NOTES ON PROTECTIVE AND CAUTIONARY MEASURES IN BRUSSELS I RECAST AND LAND REGISTRATION.

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Enforcing any judgment is considered as a sovereign act of the States. That principle is the basis of Article 24(5) of Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast): in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced have exclusive jurisdiction. Our subject of consideration are only provisional and protective measures. In general, they may be explained as those measures intended to safeguard the rights to be recognized (and later enforced) in the future judgment, to maintain the *status quo* or even to anticipate the result of the judgment (we find clear examples in family matters: provisional custody, maintenance or administration until the final judgment is given). Normally, both the existence of the right and a risk of imminet infringement of that right must be established by the creditor and a security from the creditor is required too.

In this Regulation, known as Brussels I (a) or “bis” (BRIb), we find several rules related to measures in three different situations:

1.- BY A COURT WITHOUT JURISDICTION AS TO THE SUBSTANCE OF THE MATTER

> ***Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter*** (Article 35).

BRIb (and all the other European regulations that deal with recognition and enforcement of judgments) contain a provision that allows a court to adopt such measures even where the courts of that State do not have jurisdiction as to the substance of the matter. The possibility of taking such measures is subject to the internal law. It is the national law that rules whether a national court is able to order a measure although it is not followed by proceedings in that same State. Measures related to foreign proceedings are admitted in all the european States (in Spain, art. 722 LEC).

Typical cases could be recording in a Land Registry that an action on the validity of a purchase contract on a property is pending in another State where the defendant has his domicile, so that the purchaser may be obliged to return the property, or that the recovery of a debt may be later enforced by selling that property. The effect of

publishing the measure in a Land Registry is similar: the judgment may be enforced despite a further purchase.
The jurisdiction, the procedure and the nature of the measure to be taken is ruled by the national law of the court. The measure is adopted in the same State where it has to be made effective or enforced. No recognition is necessary, no possibility arises on incompatibility between a measure adopted in one State that would be carried out in another one. In my opinion, that is the reason for this provision in BRIb, so that these measures have a territorial effect, as far as they are adopted and carried out in a single State.

With these conditions, these measures should pose no problem. But the real world is more complicated, for several reasons sush as:

- the variety of conditions and effects that each national law requires or provides for;
- the natural inclination of a party to seek the conditions that most favourably serve the applicant's interest ("forum shopping");
- a loose interpretation of the urgency factor by the courts;
- the tendency to widen the scope of the provisional measures and to include measures that do not necessarily require the existence of main proceedings, that is, summary proceedings that under the cover of provisional measures do not comply with the rules on jurisdiction by the application of Article 35 instead of Articles 5 and 7 to 26.

The European Court of Justice has put limits to the nature of provisional measures (now in Article 35) and has Stated its territorial effects: "*interim payment of a contractual consideration* [Leistungsverfügung, réferé-provision, kort geding as was the case] *does not constitute a provisional measure within the meaning of article 24* [of the Brussels Convention, precedent of BRIb] *unless, first, re-payment to the defendant of the sum awarded is guaranteed if the plaintiff is unsucessful as regards the substance of his claim and, secondly, the measures sought relate only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made*" (*van Uden* judgment of 17 November 1998, case C-391/95, ruling nº 5 and para. 47 and 48).

Article 2(a) of the Regulation does not allow recognition and enforcement of these measures in another Member State.

2-.- BY A COURT WITH JURISDICTION AS TO THE SUBSTANCE OF THE MATTER

> ***For the purposes of Chapter III*** [recognition and enforcement]***, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure***

> ***which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement*** (Art. 2 (a)).

The *van Uden* judgment had already declared: "*It is acepted that a court having jurisdiction as to the substance of a case in accordance with Articles 2 and 5 to 18 of the Convention* [now 4 and 7 to 26 of the Regulation] *also has jurisdiction to order any provisional or protective measures which may prove necessary"* (para. 18 and ruling 1).

As to give evidence that these conditions are met, the party **shall produce:**

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) the certificate issued pursuant to Article 53 (Art. 37)

containing a description of the measure and certifying that:

- **(i) the court has jurisdiction as to the substance of the matter;**
- **(ii) the judgment is enforceable in the Member State of origin; and**

(c) where the measure was ordered without the defendant being summoned to appear, proof of service of the judgment. (Art. 42.2).

In case a measure has to produce effects in another Member State, either because the assets are situated there of the person to which the order is addressed has his/her domicile in it, the measure needs to be recognised or enforced in that Member State.

Measures related to inmovable property in another Member State are not taken in proceedings on rights *in rem*, because these actions may only be dealed with in proceedings within the State in which the property is situated (Art. 24 (1)).

If the proceedings del with a monetary claim, the provisional measure may consist of the provisional attachment of an inmovable property to the result of the proceedings and to a future enforcement of the final decision. Publishing the measure in the Land Registry may be the normal way to achieve the legal effect of protecting the creditor against transmission, mortgage or encumbrance of the property. Recording the measure in a Land Registry does not imply enforcement, there is no need to use the powers of the State in order to force the will of a defendant who may resist to comply with a judicial order. Once an attachment has been ordered, that order may have access to the records of the Land Registry upon direct application to the Land Registrar by the interested party, even if the property is situated in another State. Recognition of the judgment by the Land Registrar is enough.

In Spain, we have had examples where the claimant had succeeded to have a measure issued by a court in another Member State, namely *hypotèque provisoire* and *Sicherungshypothek* (provisional or security mortgage). He has then applied, without success, for the measure to be registered, in one case to the Spanish court with territorial jurisdiction on the place in which the property was situated to enforce the order by having a national order issued by the Spanish court to the Land Registrar, in the second case directly to the Land Registry. Nowadays, in accordance with the new Act on Legal International Cooperation in Civil Matters, the registrar may examine the formal

requirements and the existence of reasons to refuse recognition. Before entering a record, he must serve his decision, both on the applicant and the person against whom recognition is sought, who may challenge this decision.

Articles 37 and 38 of BRIb envisage invoking a judgment given in another Member State not only before a court but before another authority, so that no assistance of a court is necessary to get the measure published in a Land Registry.

Another type of possible measure is the prohibition to transmit or encumber the inmovable property, a measure legally foreseen in Spanish law. The *freezing order* or *Mareva injunction* in countries of Common Law is a measure of this type. But, while the Spanish measure is meant to produce effects *in rem* (once registered), the freezing order's effects are *in personam.*

Among the provisions that are common to recognition and enforcement (Chapter IV BRIb), we find Article 54: ***If a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests.***
Such adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin.
Any party may challenge the adaptation of the measure or order before a court.

Recital 28 specifies that *How, and by whom, the adaptation is to be carried out should be determined by each Member State*. The Spanish Act on Legal International Cooperation in Civil Matters contains a similar provision in Art. 61, under the point of view of registration (as a question of incidental recognition) and states that it is the Registrar who will perform the adaptation.

In accordance with this provision, a freezing order with personal effects would not be published in a land registry producing thus effects *in rem*, beyond thoseprovided for originlly. Freezing orders have been enforced in certain States, specially with respect to bank accounts in Switzerland (Lugano Convention applies, not BRIb), where the bank in which deposits were held has been ordered by the Swiss court not to accept any disposition on them.

As far as to inmovable property is concerned, conservative seizure (*embargo preventivo* 727.1 LEC ES, *sequestro conservativo* 671 CPC IT), provisional attachment or mortgage (*hypotèque provisoire* 531-1 CPC FR, *Arresthypothek* § 932 ZPO DE that is carried out by registering a *Sicherungshypothek*) could be considered measures that are equivalent. We find cases where registration of these situations has been denied because there is not an exact equivalence, even in systems where the rights *in rem* are not a *numerus clausus* (like the Spanish examples I have quoted, RDGRN 12 May 1992 and 23 February 2004).

Nowadays, the provisions in Article 54 BRIb should solve that problem. Formal requirements for entering a record have to be met, nevertheless, to satisfy the requirements of the local Registry law.

Finally, the registrar may not examine the jurisdiction of the court. First of all, the refusal of recognition should be object of application by an interested party (Article 45.1) and, secondly, lack of jurisdiction as a reason for refusal of recognition is limited to the rules of jurisdiction on "protected contracts" and the cases of exclusive jurisdiction (para. (e)). Rules on jurisdiction, including exclusive jurisdiction on rights *in rem* and the validity of entries in public registries (Article 24), refer to the object of the proceedings (the main proceedings in which the right or the registration is the subject matter of the claim), not provisional measures, which rules on jurisdiction are different. This construction is supported by the European Court of Justice: although arbitration is excluded from the Brussels Regulation (former by the Convention),*"provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the* [earlier] *Brussels Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect*" (ECJ judgment of 17 November 1998, case C-391/95*, van Uden,* para. 33).

3.- AFTER JUDGMENT IS GIVEN ON THE SUBSTANCE OF THE MATTER

Article 40

An enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State addressed.

Once judgment is given, measures to guarantee its enforcement are possible too.
The judgment may be only provisionally enforceable.
An important judgment on provisional measures after judgment was given by the ECJ on 3 October 1985, case 119/84 (*Capelloni*). If we adapt its references to the article 39 of Brussels Convention:

> Art. 40 appears in section 2 of Chapter III of the Regulation, which is concerned with the enforcement in one Member Sate of decisions given in another Member State (para. 14).
>
> The application of the requirements of the national procedural law of the court hearing the proceedings must not in any circumstances lead to frustration of the principles laid down in that regard, whether expressly or by implication, by the Regulation (para. 31).

> Those measures are granted not on the basis of a summary procedure for authorization but rather on the basis of the legal effect with which a decision adopted in another contracting state is endowed by the Regulation (para. 34).
>
> Article 40 does not prevent the party against whom those measures have been applied from taking legal proceedings in order to secure, by recourse to the appropriate procedures laid down in the national law of the court dealing with the matter, adequate protection of the rights which he alleges to have been infringed by the measures in question.

Therefore, a court of a State with jurisdiction to enforce the judgment has jurisdiction to grant measures, even where measures are not foreseen prior to enforcement by its procedural law (they are not in Spain).

National law applies to the measures to be taken, and the only doubt could be whether other conditions should be met: appearance of right that is now clear, urgency that the words "by operation of law" do not suggest, providing a security not required for the main enforcement proceedings, authorization or ratification (*Capelloni* judgment denied this last requirement under Italian law).

In any case, cautionary measures proceedings are not standalone proceedings, so that, in my opinion, Article 40 does not allow taking measures where the applicant has not applied for enforcement or does not apply within a short time.