals through measures affecting their property and provisional payments will be assessed.

In case of non-seriously contestable obligations, the creditor may demand a *provision* (a provisional payment) to be made either *ad litem* covering the expenses of the litigation or

[12] Gilles Cuniberti (n 3) 7–8.

[13] Original: «*toutes autres mesures provisoires, même conservatoires*» French Civil Procedure Code art 789 (4).

[14] French Civil Execution Procedure Code art L. 213-6 (2).

another covering the partial or full amount of the debt.[15] In case that the claim will be unsuccessful on the merits or not to the full amount covered, the creditor will need to reimburse the debtor. It is irrelevant whether the underlying obligation is of contractual or non-contractual nature or even based on an administrative decision. As even no urgency must be proven,[16] the only deciding factor is the absence of any serious contestation.[17] Sufficient to constitute a serious contestation is the invocation of an exonerating cause without the need to effectively prove the presence of all its conditions[18] or the unproportionate character of the payment.[19] Consequently, the control covers mainly the evident character of the owed amount. Thus, this measure is particularly interesting for creditors when they do not yet possess any enforceable title or have not yet engaged in litigation. These provisional payments are not to be confused with *injonctions de payer*, which does not tend to be provisional, but rather seek a definite solution by execution of a pre-existent obligation, unless the debtor forms opposition against it. Thus, even whilst their objective is quite similar to provisional measures by protecting the creditor from the debtor's insolvability through a payment, they do not qualify themselves as provisional due to their rather definitive nature. As such, they therefore remain a false friend to be aware of.

The measures acting as prohibitions or authorisations addressed to individuals through measures affecting their property are the archetype of measures *in rem* as they are focused on the property. In France, these measures are what is traditionally defined as *mesures conservatoires*. The main distinguishing idea between the two kinds of protective measures under this category is whether the security provided to the creditor is in form of possession over some movable property – a notion including receivables owed by third parties - of the debtor physically situated with him or a third party (*saisie conservatoire*) or in form of a guarantee to receive payment preferably if some of the debtor's property is sold (*sûreté judiciaire*). The creditor must cumulatively prove that the debt seems founded in its principle as well as that circumstances able to menace the debt's recovery exist.[20] Whilst it is possible for a creditor to demand these conservative measures on the basis of an enforceable title within the meaning of article L- 111-3 of the French Civil Execution Procedure Code – a notion which covers enforceable foreign and domestic judgements as well as notarized contracts, he may also do so beforehand given that he will engage proceedings enabling him to obtain such a title within the month following the enforcement of the conservative measure.[21] This kind of measure is

[15] C. pr. civ. art 835(2).

[16] [1976] Cour de Cassation 1re Chambre civile 75-14.617, 330 Bulletin I 264.

[17] [2014] Cour de Cassation Chambre commerciale 13-11.836, 2014 Bulletin IV 140.

[18] [2015] Cour de Cassation 2e Chambre civile 14-13.405, 2016 RTD civ 182.

[19] [2021] Cour d'Appel Paris 20/13420, 2021 AJDI 434.

[20] C. pr. civ. exéc. art L. 511-1.

[21] C. pr. civ. exéc. art L. 511-4.

specifically interesting for creditors if the debtor possesses valuable property or has high revenue receivables. It is noteworthy not to confuse the above measures with the famous *saisie* under French law – written without the addition *conservatoire* – which concerns the general right of all creditors to obtain satisfaction of the obligation owed towards them by enforcing their enforceable title into the property of the debtor. Even though acting equally as *in rem* remedies, they remain nonetheless definitive, thus not qualifying as provisional measures. The latter thus seems to be a preferable choice for creditors already in possession of an enforceable title, rendering the option of conservative measures for them questionable in its attractivity.

2.1.2 The German legal tradition

In the German legal system, two kinds of provisional measures exist, which are the *Arrest* (attachment) and *einstweilige Verfügungen* (interim injunctions) and which protect different interests of creditors.[22] It should be noted that they are only available before or during proceedings on the merits as it is considered that a final judgment provides sufficient satisfaction for any dispute through its definitive enforcement.[23]

An *Arrest* can be requested by the creditor if the obligation of the debtor is monetary or can be transformed to become monetary, regardless of the conditions attached to it.[24] Its *in rem* subform (*dinglicher Arrest*), which results in taking security in form of attachment[25] or mortgage[26] over the assets of the debtor, is available when the creditor can prove, based on preponderant probabilities,[27] concerns of obstruction or substantial aggravation of enforcement through the debtor,[28] *inter alia* by dissipating his assets[29] or committing crimes affecting his assets.[30] The irrefutable presumption of concerns under §917(2) ZPO in case of satisfactory assets located in a state with whom no reciprocal relations exist, is inapplicable in the context of intra-EU disputes.[31] Such concerns are not perceived as founded, when the creditor already benefits from security, whether located domestically or abroad.[32] If the *dinglicher Arrest* is insufficient, the creditor may request under §918 ZPO a *persönlicher Arrest*, which targets the

[22] Musielak and Voit, *Zivilprozessordnung* (20th edn, Vahlen 2023) para 916 Rn.2.
[23] Musielak and Voit (n 22) para 916 Rn.4.
[24] German Civil Procedure Order (Zivilprozessordnung) para 916.
[25] ZPO paras 930 and 931.
[26] ZPO para 932.
[27] ZPO para 920(2); Musielak and Voit (n 22) para 920 Rn.9.
[28] ZPO para 917.
[29] [1996] Oberlandesgericht Karlsruhe 2 UF 140/96, 1997 NJW 1017.
[30] [2017] Oberlandesgericht München 23 U 4047/16, 2017 ZInsO 847.
[31] [2019] Oberlandesgericht Köln 5 U 126/18, 2020 ZInsO 2019.
[32] [1972] Bundesgerichtshof VI ZR 135/70, 1972 NJW 1044.

debtor *in personam* through reporting duties or even imprisonment[33] in order to allow the creditor to find the debtor's assets. However, it cannot be used to obtain satisfaction through coercion.[34] Independently of the ordered form, the debtor can always stop the provisional enforcement by making a payment into court for the duration of the proceedings, which acts as security for the creditor.[35] Thus, this faculty provides indirectly for interim payments.

In case of non-monetary obligations, the creditor can demand an *einstweilige Verfügung* (interim injunction). If the obligations are subject to concerns of obstruction or substantial aggravation, a *Sicherheitsverfügung* obliging the debtor to maintain the status quo can be requested as protection.[36] To regulate a certain legal relationship and not merely protect the individual claim, a *Regelungsverfügung* may be requested to prevent dire consequences. In the face of an urgent need for satisfaction, which if provided later through substantive proceedings would result in a loss of purpose of the obligations and grave detriments to the creditor, he may request a *Leistungsverfügung* under §940 ZPO requiring the debtor *in personam* to execute.[37] A faculty of interim payment instead of the injunction is provided as well, however subject to the presence of special circumstances guaranteeing sufficient protection of the creditor's interests.[38]

2.1.3 The English legal tradition

Within the English common law, a broad discretion is given to judges to order interim measures, for which Civil Procedure Rule 25.1 provides a non-exhaustive list, whenever they find it just and appropriate.[39] Three of these measures, namely freezing injunctions, anti-suit injunctions and interim payments are the most relevant in the context of transnational proceedings. Freezing injunctions, also called Mareva injunctions, are *in personam* prohibitions against the debtor restrain him from dissipating his assets, whichever they might be.[40] To obtain such a freezing injunction, the creditor must prove not only a good arguable case on the merits and the satisfaction of the just and convenience test,[41] but also a real risk of asset dissipation.[42] Whilst their effects may be limited to the territory of the UK, they may also be extended to be

[33] Musielak and Voit (n 22) para 918 Rn.2.

[34] Kindl and Meller-Hannich, *Gesamtes Recht der Zwangsvollstreckung* (4th edn, Nomos 2021) para 918 ZPO Rn.2.

[35] ZPO para 923; Musielak and Voit (n 22) para 923 Rn.1.

[36] ZPO para 935.

[37] [2014] Oberlandesgericht Celle 2 W 237/14, 2015 NJW 711.

[38] ZPO para 939.

[39] UK Senior Courts Act 1981 s 37.

[40] *Mareva Compania Naviera SA v International Bulk Carriers SA* (1975) 1 All ER 213 (Court of Appeal).

[41] *American Cynamid Co v Ethicon Ltd (No 1)* [1975] AC 396 (House of Lords).

[42] *Nippon Yusen Kaisha v Karageorgis* (1975) 1 WLR 1093 (Court of Appeal) 1095 per Denning.

worldwide in which case the creditor must bear in mind the duties to inform the English judge of foreign enforcement proceedings in order to allow him to control the continued necessity for the injunction.[43] Anti-suit injunctions are prohibitions targeted at the defendant *in personam* to discontinue foreign judicial proceedings. Their objective is not to impede on other states' sovereignty, but rather to protect a threatened contractual right not to be sued in that foreign court[44] as well as prevent vexatious and oppressive, including inconsistent and parallel, proceedings.[45] Interim payments constitutive of a reasonable proportion of a highly probable amount to be determined on the merits, may be ordered by the judges if the creditor has either already obtained or has satisfactory chances of obtaining such payment on the merits.[46] Thus, the interim payment mechanism is mostly similar to the ones in France and Germany.

2.1.4 Harmonisation tentatives

Due to the significant divergences in the structuration of provisional measures within the legal systems of its member states, the European Court of Justice had difficulties distilling a common definition of provisional measures necessary for article 35 of the Brussels I Recast, which linguistic versions diverge as mentioned in the introduction. Its case-law now defines the notion to include all measures "*intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having juris- diction as to the substance of the matter*"[47], thereby stressing its temporary, reversible and ancillary nature.[48] This definition has been utilised as basis for the European Account Preservation Order (EAPO), which allows the creditor to essentially obtain an attachment over the specified account in cross-border proceedings.[49] Given that the EAPO Regulation is without impact on the Brussels I Recast,[50] the result of the research question will not differ whether a national measure or an EAPO was ordered.

Concludingly based upon the above developments, the different understandings and natures of provisional measures, except provisional payments, in the three assessed national systems seem incompatible both regarding the formulation of their objective and territorial reach, even though

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[43] *Dadourian Group International v Simms* (2006) 1 WLR 2499 (Court of Appeal).

[44] *Deutsche Bank AG v Highland Crusader Offshore Partners LP* (2009) 1 WLR 1023 (Court of Appeal).

[45] *OceanConnect UK Ltd v Angara Maritime Ltd* (2010) 1 All ER 193 (Court of Appeal).

[46] UK Civil Procedure Rules r 25.7.

[47] *Reichert and Kockler v Dresdner Bank* (n 8) para 34.

[48] *Louise de Cavel v Jacques de Cavel* [1980] European Court of Justice C-120/79, I European Court Report 731 [9].

[49] Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters 2014 59, art 1.

[50] EAPO Regl art 48.

the underlying requirements for their pronunciation are fairly similar. These differences affect efforts of international harmonization as was seen in the European Union's functional definition or also the broad definitions contained in the Helsinki Principles,[51] the ALI/UNIDROIT Principles of Transnational Civil Procedure,[52] and the ELI/UNIDROIT Model European Rules of Civil Procedure.[53] This leads to legal uncertainty for all parties involved in cross-border disputes where courts will have to deal with a foreign measure as will be analysed in the subsequent sub-part and decide whether to enforce foreign measures ordered on the base of various jurisdictional bases.

2.2 The equivalency transformation of foreign measures

In the previous sub-part, it was seen that cross-border civil proceedings involving provisional measures will necessarily introduce an element of foreignness into the receiving legal system. The question therefore arises how the three different systems deal with such measures subject to, and indeed creatures of, foreign law.

2.2.1 Dealing with foreign law generally

The divide between civil and common law systems becomes once again evident in regard to how judges deal with foreign law when it arises on the merits of ongoing proceedings. In Germany, which can be seen as generally representative for civil law systems in this regard, the question of foreign law is regarded as a question of law and based on the principle *iura novit curia* the judges are supposed to know and apply the foreign law *ex officio*.[54] Nonetheless the parties may assist this process of research, especially if they have special knowledge or better access to the sources,[55] and are heard on these questions in order to guarantee the contradictory nature of the proceedings. In their quest, the judges may rely upon the European Convention on Information on Foreign Law to request the concerned state to answer the questions relating to it law on basis of a description of the relevant facts, which the contacted state will be obliged to answer.[56] Quite the opposite view is followed in the permissive common law systems, where

[51] International Law Association (n 7) r 1.

[52] The American Law Institute and UNIDROIT, *ALI/UNIDROIT Principles of Transnational Civil Procedure* (CUP 2005) r 8.1.

[53] ELI and UNIDROIT, 'ELI/UNIDROIT Model European Rules of Civil Procedure' r 184.

[54] ZPO para 293. The Max-Planck Institute for Comparative and International Private Law has recently published soft-law guidelines as a help for courts on how to deal with foreign law. These so-called Hamburg Guidelines are available on the internet in German under www.hhleitlinien.de

[55] [1992] Bundesgerichtshof IX ZR 233/90, 118 BGHZ 151, 163.

[56] European Convention on Information on Foreign Law arts 3, 4 and 10.

foreign law is treated as a question of fact,[57] which must be pleaded in order to be considered[58] and not merely treat its contents as identical to English law[59] as well as proven by the party invoking it.[60] A mixed approach is taken in France, where even though foreign law is a question of law, the judges are only obliged to research and apply it *ex officio*, if the concerned rights are of such a nature that the parties may not freely dispose of them.[61] However, if the parties may freely dispose of their rights, then judges follow the permissive approach requiring the parties to plead the foreign law,[62] based on the rationale that a non-pleading would constitute a tacit choice of law in favour of French law.[63] This difference in treatment of foreign law affects the circulation of provisional measures insofar as that judges in permissive systems or in France for disposable civil and commercial rights will simply regard the contents of the foreign provisional measure as equal to a more or less similar domestic measure, thereby allowing for the possibility that the debtor's obligations are denaturized and become more strict or even paradoxical.

2.2.2 The equivalency transformation

During the enforcement proceedings of foreign provisional measures, the above mentioned dealing with foreign law will influence the approach to and the outcome of the proceedings on the potential refusal of recognition or enforcement. In order to prevent the refusal of recognition and enforcement on the mere basis that the measure as such is unknown in the hosting legal system, it has been recognised, since before the recast, by domestic courts that they may adapt, complete or specify a foreign measure even in the absence of any explicit provision to this regard in EU law.[64] The European Court of Justice has, although in the context of a prejudicial question on the Community trade mark, clarified the extent of this transformation requirement as transformation into a similar measure or if none exists into a measure providing the same protection.[65] The judges have also specified that this duty exists based on the foundation of sincere cooperation within the Union, which is required due to the non-harmonisation of procedural and enforcement rules. This duty including its extend have now been incorporated into the newly enshrined article 54 of the Brussels I Recast. During the adaptation process, the

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[57] *Guaranty Trust Co of New York v Hannay & Co* (1918) 2 KB 623 (Court of Appeal) 667 per Scrutton.

[58] *Ascherberg, Hopwood & Crew v Casa Musicale Sonzongo di Pietro Ostali* (1971) 1 WLR 1128 (Court of Appeal) 1131B-E per Russell.

[59] *The Parchim* (1917) 1918 AC 157 (Privy Council) 161 per Parker.

[60] *Guaranty Trust v Hannay* (n 57) 655 per Warrington.

[61] [1999] Cour de Cassation 1re Chambre civile 97-16.684, 174 Bulletin I 114.

[62] [1999] Cour de Cassation 1re Chambre civile 96-16.361, 172 Bulletin I 113.

[63] Gilles Cuniberti, *Conflict of Laws : A Comparative Approach* (1st edn, Edward Elgar 2017) 117.

[64] [1990] Bundesgerichtshof IX ZB 68/89, 48 NJW 3084; [1993] Bundesgerichtshof IX ZB 55/92, 28 NJW 1801.

[65] *DHL Express France SAS v Chronopost SA* [2011] European Court of Justice C-235/09 [56 and 59].

seized judge must first crystallise the objective pursued and interests protected by the unknown foreign measure, before secondly verifying that the domestic measure to be ordered develops similar effects. Lastly, the judge must bear in mind that the transformed measure may not have effects subsequent to the transformation that go beyond the effects under the original ordering law,[66] thereby establishing a maximum cap. This transformation must not be, however, a revision on the merits of the foreign judgment as this undermines the fundamental mutual trust principle within the Union[67] and is prohibited by article 52 of the Brussels I Recast. As this transformation process requires the foreign measure to be unknown, or at least too imprecise for an enforcement in the domestic system, it cannot be applied to ordered payments,[68] and thus provisional payments, as these are known in all three assessed systems.

2.2.3 Its application in practice to provisional measures and their acccessories

The German judicial application of the transformation is surprising as it highlights increased precision requirements, which are not met by common law Mareva injunctions as they do not specify precisely which assets are subject to the order[69] nor all measures from civil law systems. An example of the latter is the French *astreinte*, whose final sum until liquidated by a judge remains unprecise, due to formulations such as x amount of EUR for each month of continuing non-compliance, thus requiring the German judge to verify whether it is clear which law governs the calculation of the precise amount to be paid.[70] This restriction of application in practice to interests is surprising both in light of the different natures of provisional measures in the different systems as well as of the existence of article 55 of the Brussels I Recast which deals specifically with such penalty payments. Nevertheless, there exists some case-law in which German courts, although without express reference to this article, have transformed English *in personam* measures into a German *in rem* measure[71] or merely accessorized it with a coercive measure,[72] thereby providing additional evidence for a transformation requirement outside article 54 during enforcement proceedings. It must be noted however, that the German judges have not conducted in depth assessments whether the substituted measure is indeed closest to and lower than the extents and effects of the English injunction, which is taken up for debate below. French courts remain on the opposite. They recognize English interlocutory

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[66] *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams* [2009] European Court of Justice C-420/07, I European Court Reports 3571 [66].

[67] *Prism Investments BV v Jaap Anne van der Meer* [2011] European Court of Justice C-139/10 [31].

[68] Bernhard Wieczorek (eds.), Rolf Schütze (eds.), and Martin Gebauer (eds.) (n 9) art 54 Rn. 4.

[69] [1994] Oberlandesgericht Karlsruhe 9 W 32/94, 1996 ZZPInt 91; Peter Schlosser, 'Anerkennung und Vollstreckbarerklörung englischer "freezing injunctions" (zu Cour de Cassation, 30. 06. 2004 - 1re civ.)' 2006 Praxis des Internationalen Privat- und Verfahrensrechts 300, 302.

[70] (n 64) ; (n 64).

[71] [2010] Oberlandesgericht Nürnberg 14 W 1442/10, 2011 IHR 215.

[72] [1998] Oberlandesgericht Frankfurt am Main 13 U 175/98, 1999 OLGR Frankfurt 74 ; (n 69).

orders as such without any transformation,[73] even though those *in personam* measures are not known in the French legal tradition. This non-application can be interpreted as a sign of an increased transnationalisation of civil procedure in the wake of globalisation whereby foreign measures are incorporated into a domestic system.

Generally, there is few case-law under this provision, as its *ex officio* application lies with the authorities charged with the execution under the relevant domestic law, which are not judges, and thus only those cases in which the debtors complain against the execution, the relevant courts, described under 3.1, are able to review the facts and apply the article. Nevertheless, it is of paramount importance to assess theoretically within the frame of this thesis how this provision should be applied and reasons why it is not. For the purposes of this endeavour, the common law concept titled contempt of court allows for an appropriate and interesting object of study, as it is often understood to be unknown to civil law systems,[74] thereby highlighting the potential for conflicts between different legal systems. However, it seems that to the certain extent presented below, its regime is fairly similar to the French *astreinte* and the German *Zwangs- und Ordnungsmittel*.[75] This plays an important role as, according to the European Court of Justice's case-law, such ancillary coercive measures are actually included in the transformation obligation of article 54.[76]

The common law notion of contempt of court, which has its origins in equity, is traditionally distinguished into criminal and civil contempt. Criminal contempt covers interferences with the administration of justice being contempt in the face of the court, scandalising the court and infringement of the *sub judice* principle, whereas civil contempt covers non-compliance of the addressed person with court orders.[77] For conduct to constitute civil contempt, the person must (i) have completed a prohibited act or failed to do a prescribed act after having received notice of the order, (ii) done the act or failed to do it intentionally and (iii) have known all the facts qualifying the act or the failure as a breach.[78] Based on these constitutive criteria, it is necessary that the concerned order to which the breach relates was sufficiently unambiguous as to what

[73] *M Wolfgang Stolzenberg c/ CIBC Mellon Trust Company et autres* [2004] Cour de Cassation 1re Chambre civile 01-03.248, 191 Bulletin I 157; *Crystal et al c/ Gorsoan* (n 1).

[74] Michael Chesterman, 'Contempt: In the Common Law, but Not the Civil Law' (1997) 46 International & Comparative Law Quarterly 521, 521.

[75] It should be noted that Michael Chesterman undertook a comparative assessment of the common law contempts and the French *astreinte*. In the following, the findings of his research are complemented with the legal developments since the publication of his article in 1997 as well as with a comparison to German law.

[76] *DHL v Chronopost* (n 65) paras 55–57.

[77] *Home Office v Harman* (1983) 1 AC 280 (House of Lords) 310 per Scarman. Nowadays enshrined in Part 81 of the Civil Procedure Rules.

[78] *Cuadrilla Bowland Ltd v Persons Unknown* (2020) 4 WLR 29 (Court of Appeal) [25 per Leggatt].

was prohibited or prescribed.[79] The relevant judge may punish civil contempt through a fine, sequestration of assets, an enlargement of the related injunction or even committal to imprisonment depending on the seriousness of the breach and what is just and appropriate under the given factual circumstances.[80] The title of civil contempt may lead to confusion as it remains, at least outside English law,[81] a criminal measure,[82] which as such is not enforceable under the Brussels I Recast and would fall into the public policy exception discussed in more detail below under 3.2. However, case-law in France[83] and Germany[84] has nonetheless allowed for the enforcement of provisional injunctions accompanied by this sanction. The French Court of cassation has specified that the accompanying contempt of court is to be regarded as separated from the main order, thereby posing an argument of severability between the principal and accessory, into the latter of which contempt falls. The *Oberlandesgericht* (OLG, court of appeal) Nürnberg did not even comment on this accessory feature, but contended itself with transforming the injunction into a *dinglicher Arrest*, whereas the Court of Appeals of Frankfurt and Karlsruhe elegantly dealt with both the principal and accessory in transforming the injunction into an *Ordnungsmittel*.

Whilst the recognition is certainly favourable for the transnational and cross-system circulation of provisional measures, the question arises why neither the French nor the German judges considered it necessary to complement the recognition and enforcement of the English injunction with an *astreinte* or a *Zwangs- oder Ordnungsmittel* as a supplement for the civil contempt to remain in compliance with the same-effect requirement of article 54 and the European Court of Justice's case-law on the effects of foreign judgments in another forum? Starting the comparison, the first aspect which presents itself concerns when such an accessory commences. Whereas contempt of court is an automatic accessory of English orders without any particular requirement except knowledge of the order debtor about the content of the order, an *astreinte*[85] as well as *Zwangs- oder Ordnungsmittel*[86], all three of which are pronounced after contradictory proceedings, must in most cases be requested by the plaintiff, although the judges may order an *astreinte ex officio*, as should be done in case of recognition and enforcement of English injunctions according to article 54 of the Brussels I Recast.

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[79] *Melanie Olu-Williams v Oscar Olu-Williams* (2018) 9 WLUK 396 (High Court (Family Division)) [33 per Williams].

[80] *Cuciurean v Secretary of State for Transport High Speed 2 Limited* (2021) 3 WLUK 224 (Court of Appeal) [16-17 per Warby].

[81] In English law, civil contempt is not a criminal offence, see *Director of Serious Fraud Office v O'Brian* [2014] AC 1246 (Supreme Court) [38 per Toulson].

[82] *Stephen Andrew Benham v UK* [1996] European Court of Human Rights 19380/92, 22 EHRR 293 [56].

[83] *Stolzenberg c/ CIBC Mellon* (n 73).

[84] (n 71).

[85] C. pr. civ. exéc. art L.131-1.

[86] ZPO paras 888 and 890.

The French *astreinte* operates as a measure putting financial pressure on the debtor *in personam* as target,[87] thus not on his property. Its objective is to induce compliance with the terms and obligations, independent on their kind thus including negative obligations[88] or to pay certain sums of money,[89] of a judgment, which must be enforceable even if only provisionally[90] and of which it is the accessory.[91] The ordering judge may decide on the nature of the *astreinte*, whether it is definitive incorporating an originally determined amount which may not be changed,[92] or provisional allowing for later adaptation based on the conduct of the debtor and his difficulties.[93] The financial pressure commences from the moment of its notification[94], and is stopped through its liquidation, occurring after late or continued inexecution,[95] by the enforcement or ordering judge determining the precise amount due based on the conduct and difficulties of the debtor, thereby transforms the pressure into a debt owed to the creditor. The ordering of an *astreinte* allows, even before its liquidation, for provisional measures to be taken on its basis together with the debtor's resistance to execute.[96] It seems, that given the similarities of the English contempt and the French *astreinte* in their *in personam* qualification, that the French judges have relied on this domestic possibility to implicitly justify their decision in the Gorsoan case.

Within the German legal system, it is distinguished between *Ordnungsmittel* (disciplinary measures) sanctioning past misconduct and *Zwangsmittel* (coercive measures) operating as inducement for the future to comply with the ordered obligations. *Zwangsmittel*, which may consist in either a penalty payment or even imprisonment, can only be utilised for obligations whose execution is purely dependent the intent of the debtor[97], who is not inclined to comply and which are positive, thus not prohibitions,[98] regardless of whether the performance would be situated domestically or abroad.[99] On the contrary, *Ordnungsmittel*, which may also result in either a penalty payment or imprisonment, can be requested by the creditor for negative

[87] [2006] Cour de Cassation 2e Chambre civile 05-17.118, 218 Bulletin II 208.

[88] [2009] Cour de Cassation Chambre commerciale 08-10.923, 29 Bulletin IV.

[89] [2009] Cour de Cassation Chambre commerciale 08-15.835, 106 Bulletin IV.

[90] [2002] Cour de Cassation 2e Chambre civile 00-20.262, 166 Bulletin II 132.

[91] [2003] Cour de Cassation Chambre commerciale 01-01.118, inédit.

[92] C. pr. civ. exéc. art L.131-4(2).

[93] C. pr. civ. exéc. art L.131-4(1).

[94] [2004] Cour de Cassation 2e Chambre civile 02-15.144, 168 Bulletin II 142.

[95] [2000] Cour de Cassation 2e Chambre civile 99-10.299, inédit; [2005] Cour de Cassation 2e Chambre civile 03-19.473, inédit.

[96] C. pr. civ. exéc. art R.131-3.

[97] Kindl and Meller-Hannich (n 34) para 888 ZPO Rn. 2; Musielak and Voit (n 22) para 888 Rn. 6.

[98] [1979] Oberlandesgericht Frankfurt am Main 20 W 395/79, 1980 Rpfleger 117.

[99] [2002] Oberlandesgericht Köln 11 W 16/02, 5 IPRax 446.

obligations, be their source in a judgment or deed, both in form of inaction or action, i.e. putting down a poster, depending on the relevant circumstances[100] after such disciplinary measures have been threatened for non-compliance through a court decision.[101] Given the effect of both German accessory measures, it seems that they too qualify as *in personsam* as they are directed against the debtor as person and not his property.

Additional complexity arises through the so-called Dadourian guidelines, laid down in the likewise called case,[102] which under 4 prohibit that the creditor may obtain any additional benefits through the enforcement of the English freezing injunction abroad, which according to Heinze would be the case if the foreign court transforms the English injunction into an *in rem* measure.[103] This poses the risk that in case of a transformation of the injunction into an *Arrest* in Germany, as was done in the precited decision of the OLG Nürnberg,[104] or into any French measure, the English court may retract the injunction and potentially sanction the creditor with civil contempt, thereby leaving him without any satisfactory international protection. As the non-English court is not bound by these guidelines, even in case the judges are supposed to apply the foreign law *ex officio*, it is of utmost importance that the creditor bears this limitation in mind and kindly requests the court to decide accordingly. Given the approach of judges to foreign law in France, it may well be that the Court of cassation implicitly bore in mind this guideline whilst deciding the 2018 case[105] in order to maintain the efficiency of the creditor's protection, thus providing a sound comparative reason for the retained solution. The above mentioned qualification of the French *astreinte* as an *in personam* measure allows for the simple and elegant compliance to the requirements of article 54 of the Brussels I Recast and the Dadourian guideline 4 by recognising English injunctions and merely adding it to maintain sufficient protection of the creditor's interests.

[100] [2020] Bundesgerichtshof I ZB 79/19, 1 DGVZ 21.

[101] [1962] Oberlandesgericht Stuttgart 2 W 12/62, 62 MDR 995.

[102] *Dadourian v Simms* (n 43).

[103] Christian Heinze, 'Grenzüberschreitende Vollstreckung englischer freezing injunctions' 2007 Praxis des Internationalen Privat- und Verfahrensrechts 343, 346.

[104] (n 71).

[105] *Crystal et al c/ Gorsoan* (n 1).

3 Their circulation

It was seen above that different legal systems base themselves on different conceptions and designs of provisional measures, which thus may be transformed when entering another legal system. It is now necessary to analyse this entering of another legal system through cross-border circulation. In the European Union, the Brussels I Recast harmonises the circulation of judgments in civil and commercial matters and abolishes the otherwise required exequatur stage. This means that European civil judgments are directly recognisable[106] and enforceable by themselves[107] in all other member states, unless the judgment debtor argues successfully in front of the courts of the receiving state that the judgment is entrenched with one of the exhaustively listed grounds for refusal.[108] Orders containing provisional measures fall within the definition of a judgment under the Regulation and can therefore easily circulate across borders insofar that only measures ordered by a court having jurisdiction on the merits, in contradictory proceedings or at least having been notified to the debtor who may form recourse against them, and the absence of any generally applicable ground of refusal.[109] Based on this structure of the regime, it is necessary to assess how the jurisdictional (3.1) and substance-matter (3.2) delimitations act to prevent, or on the contrary deepen, conflicts of provisional measures, thereby precluding abusive litigation strategies.

3.1 Jurisdictional delimitations to their circulation

Given the harmonisation within the EU, it seems opportune to commence the assessment with the Brussels I regime, before continuing with the intricacies of each of the three systems.

3.1.1 The Brussels I regime

Under article 35 of the Brussels I Recast, provisional measures can be ordered either by the judges competent as to the merits of the dispute or by the judges of a specific member state even in absence of competence on the merits under the Brussels I regime, thus extending to include autonomous jurisdictional bases otherwise considered exorbitant as for instance those based on nationality or mere location of assets,[110] whose applicability is normally excluded in intra-EU proceedings.[111] Nevertheless, the European Court of Justice has clarified that article

[106] Brussels I Recast art 36.

[107] Brussels I Recast art 39.

[108] Brussels I Recast art 45; *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams* (n 66) para 55.

[109] Brussels I Recast art 2(a).

[110] Bernhard Wieczorek (eds.), Rolf Schütze (eds.), and Martin Gebauer (eds.) (n 9) art 35 (Rn.6).

[111] Brussels I Recast art 5.

35 still requires a real connecting link between the forum and the measure.[112] This article does not intend to cover the procedure, requirements and effects of provisional measures under each autonomous procedural law of the member states, but rather seeks to coordinate the ordering and circulation of such measures in the context of transnational disputes.[113] It is for this objective, that article 35 is paramount to the analysis of this thesis, which intends to highlight one of its shortcomings. The creditor may also only obtain an EAPO from the judges competent on the merits in the absence of any judgement or other authentic act,[114] whereas once a judgment or authentic act delivered, the creditor is bound to the court of that state for requesting an EAPO.[115] In fact, the Brussels I Recast distinguishes between alternative, protective and exclusive jurisdictional bases.

Alternative jurisdiction covers both the generally available forum of the domicile of the defendant,[116] who often is the debtor though not exclusively for instance in proceedings to find absence of liability, as well as the special jurisdictions for *inter alia* contractual or tortious matters.[117] In case of alternative grounds of jurisdictions, it seems multiple alternatively competent judges, between which the plaintiff has to operate a choice, may order provisional measures and these measures may all circulate transnationally, as long as the orders do not conflict on the subject matter level, especially regarding their objective, under the concepts of *lis pendens* and *res judicata* as discussed in detail in the next sub-part. It is worth noting, although this will not be dealt with more specifically in our assessment due to the limited impact on the topic, that if a proceeding is directed against multiple defendants, then the plaintiff may choose among the courts of the domiciles of the various defendants under the doctrine of connexity.[118] Hence, these kind of jurisdictional bases allows to a certain extent for forum shopping among pre-defined options.

Protective jurisdiction pertains to protect the weaker party by limiting the courts in which it may be sued as well as extending in which it may sue against the stronger party is the case for

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[112] *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line* [1998] European Court of Justice C-391/95, I European Court Report 7091 [40]; *Skarb Państwa Rzeczypospolitej Polskiej reprezentowany przez Generalnego Dyrektora Dróg Krajowych i Autostrad v TOTO SpA - Costruzioni Generali and Vianini Lavori SpA* [2021] European Court of Justice C-581/20 [52].

[113] Bernhard Wieczorek (eds.), Rolf Schütze (eds.), and Martin Gebauer (eds.) (n 9) art 35 (Rn.1-2).

[114] EAPO Regl art 6(1).

[115] EAPO Regl art 6(3-4).

[116] Brussels I Recast art 4.

[117] Brussels I Recast art 7.

[118] Brussels I Recast art 8.

insurance,[119] consumer,[120] and employment contracts.[121] Whilst they therefore act fairly similar to ordinary alternative bases, their incidence is underscored with regards to the choice of forum agreements. Whereas the regime recognises the parties' freedom to choose the court to which they would like to submit any future dispute actively in the form of a prior agreement[122] or tacitly by contributing to the proceedings without raising a defence as to the incompetence of the court *in limine litis*,[123] this freedom is limited within the fields of the protective jurisdictions as to only allow agreements concluded after the arising of a specific dispute, again in a view to protect the weaker party.[124] If the parties did indeed agree to a prorogation of competence, then this competence will be seen as exclusive, thereby extinguishing the competence of otherwise available fora. The other kind of fixedly established exclusive jurisdictional bases, which prevent the conclusion of any choice of forum agreement in their presence, cover immovable property, corporate law, public law bodies, intellectual property and, logically, proceedings for the enforcement of a decision in the concerned state.[125] These protective and exclusive bases are relevant insofar as that within their scope of application an order for provisional measures made would be considered as taken under the autonomous procedural law of the member state subject to the consequences thereof regarding cross-border enforcement.

As mentioned above, only the courts of the member state in which the creditor wishes to enforce the foreign judgment are exclusively competent to decide on the enforceability – even though this is automatic for enforceable intra-EU judgments[126] – or its refusal.[127] In view of preventing conflicts between various provisional measures under the various jurisdictional bases, the Brussels I regime harmonizes the grounds for refusal of recognition and enforcement, the most relevant of which on the subject-matter level are addressed in detail under 3.2. On the jurisdictional level, the recognition and enforcement of provisional measures may be refused if the decision was obtained in violation of the protective and exclusive bases outlined above[128] or of the relevant member state's public policy.[129] Precisely this public policy aspect becomes relevant in case of *ex-parte* measures, which infer with the debtor's fundamental right to be heard. For this reason, such measures must be notified to the debtor to allow him to contest them before the creditor can demand their enforcement abroad. Furthermore, measures ordered

[119] Brussels I Recast arts 11–14.
[120] Brussels I Recast art 18.
[121] Brussels I Recast art 21.
[122] Brussels I Recast art 25.
[123] Brussels I Recast art 26.
[124] Brussels I Recast arts 15, 19 and 23.
[125] Brussels I Recast art 24.
[126] Brussels I Recast art 39.
[127] Brussels I Recast art 24(4) and 47.
[128] Brussels I Recast art 45(1)e.
[129] Brussels I Recast art 45(1)a.

under the autonomous jurisdictional bases of the member states' under article 35 of the Recast must have effects limited to the territory of the ordering state[130] and may not be enforced under the Recast,[131] whilst enforcement under the concerned national law remains possible.[132] *De facto*, such a limit to the circulation and territorial reach is unconceivable for *in personam* measures, when those are not by their very wording limited to a certain territory or subject to an enforceability condition, thereby highlighting one of the shortcomings of the Brussels I regime allowing for conflicts.

3.1.2 The French jurisdictional regime

As also contained in the Brussels I regime, French jurisdictional rules base themselves on territorial attribution of competence based on the residence of a party or the location of property or execution of an obligation, a notion including the solicited provisional measure.[133] On the material level, the Civil Procedure Code operates various distinctions. Firstly, a distinction is made based on the subject matter whether the case concerns a civil or commercial matter, which is important due to the existence of different tribunals of first instance. If the matter is a civil one, it will be addressed by the Judicial Tribunal (*tribunal judiciaire*), whereas if it is commercial, it will be addressed by the Commercial Tribunal (*tribunal de commerce*).[134] Logically, the reason for this differentiation is due to the more liberal regime relating to proof applicable in commercial cases as well as other procedural adaptations for more efficient dispute resolution. Nevertheless, a division of competence poses the potential risk of the development of diverging case-law creating judicial uncertainty, which can only be overcome if a chamber of the Court of Cassation decides to send the problematic to its plenary assembly.

Secondly and more importantly, different judges are competent based on whether the concerned tribunal has already been seized on the merits, the urgency and contradictory nature of the measure as well as the kind of requested measure. If a tribunal has been seized on the merits and instituted a judge of the chamber – called *juge de la mise en état* – in charge of preparing the dispute to be heard during an audience, then only this judge is competent, unless another judge has been seized before his designation with regards to obtain a specific measure,[135] to

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[130] Brussels I Recast para 33.

[131] Brussels I Recast art 2(a).

[132] Trevor Hartley, 'Provisional, Including Protective, Measures', *Civil Jurisdiction and Judgments in Europe: The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention* (2nd edn, Oxford University Press 2023) 389 para 22.26.

[133] (1957) 356 Bulletin II (Cour de Cassation 2e Chambre civile).

[134] It should be noted that this distinction is not applicable as such in the Grand Est region, in which specific local law rules on jurisdiction apply.

[135] [1998] Cour de Cassation 2e Chambre civile 96-18.510, 96 Bulletin II 58.

order any provisional measure except those under the exclusive competence of another judge.[136] The orders of this judge will be exclusively based on contradictory proceedings,[137] therefore not allowing for a surprise effect of the ordered measure, and will only be subject to judicial review together with a decision on the merits creating the potentiality of unsatisfaction for either of the involved parties.[138]

In the absence of any seizing on the merits, any provisional measures, except those in the exclusive competence of enforcement judges, may be order by the president of the competent tribunal – judicial or commercial – either acting as *référé* based on contradictory proceedings[139] or deciding based on a *requête* in unilateral proceedings. [140] Generally whilst the plaintiff often has the choice between these two forms, a constant line of case-law requires the plaintiff to utilise the *référé* procedure unless the circumstances require that the measure should be taken in a non-contradictory manner. [141] This need for unilateral action may be argued in case a creditor needs a surprising provisional measure in order to prevent a bad faith debtor of making his assets unavailable, which is a lot more difficult, if not even impossible, to argue in a case similar to the aforementioned Gorsoan case where other measures protecting the assets have already been imposed. Moreover, the plaintiff must also demonstrate when making an application under these procedures that there exists some urgency requiring an immediate non seriously contested response,[142] some imminent damage or manifestly illicit trouble even in presence of serious contestation,[143] any not seriously contestable obligation for the purposes of ordering a provisional payment,[144] or the need to establish proof on which could depend the resolution of future proceedings.[145] Whilst it might seem that this agglomeration of competencies of the president may decrease potential conflicts of foreign and domestic provisional measures, it should be borne in mind that his order taken under one may not make reference to his other competencies under the risk of annulation under the stringent case-law of the Court of Cassation.[146] Conservational measures as presented under 2.1 for which no enforceable title within the meaning of articles L. 111-3 and 511-2 of the French Civil Execution Procedure Code exist, can only be ordered by enforcement judges (*juges de*

[136] C. pr. civ. art 789.
[137] C. pr. civ. art 793.
[138] C. pr. civ. art 795(4).
[139] C. pr. civ. arts 484 and 834f.
[140] C. pr. civ. arts 493 and 845.
[141] [2008] Cour de Cassation 2e Chambre civile 07-14.858, 104 Bulletin II.
[142] C. pr. civ. art 834.
[143] C. pr. civ. art 835(1).
[144] C. pr. civ. art 835(2).
[145] C. pr. civ. art 145.
[146] (2003) 2003 Procédures 238 (Cour de Cassation 1re Chambre civile).

l'exécution),[147] except if the measure concern a commercial debt in which case the president of the Commercial Tribunal acting as *référé* is also competent.[148] The enforcement judge will decided based on unilateral proceedings in order not to menace the surprise effect protecting the concerned assets of the debtor.[149] For exequatur purposes heard in a contradictory manner, a judge of the Judicial Tribunal, sometimes the president on virtue of bilateral conventions, is exclusively competent regardless whether the foreign judgement concerns a civil or commercial matter.[150]

The structure of the French judiciary, which can seem intimidatingly opaque for foreigners, poses a found feast for abusive judicial strategies from a bad faith plaintiff as various judges are competent for provisional measures and their enforcement, consequently increasing the risk of contradictory judgements. This can only be overcome through effective subject-matter delimitation to the circulation of the orders as discussed under 3.2.

3.1.3 The German jurisdictional regime

In contrast, Germany does not know such a pronounced differentiation between civil and commercial courts as France. Indeed, civil and commercial matters are only treated in different chambers of the same court, whose difference mainly consist in the different composition of the judges as in commercial chambers the two bysitters are merchants contributing as volunteers. Also as mirrored in the Brussels I regime, German courts operate with a territorial delimitation of competence supplemented by a material criterion of the amount in dispute deciding whether the local court (*Amtsgericht*) or district court (*Landgericht*) will be competent. For competencies regarding provisional measures, different courts are competent depending on the type of requested measure.

If the creditor requests an *Arrest*, then he will have the choice between the court seized on the merits or the local court in which territory the concerned property or person is located at the time of the request.[151] This choice is available both in purely domestic as well as international disputes, however if the dispute is indeed international then the local court of the location of the property will be fictitiously seen as court seized on the merits[152] or the creditor may turn to the court which could be seized on the merits under jurisdictional rules of the ZPO including an exorbitant jurisdictional basis not recognized by the Brussels I regime in §23 ZPO

[147] French Judicial Organization Code art L. 213-6.

[148] C. pr. civ. exéc. art L.511-3.

[149] C. pr. civ. exéc. art R. 511-1.

[150] COJ art R. 212-8(2°).

[151] ZPO para 919.

[152] [2001] Oberlandesgericht Karlsruhe 9 W 88/01, 2002 MDR 231.

(jurisdiction of *forum rei situæ*).[153] This fiction is due to otherwise arising problems with regard to the right of judicial review as only the court seized on the merits is competent for the termination of the ordered measure.[154] As the provision envisions two concurring alternatives, it is very important that the subject-matter delimitation discussed in 3.2 are effectively put into place to prevent any abuses by malicious creditors. Parties may conclude choice of forum agreements concerning the court to be seized on the merits which therefore would become competent to order a measure under this provision, however they may not conclude a choice of forum agreement covering only the court competent for ordering such a measure.[155]

If, however, the creditor chooses to pursue an *einstweilige Verfügung*, then he will primarily have to turn to the court seized on the merits. [156] In case no court has been seized on the merits or only a foreign court would be competent on the merits, the notion of "court seized on the merits" contained in §943 ZPO has been held to include the court which would be competent on the merits, if the dispute were only domestic[157] and without this determination of the court to request this measure precluding a later choice of another court on the merits in case of alternative jurisdictional bases.[158] Whereas these kind of measures are generally ordered on the basis of contradictory oral proceedings, the creditor can obtain an order on the basis of unilateral proceedings if he demonstrates the existence of temporal urgency meaning that the length of contradictory oral proceedings would deprive the measure of their objective or preventive urgency meaning that an invitation of the debtor would deprive the measure of their objective therefore requiring a surprise effect.[159]

In very temporally urgent cases, in which the request at the courts seized on the merits would create inacceptable temporal delays, the local court at the location of the property or person would be competent to order an *einstweilige Verfügung* [160] acting as prolonged arm of the court seized on the merits.[161] This competence is however strictly limited to the ordering of the measure and the determination of the time limit in which the creditor has to invite the debtor to contradictory confirmation proceedings of the measure at the court seized or seizeable on the merits. Due to the structure of this procedural safeguard of the debtor's interest, this option is

[153] [1977] Oberlandesgericht Düsseldorf 3 U 6/77, 1977 NJW 2034.

[154] Kindl and Meller-Hannich (n 34) para 919 ZPO Rn. 1.

[155] ZPO para 40(2)1.2.

[156] ZPO para 937.

[157] Bernhard Wieczorek (eds.), Rolf Schütze (eds.), and Martin Gebauer (eds.), *Zivilprozessordnung und Nebengesetze*, vol 11 (5th edn, De Gruyter 2019) para 943 Rn. 1; Musielak and Voit (n 22) para 943 Rn. 8.

[158] Kindl and Meller-Hannich (n 34) para 937 ZPO Rn. 5.

[159] [1987] Oberlandesgericht Karlsruhe 6 W 30/87, 1987 NJW-RR 1206.

[160] ZPO para 942.

[161] Bernhard Wieczorek (eds.), Rolf Schütze (eds.), and Martin Gebauer (eds.) (n 157) para 942 Rn. 2.

only available in cases where the court seized on the merits is a German court, thus excluding also this option for all choice of forum agreements in favour of a non-German jurisdiction.[162] As this urgency requirement is even more stringent as the aforementioned urgency in the context of §937 ZPO, the latter urgency must also be given,[163] resulting again in an *ex-parte* proceeding.

Upon urgency, it is furthermore also possible for all provisional measures that the presiding judge decides alone instead of the whole bench of judges.[164] Whilst this option seems similar to the French *référé*, the stricter limitation of circumstances under which such urgent decisions are possible lead to a clear distinction. Under the German civil procedure rules, the presiding judge may only decide alone if the decision was not meant to be a decision by a single judge in any manner[165] and no oral proceedings are legally required under §128(4) ZPO. Hence, only orders are covered under this provision. Additionally, this power is subject to material delimitations insofar as the judge may only decide upon ordering the measure, but not on any contentions against it by the debtor.[166] The urgency required again refers to the unacceptability of temporal delays burdening the creditor in the case of inclusion of the by-sitting judges and the subsequent oral proceedings,[167] thus being most relevant for commercial chambers and going beyond the mere urgency criterion constituting the foundation of the request for the measure.[168]

In the rare event that a debtor would indeed contest an equivalency transformation made under article 54 of the Brussels I Recast, the competent jurisdiction would either be the court who made the order or the enforcement court in case the transformation was performed by a bailiff.[169] The enforcement court is defined elsewhere in the civil procedure code as the local court at the location of enforcement.[170] In comparison to the French judicial organization, the German solution to simply add the competence over enforcement disputes to the local courts prevents any unnecessary complexity therefore allowing foreign parties to better understand which courts are to be seized in which cases.

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[162] [2008] Oberlandesgericht Frankfurt am Main 19 W 42/08, 2009 OLGR Frankfurt 419.

[163] Bernhard Wieczorek (eds.), Rolf Schütze (eds.), and Martin Gebauer (eds.) (n 157) para 942 Rn. 6.

[164] ZPO para 944.

[165] Bernhard Wieczorek (eds.), Rolf Schütze (eds.), and Martin Gebauer (eds.) (n 157) para 944 Rn. 1.

[166] Bernhard Wieczorek (eds.), Rolf Schütze (eds.), and Martin Gebauer (eds.) (n 157) para 944 Rn. 2.

[167] Bernhard Wieczorek (eds.), Rolf Schütze (eds.), and Martin Gebauer (eds.) (n 157) para 944 Rn. 3.

[168] [1988] Oberlandesgericht Karlsruhe 6 W 103/88, 1989 WRP 265.

[169] ZPO para 1114.

[170] ZPO para 764.

For proceedings relating to the refusal of recognition and enforcement of foreign judgements under articles 45 and 47 of the Brussels I Recast, the district court of the domicile of the debtor is competent, except when his domicile is outside Germany, in which case the district court of the location of enforcement will be competent.[171] The procedure will be conducted contradictorily even if no oral audience is required to take place,[172] thereby allowing the debtor to be heard and preventing any surprise effect even though such an effect is impossible under the Brussels I regime which requires that the debtor was either involved in the proceedings or had been notified the concerned judgement. Consequently, the whole German judicial organization in relation to competencies regarding provisional measures is highly concentrated around the local and district courts of the domicile of the debtor and the location of enforcement, therefore reducing the potentiality of obtaining various contradictory judgements on different aspects from different judges under malicious judicial strategies.

3.1.4 The English jurisdictional regime

In the UK, Schedule 4 of the Civil Jurisdictions and Judgments Act 1982 (hereinafter „*1982 Act*") contains the rules on the applicable jurisdictional bases, which are modeled after the Brussels I rules and remain for the time being unaffected by Brexit due to their inclusion in the statute as general rules applicable to every proceedings including those with an extra-EU aspect.[173] Two exorbitant jurisdictional bases have to be highlighted, which are the location of the property, immovable or movable, whose possessory or security rights are in question[174] thus covering disputes between creditors and debtors when the former tries to enforce his general security right over the debtor's property, and transient jurisdiction, sometimes also referred to as tag jurisdiction, for which it is sufficient to serve the defendant with the claim form whilst he is on the territory of the UK no matter for how long.[175] There is nevertheless a certain degree of control of convenience of England as forum by the court to be seized which decides whether to give permission to the plaintiff to bring the case in it.[176] Closely related to this control of convenience of the forum for the permission to serve the claim form and thus institute proceedings, is the doctrine of *forum non conveniens*, which permits a court at any point to stay, strike out or dismiss any proceedings.[177] Under the doctrine, the defendant can demand this stay or dismissal if he proves in a satisfiable manner to the court "*that there is some other*

[171] ZPO para 1115.

[172] Musielak and Voit (n 22) para 115 (Rn.4).

[173] Trevor Hartley, 'Basic Principles of Jurisdiction in Private International Law: The European Union, the United States and England' (2022) 71 International & Comparative Law Quarterly 211, 212.

[174] UK Civil Jurisdiction and Judgments Act 1982 s 3(h) Schedule 4.

[175] UK Civil Procedure Practice Direction 6B r 3.1(4A)a.

[176] UK CPR r 6.36 and 6.37.

[177] UK 1982 Act s 49.

tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all parties and for the ends of justice".[178] It should however be noted that this doctrine is not applicable in intra-EU proceedings as the European Court of Justice held that it undermines the imperative character of article 4 of the Brussels I Recast, foreseeability and legal certainty.[179]

With regards to judicial organization, there is no main distinction between civil and commercial matters but rather between civil matters heard before the High Court[180] and criminal matters before the Crown Court.[181] Within the High Court, a distinction is drawn between the Chancery Division, which is generally competent in absence of any specific competence of another division, the King's Bench, which deals with cases under Admiralty, Patent and Commercial jurisdiction, as well as the Family Court dealing with family and matrimonial cases.[182] All divisions apply cumulatively the statutory law and equity, but the latter will prevail in case of conflict.[183]

Specifically for provisional measures, different provisions exist depending on whether the same court is competent on the merits of the case, its jurisdiction is doubtful or in absence of substantive jurisdiction. In the case, the relevant High Court is competent also on the merits of the claim, it may order a provisional payment,[184] an interlocutory injunction including freezing injunctions[185] or an attachment of a bank account[186] as it conceives as just and potentially under specified terms and conditions. In the case of doubtful jurisdiction, the 1982 Act prescribes to act under a fiction as if the court has jurisdiction.[187] In the absence of substantive jurisdiction, thus in cases where another court might have exclusive jurisdiction based on the Brussels I regime or a choice of court agreement, the High Court may nevertheless order a provisional measure specified in the Civil Procedure Rules, if another part of the UK or another 2005 Hague Convention state is competent on the merits.[188] Whereas this seems quite restricted, it must be borne in mind that the mere presence of assets or of a person even for a short time is sufficient to establish substantive jurisdiction as described above.

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[178] *Spiliada Maritime Corporation v Cansulex Ltd* [1986] AC 460 (House of Lords) per Goff of Chieveley.

[179] *Andrew Owusu v N B Jackson* [2005] European Court of Justice C-281/02, I European Court Report 1383 [37–46].

[180] UK 1981 Act s 61.

[181] UK 1981 Act s 73.

[182] UK 1981 Act s 62 and Schedule 1.

[183] UK 1981 Act s 49.

[184] UK 1981 Act s 32.

[185] UK 1981 Act s 37.

[186] UK 1981 Act s 40.

[187] UK 1982 Act s 24.

[188] UK 1982 Act s 25.

The recognition and enforcement of foreign judgments of a state, which is reciprocally recognizing English judgments, is decided upon application by the High Court.[189] The notion is foreign judgments referred to expressly includes judgments on interim payments.[190] Foreign judgments will be set aside, if the High Court considers that they lacked jurisdiction on the merits,[191] though it can be tacitly accepted by not raising a defense *in limine litis*. Concluding, the judicial organization in the UK concentrate all competences for ordering provisional measures and enforcing foreign measures in the High Court, thereby contributing to diminishing the risk of malicious judicial strategies exploiting various competent courts at once.

Whereas the Brussels I regime tries to establish harmonized rules regarding jurisdiction of the member states, article 35 of the Recast allows member states under their autonomous jurisdictional bases, including exorbitant ones normally excluded, to order provisional measures. This far-reaching faculty enables to considerably increase the complexity of transnational proceedings and may be abused by malicious plaintiffs. Indeed, the extent of the partition of the various competences related to provisional measures and the enforcement of foreign judgements within a particular legal system can become an important tool in favour of malicious plaintiffs, thereby rendering forum shopping problematic and also important. Thus, it is very important that the subject-matter delimitations assessed in the next sub-part work as to further contribute to the prevention of conflicting provisional measures, objective to which also the jurisdictional delimitations contribute insofar that they limit the possibility of ordering measures to courts competent either on the merits under the Brussels I regime or under the member states' autonomous jurisdictional bases.

3.2 Subject-matter delimitations to their circulation

After having seen that the European and national judicial constructions and jurisdictional competences can delimit the circulation of provisional measures as well as augment or prevent any conflicts between them, it is now necessary to turn to subject-matter delimitations preventing their circulations and conflicts. Nonetheless, this prevention occurs mainly *a posteriori* through refusal proceedings as since the Brussels I Recast a foreign judgment automatically enjoys recognition and enforceability in another member state without the need for any exequatur proceedings.[192]

[189] UK Foreign Judgments (Reciprocal Enforcement) Act 1933 s 2(1).

[190] UK 1982 Act s 35(1).

[191] UK 1933 Act s 4(1)a.ii.

[192] Brussels I Recast arts 36(1) and 39.

3.2.1 The public policy exception

The first delimitation arises from the public policy exception to recognition and enforcement contained in article 45 (1)a of the Brussels I Recast. Under this exception, a court may refuse recognition and enforcement if the concerned foreign judgment contains an infringement constituted by "*a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order*".[193] Whilst it seems that this exception mainly comes into play for unilaterally decided measures, it should be borne in mind, as discussed in the previous sub-part, that their circulation is limited to cases where cumulatively the ordering court was competent on the merits under the Brussels I regime and the decision has been notified to the debtor before the enforcement proceedings, thereby enabling him to rely upon the recourse set out in the law of the ordering court. Consequently, this exception is rather relevant to provisional measures regarding their third party effects as those third parties, which are especially banks, are normally not heard during the ordering of the measure as well as the refusal of exequatur proceedings and which are especially highlighted through the coverage of third parties by criminal contempt of court for intentional and non-intentional violations of English injunctions.[194] Hence, this absence of any opportunity to be heard is in violation with the fundamental right to be heard recognised in all three assessed legal systems. For this reason, English courts nowadays delimit the third party contempt of court effect of injunctions in other countries to their recognition and enforceability in that country.[195] Thus, it must be analyzed whether the German and French systems allow for this enforceability or even have similar provisions in their own laws. Indeed, both systems recognize that through knowledge of such an injunction, third parties disregarding their prohibitions to the profit of the debtor are considered as acting in bad faith. Whilst in France, this act of bad faith merely gives rise to tortious liability of the third party itself,[196] the act also becomes void *ab initio* under German law.[197] Concluding, the public policy exception does not prevent the liability and annulment of the act of a third party to the debtor's benefit, as those remedies are provided for in other provisions of the relevant laws.

3.2.2 The principle of *lis pendens*

[193] *Dieter Krombach v André Bamberski* [2000] European Court of Justice C-7/98, I European Court Report 1935 [37].

[194] *Attorney-General v Times Newspaper Ltd* (1991) 1 AC 191 (House of Lords) 214 per Ackner.

[195] UK Civil Procedure Practice Direction 25A.

[196] French Civil Code art 1310.

[197] German Civil Code (Bürgerliches Gesetzbuch) para 136 together with 135 and 407.

The second delimitation is focused on preventing future conflicts through future orders between two pending proceedings before two different courts under the principle of *lis pendens*, sometimes referred to as *lis alibi pendens*, which requires the secondly seized court to stay or dismiss the claim. This principle can be regarded as the civil law equivalent to the common law doctrine of *forum non conveniens* as both pursue the same objective of preventing parallel litigation although the common law doctrine does so indirectly.[198] Within the Brussels I Recast, *lis pendens* is codified for intra-EU proceedings in article 29, subject to the conditions of articles 31 and 32. To successfully prevent conflicts, the chronologically second seized court must stay *ex officio* the proceedings until the first court seized by the same parties and the same cause of action has confirmed its jurisdiction, when the second court must dismiss the proceedings brought before it. Based on this formulation, the obligatory[199] chronological, determined according to the respective *lex fori*,[200] dismissal is applicable when two conditions are met in relation to the two proceedings conducted (i) same parties through the (ii) same cause of action. Natheless, it must be stressed that in the French version of the regulation, which is equally authentic and binding, the second criterion is split into the *cause* and the *objet* of the claim, which has led the European Court of Justice to qualify this principle as a broadly construed autonomous concept under EU law.[201] Thus, article 29 is composed of the cumulative triple identity of the parties, the subject-matter and cause of action, thereby covering the request made by the claimant, the facts and rule of law relied upon.[202] As the conditions are essentially identical and also assessed in the same manner between *lis pendens* and *res judicata*,[203] kindly refer to the detailed analysis below on the application of the conditions to the specific context of provisional measures. It must be stressed that under no circumstances, not even the aforementioned public policy exception, may the secondly seized court verify the competence of the first court when applying article 29.[204] Notwithstanding this general rule, a court seized under an exclusive jurisdictional basis, both based on the Brussels I Recast or an choice of court agreement, may not stay or dismiss the proceedings based on concurrent proceedings in another court without exclusive jurisdiction,[205] the latter of which shall dismiss the claim before it even

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[198] Gilles Cuniberti (n 63) 199 and 208; Bernhard Wieczorek (eds.), Rolf Schütze (eds.), and Martin Gebauer (eds.) (n 9) art 35 Rn. 5.

[199] *Erich Gasser GmbH v MISAT Srl* [2003] European Court of Justice C-116/02, I European Court Report 14693 [72].

[200] Brussels I Recast art 32.

[201] *Erich Gasser GmbH v MISAT Srl* (n 199) para 41.

[202] *The owners of the cargo lately laden on board the ship 'Tatry' v the owners of the ship 'Maciej Rataj'* [1994] European Court of Justice C-406/92, I European Court Report 5439 [38–39].

[203] [2020] Cour de Cassation 1re Chambre civile 18-20.023, Bulletin I.

[204] *Stefano Liberato v Luminita Luisa Grigorescu* [2019] European Court of Justice C-386/17, European Court Report [45].

[205] *Irmengard Weber v Mechthilde Weber* [2014] European Court of Justice C-438/12, European Court Report [56–57].

if seized chronologically first, all whilst not precluding the right of the weaker party to benefit from the protective jurisdictional bases.[206] Since the cause of action between proceedings on provisional measures and proceedings on the merits are different, thus not identical, *lis pendens* is inapplicable between a court seized on the merits and another one seized for provisional measures.[207]

In their commentary on the Brussels I Recast, the three German scholars Wieczorek, Schütze and Gebauer argue that in principle the exception of *lis pendens* is not applicable in the context of various concurrent proceedings on provisional measures.[208] To support their argument, they refer extensively to other German commentaries on the regulation, without providing any supporting case-law for their argumentation, which is subject to broadly formulated exceptions in case of multiple requests for orders of forced performance or in prohibitive orders undermining proceedings on the merits. This is highly criticisable as neither of articles 29 and 31 states that they exclude provisional measures from their scope of application and such an exclusion is furthermore also not mentioned in the preamble of the regulation or the definitions. Additionally, this argumentation seems to be a rather odd particularity of the German legal system in light of the European Court of Justice's case-law characterising *lis pendens* as an objective and automatic mechanism,[209] equally applicable in the context of provisional measures.[210] Ordinarily such European case-law should have a harmonizing effect. Nonetheless, the conclusion is fairly similar when pursuing a pragmatic approach given the relative short time period between the request of provisional measures and their ordering in all the legal systems assessed, which in addition are often requested *ex parte* and only notified to the debtor before a potential transnational circulation. Thus, it is highly unlikely that a party, who often do not know of the proceedings, will rely on this principle as a defense to prevent a potential conflict in this specific context. Consequently, this unlikeliness of application can be exploited by malicious creditors, however this would require meticulous litigation planning and would not resolve the subsequent limited practical effect they could enjoy from the obtained measures when it comes to their transnational circulation. In the sphere of malicious litigation strategies, one of the most prominent strategies to follow is the "Torpedo". It consists in the wilful chronologically first seizing of fora known for their lengthy processes, thereby dragging the time till satisfaction of the creditor through a final judgment on for a long period of time. Whilst the Torpedo cannot be used directly for proceedings for provisional measures, as they

[206] Brussels I Recast art 31 (2-4).

[207] *HanseYachts AG v Port D'Hiver Yachting SARL and Others* [2017] European Court of Justice C-29/16, European Court Report [35].

[208] Bernhard Wieczorek (eds.), Rolf Schütze (eds.), and Martin Gebauer (eds.) (n 9) art 35 Rn. 83.

[209] *HanseYachts AG v Port D'Hiver Yachting SARL and Others* (n 207) para 28.

[210] *Italian Leather SpA v WECO Polstermöbel GmbH & Co* [2002] European Court of Justice C-80/00, I European Court Report 4995 [41].

are demanded by the creditor in a forum of his choice, it can play an indirect role either through skilful negotiation from the debtor to exclusively give jurisdiction on the merits to a slow forum or through the debtor commencing negative liability proceedings in the hope of being held non-liable. Negative provisional measures would be orders allowing the debtor to spend money freely or, in their most notorious form, as anti-suit injunctions preventing the creditor to pursue proceedings in view of obtaining satisfaction elsewhere. It suffices for our objective to state that anti-suit injunctions are not available in intra-EU proceedings as they fundamentally violate the mutual trust on which the Brussels I regime is built upon.[211] Hence, neither the Torpedo strategy nor negative measures are able to delimit the circulation of other foreign measures under the principle of *lis pendens*.

3.2.3 The principle of *res judicata*

It is exactly the enforceability in this transnational circulation, which is affected by the third delimitation constituted by the principle of *res judicata*. Its objective, contrary to *lis pendens*, is not to preclude two parallel pending proceedings which might have different outcomes but to preclude incompatible judgments from both, whether rendered in the enforcing forum, another member state or a third state, to enjoy recognition and enforceability within the same legal system.[212] Hence, the principle acts as a bar to any attempt to reargue the merits already decided. It must be noted however, that this defense cannot be raised when both the judgement to be enforced as well as the one used as defense originate from the same country, as this would substantially amount to a review on the merits of the second judgement and thereby undermine the mutual trust.[213] Under the French name for this principle, which is *autorité de la chose jugée*, it is highlighted that the traditional understanding of this concept is limited to judgments having authority on a certain aspect. This seems to indicate that only final substantive judgments may be covered by *res judicata*, making it necessary to firstly inquire whether ordering provisional measures and their accessories to be covered. According to longstanding case-law of the European Court of Justice, orders of provisional measures do indeed have such an authority and effectiveness.[214] The recently decided case TR v BNP Paribas, however, can be understood as to modify this position. On the facts, the case dealt with an employee, TR, who tried to open a second set of proceedings in the French labour court after having obtained an English judgment awarding damages and to which his former employer BNP Paribas raised an objection of preclusion of the action under *res judicata* due to the English law obligation to

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[211] *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* [2004] European Court of Justice C-159/02, I European Court Report 3565 [27–28].

[212] Brussels I Recast art 45 (1)c and d.

[213] *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA* [2013] European Court of Justice C-157/12, European Court Report [36–37].

[214] *Italian Leather SpA v WECO Polstermöbel GmbH & Co* (n 210) para 47.

concentrate all arguments. The European judges held that only rules concerning "*the authority and effectiveness of a judgment*"[215] may benefit from the precluding effect, thus that the extent of the effect is governed by the law of the ordering forum, whereas the characterisation of the rule as such a *res judicata* rule is based upon the law of the enforcing forum.[216] As a consequence of this tenor, it is necessary to verify whether the three legal systems recognise provisional measures to have such an authority and effectiveness and if yes, to which extent, as differences might undermine the effectiveness of the mechanism due to exploitation by malicious litigants by forum shopping.

French law distinguishes between a precluding effect on the principal and on the provisional. Based on this distinction, provisional measure are by their nature as well as by their form, if they are based on an order by *référé*, only binding on the provisional,[217] thus vis-à-vis other provisional measures, but not on the principal allowing the judge seized on the merits to redecide the issue.[218] Orders in form of *requête* are not covered.[219] Additionally, the decision pronouncing an *astreinte* is not covered at all by *res judicata* as it may be modified or taken back at any time by the ordering or enforcement judge,[220] whereas the decision on its liquidation is precluding on the merits for the period covered[221] whilst still allowing for a subsequent request of liquidation for a later period[222] as well as precluding on the merits when the accessory is refused due to execution of the obligation by the debtor.[223] In Germany, the Federal Supreme Court has confirmed that provisional measures do fall into the scope of the principle,[224] without specifying the exact scope of the limited applicability. Scholars consider that the precluding effect is however limited to the provisional,[225] likewise as in France, especially also due to the prohibition to already decide on the merits.[226] In the English common law, *res judicata* is understood as a labelled bottle full of different forms of estoppel, which together preclude the claimant from relitigating the same cause of action, the same issue, an argument not raised in

[215] *BNP Paribas v TR* [2023] European Court of Justice C-567/21 [49].

[216] *BNP Paribas v TR* (n 215) paras 49–55; Erik Sinander, 'What Law Applies to the Issue of Res Judicata?' (*EAPIL Blog*) <https://eapil.org/2023/06/30/what-law-applies-to-the-issue-of-res-judicata/>.

[217] C. pr. civ. art 771(4).

[218] C. pr. civ. art 488(1) and 775.

[219] [1998] Cour de Cassation 2e Chambre civile 95-22.146, inédit.

[220] [2019] Cour de Cassation 2e Chambre civile 17-27.900, Bulletin II.

[221] [1995] Cour de Cassation 2e Chambre civile 93-12.701, 63 Bulletin II 37.

[222] [2006] Cour de Cassation 2e Chambre civile 04-13.933, 78 Bulletin II 76.

[223] [2010] Cour de Cassation 2e Chambre civile 08-21.718, 44 Bulletin II.

[224] [2004] Bundesgerichtshof III ZR 200/04, 161 BGHZ 298 [6].

[225] Bernhard Wieczorek (eds.), Rolf Schütze (eds.), and Martin Gebauer (eds.) (n 157) para Vor §916 Rn.16; Kindl and Meller-Hannich (n 34) para Vor §916 ZPO Rn.17.

[226] [1977] Bundesgerichtshof VIII ZR 217/75, 68 BGHZ 289, II.2.b.

the first proceedings on the same subject-matter as well as generally all abusive proceedings.[227] However, this defence is limited to final enforceable judgments[228] or foreign orders on interim payments,[229] thereby excluding most of kinds of provisional measures. Notwithstanding, it might still be that given the source of this limitation in equity a judge will extend its applicability to all provisional measures in the future. Again, this difference between civil and common law systems provides room for conflicts and abuse, thus reiterating the need for harmonisation of procedural rules.

The chronological order of the judgements is only important if the judgment referred to as a defence is from another member state or a third state, whereas a domestic judgment of the enforcing forum will always prevail.[230] Besides this temporal element, the principle of *res judicata* relies on the triple identity of the parties, the subject-matter and the cause of action, understood in the same manner as under *lis pendens*,[231] as well as their incompatibility, requiring them, according to the autonomous standard, to have mutually exclusive consequences.[232] The identity of the parties is satisfied when formally the same natural or legal persons are involved, regardless of whether their role is as claimant or defendant.[233] The subject-matter is constituted by the facts and relied upon rule of law construed largely to include opposites,[234] whereas the cause of action is understood as the request made by the claimant containing essentially by his objective construed largely by merely focusing on the core of the merits.[235] Once these cumulative conditions met, the court is obligated to refuse the recognition and enforcement of the second incompatible judgment.[236]

Following the foregoing structure of the mechanism, it is insightful to now turn towards the application and nonapplication of *res judicata* to conflicts of provisional measures ordered from judges in two different legal systems, as this will highlight when judges consider the measures to have the identical subject-matter and cause of action. Based on the prementioned transformation of freezing injunctions into German *in rem* measures,[237] it seems that German

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[227] *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* (2013) 3 WLR 299 (Supreme Court) [17 per Sumption].

[228] UK 1982 Act s 34.

[229] UK 1933 Act s 35(1).

[230] Brussels I Recast art 45(1)c and d.

[231] *The Tatry* (n 202) para 22.

[232] *Horst Ludwig Martin Hoffmann v Adelheid Krieg* [1988] European Court of Justice C-145/86, 1988 European Court Report 645 [19–22].

[233] *The Tatry* (n 202) para 30.

[234] *Prism Investments BV v Jaap Anne van der Meer* (n 67) paras 39–40.

[235] *Gubisch Maschinenfabrik KG v Giulio Palumbo* [1987] European Court of Justice C-144/86, 1987 European Court Report 4861 [16].

[236] *Italian Leather SpA v WECO Polstermöbel GmbH & Co* (n 210) paras 50–52.

[237] (n 71).

courts consider the identity of subject-matter and cause of action, namely the protection of the creditor against the debtor's bankruptcy, between these two kinds of measures to be met. In case of the mere addition of an accessory measure, disciplinary or coercive, as has been chosen instead by certain German courts of appeal in the absence of any guiding choice from the Federal Supreme Court, the precluding effect of the *res judicata* will not come into play as the *in personam* accessory will act as incentive to perform the foreign obligation targeted at the debtor as person, thereby maintaining a distinction from the otherwise available German measures focused on his property. This is very much in line with the consideration of French judges that English *in personam* injunctions and French *in rem* measures do not have the identical cause of action. This conclusion is reached by constating that English injunctions prohibit the debtor to dispose of his assets, whereas French *saisies* render the concerned property inaccessible, thereby having two distinct targets.[238] Whilst this differentiation is doctrinally more precise than the previously criticized German approach to transform into a measure of a different nature due to the more precise formulation of the cause of action and more respectable attitude towards foreign legal particularities, the practical effects are minimally divergent for the creditor who will obtain satisfaction either way especially when an accessory coercive measure is ordered. Following the recent judgment by the European Court of Justice on which law governs the extent of *res judicata* rules, injunctions from common law systems within the EU seem, if subject to the same regime as detailed above for English law, to have no precluding effect, thereby allowing for their cumulability, unless they have been transformed into a domestic measure subject to the principle.

Moreover, another last aspect needs to be raised under this principle in respect to the recent judgment of the European Court of Justice permitting the beforehand unthinkable namely the recognition and enforcement of recognition and enforcement orders,[239] traditionally referred to as double exequatur. This retained solution will impact conflicts of provisional measures insofar that it is arguable that the decision of the first enforcing forum will be binding upon the second enforcing forum regarding the absence of any grounds of refusal, except the public policy exception which is dependent on *lex fori*, based on the prohibition to review the merits. This prohibition has already been recalled in the context of *res judicata* by the European judges in regard to the effect of the jurisdictional decision of a foreign court.[240] If such an argumentation were to be upheld and confirmed, the choice of the creditor where to enforce provisional measures would be strongly influenced, as most debtors will probably request a double protection through the cumulability of a civil law *in rem* and a common law *in personam*

[238] *Crystal et al c/ Gorsoan* (n 1).

[239] *J v H Limited* [2022] European Court of Justice C-568/20.

[240] *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH* [2012] European Court of Justice C-456/11, European Court Report [22–32].

measure to be most certain to obtain satisfaction. Thus, a fierce competition to become the most favorable forum for international provisional litigation may start allowing for more malicious forum shopping strategies.

4 Conclusion

Having assessed the three legal systems in detail by focusing on certain aspects quintessential in the creation and prevention of conflicts between provisional measures, it is now necessary to summarise the findings in order to provide an answer to the research question. Summarising into a single sentence, the extent will depend on the chosen forum for the request of the measure and the one for enforcement, thereby amplifying forum shopping effects.

Now to the longer summary. Starting off, the focus lay on the provisional measures themselves. It was underscored that different legal traditions have different approaches to these measures and their extents. Whereas French law is focusing exclusively on measures *in rem* targeting the assets of the debtor, English law exclusively targets the debtor *in personam*. German law is in between as it normally utilises *in rem* measures, but sometimes relies on *in personam* measures. These differences underscore the probability of a judge confronted with a measure unknown in his law, meaning a foreign law measure. Whilst the treatment of foreign law generally diverges depending on the forum, article 54 of the Brussels I Recast provides for an obligatory transformation of unknown measures into measures of similar although not larger effects, thus preventing a refusal of recognition and enforcement on this ground. The application of this duty by the various systems is different as it depends on the equivalent measure of each system. Civil law systems remain split on whether to transform common law *in personam* injunctions into *in rem* measures, which puts the injunction at risk of being annulled, or contenting themselves with accessory coercive measures. Upon inspection, it was distilled that the English contempt of court is not unknown in France and Germany, which through the *astreinte* and *Zwangs- und Ordnungsmaßnahmen* know similar execution inducing means.

Turning towards the circulation of the measures, which involves automatic recognition and enforceability under the Brussels I Recast, two main delimitations were distilled. Their jurisdictional delimitations based on articles 2 and 35 of the Brussels I Recast requiring contradictory proceedings or at least a notification of the order before enforcement abroad as well as jurisdiction to the merits of the ordering judge were highlighted. Under article 35, provisional measures may still be ordered based on national jurisdictional bases, hence creating potential for more conflicts upon reception of a foreign measure. National judicial organisations can aggravate or minimise risks of conflicts through the degree of centralisation of competence for the various available measures and for enforcement. The subject-matters delimitations of the public policy exception and the principles of *lis pendens* and *res judicata* try to provide solutions to the conflict. Whereas the first two are rather unsuccessful in preventing conflicts due to, respectively, their restricted application to third parties and the short periods of interim proceedings. *Res judicata* does provide a rather successful solution to conflicts between measures, however the precise extents depend under the recent EU case-law on the laws of the

ordering and enforcing forum regarding which measures profit from binding authority, thus allowing for forum shopping. The divergencies in the national case-law on equivalent measures affects the *res judicata* analysis insofar as that their triple identity can be presumed, thereby blocking the ordering of the national equivalent measure in presence of the foreign measure. When national systems do not considered measures as equivalent, this allows for cumulability of different provisional measures, thus potentially constituting a consideration for creditors in choosing their preferred forum.

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