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Harmonisation of Provisional and Protective Measures in Europe

- Published in: M. Storme (ed.), *Procedural Laws in Europe. Towards Harmonisation*, Maklu: Antwerpen/Apeldoorn, ISBN: 90-6215-881-1, p. 305-319

Abstract: *This contribution deals with the harmonization of provisional and protective measures in the European Union at the background of the Storme Report of 1993. Attention is paid to function and aim of provisional and protective measures, the recent and ongoing reform of procedural laws in several Member States, harmonization of procedural law, harmonization initiatives concerning provisional and protective measures (amongst others ILA and UNIDROIT), the case law of the ECJ laying down certain criteria for provisional and protective measures, and the proposals of the Storme Report are being reviewed for further deliberation and use for future harmonization.*

1. Introduction

Provisional and protective measures can be found in every developed legal system. The rules concerning these measures, and especially the requirements for obtaining such a measure, as well as the contents and their scope, are however quite different. To get a full understanding of the provisional and protective measures existing in other legal system than ones own requires knowledge of the procedural system of that country as a whole. These measures are imbedded in a legal system that safeguards rights through a variety of procedures and measures, and they cannot be studied separately. For example the Netherlands, contrary to Germany and several other countries, does not have a procedure that resembles the *Mahnverfahren* – a summary procedure for non-contradicted monetary claims. This is, however, overcome by the possibility to apply for a provisional payment in the *kort geding* procedure. Although this results in a provisional judgment, there is no need to start principal proceedings, and especially in clear cases parties will not commence main proceedings. So, in practice the *kort geding* procedure fills ‘gaps’ that may not exist in other legal systems.

Between 1994, when the *Storme*-report was published, and now, there have been a lot of developments. In the first place, in several European countries important reforms of the rules of civil procedure were initiated. These reforms result from the urgent necessity to improve efficiency and reduce costs of civil litigation. Secondly, also other projects on the harmonisation of procedural law were started, including provisional and protective measures. In the third place, the European Court of Justice gave several preliminary rulings on provisions of conventions concerning provisional and protective measures, that have to be taken into account as well when the harmonisation of these measures is considered.

In this report successively attention will be paid to the concept of provisional and protective measures, the reforms of procedural law in several European countries, the international harmonisation of procedural law, the developments concerning provisional and protective measures in international litigation and the several drafts for harmonisation. Finally, some concluding remarks will be made on the necessity and desirability of

harmonisation of provisional and protective measures on the basis of the draft *Storme/Tarzia*.¹

2. Provisional and protective measures; aim and function

Provisional and protective measures are a fundamental part of civil justice. They are necessary to secure the enforcement of decisions and to provide measures in urgent cases. Because the duration of normal proceedings is in some countries very long and the civil case load grows, the need for provisional measures has become more urgent in the last few decades.² These procedures are sometimes not only commenced parallel to or before commencing normal (principal) proceedings, but also in stead of the main proceedings, in order to save – shortly – time and money.

Provisional and protective measures are, at least in European continental doctrine, usually divided into three kinds of remedies.³ In the first place, measures that are meant to secure the enforcement of the decision on the merits (conservatory measures). In the second place, regulatory measures, that cover a wide range of measures that can be ordered to maintain the status quo or to give a provisional arrangement of some kind. Thirdly, the so-called anticipatory measures, which can grant claims similar to those in principal proceedings, such as (interim) payments. Especially as regards the anticipatory measures the differences between the European legal systems are substantial.

An important feature of the (national) rules for provisional and protective measures is that they leave room for discretion. A judge has to be able to decide on the basis of the urgency and other circumstances of the case whether to grant a measure or not, and what the contents should be. For example in the Netherlands, there are only nine provisions in the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) concerning the *kort geding*. Most rules are formulated in practice, and they are highly dependant upon the factual circumstances of the case, other possibilities for safeguarding certain rights, and also efficiency reasons. This will remain the same under the reformed Code of Civil Procedure.⁴

3. Reforms of procedural law in Europe

The most significant reform of national procedural law since the *Storme*-report of course took place in the United Kingdom. In 1994 the reforms were initiated and on April 26, 1999 the Civil Procedure Rules (CPR) came in force. The reform had as its most important objectives the improvement of access to justice, reduction of the costs of litigation, reduction of the complexity of litigation, modernisation of terminology and removing unnecessary distinctions between the rules, practice and procedure.⁵ The CPR contains a part with quite extensive rules on interim injunctions (Part 25). These rules did not bring about very fundamental changes to the rules concerning provisional measures,

¹ M. Storme (ed.), *Rapprochement du Droit Judiciaire de L'Union européenne/Approximation of Judiciary Law in the European Union*, Dordrecht/Boston/Londen: Martinus Nijhoff Publishers 1994, p. 203-207.

² P.A.M. Meijknecht en R.C. Verschuur, The (ab)use of summary proceedings, in: W.G.Ph.E. Wedekind (ed.), *The Eighth World Conference on Procedural Law, Justice and efficiency. General reports and discussions*, Deventer/Antwerpen/Boston: Kluwer 1989, p. 365-403, esp. p. 402.

³ See e.g. Storme (ed.) 1994 (note 1), p. 106; Meijknecht and Verschuur 1989 (note 2), p. 371-390.

⁴ See para 3 for the reforms of the Dutch Code of Civil Procedure.

⁵ See e.g. N.H. Andrews, *English civil Procedure: Three Aspects of the Long Revolution*, Centro di studi e ricerche di diritto comparato e straniero, Roma 2001; N.H. Andrews, A New Civil Procedural Code for England: Party-Control 'Going, Going, Gone', *CJQ* 2000, p. 19-38.

though in perspective of the aims of the reform, the granting of interim injunctions should also be dependant on the question whether the costs involved are in proportion with the interests at stake (especially the search order implies high costs) and whether interim proceedings will not delay the (principal) procedure.⁶

Another important, though less 'radical', reform currently takes place in the Netherlands. In October 1999, a draft on the revision of the Dutch Civil Procedural Code was put before Parliament.⁷ It is assumed that the new rules will enter into force on January 1 or March 1, 2002. As in England, the reforms are primarily meant to simplify procedural law, and to cut back formalities. The relation between the parties and the court is altered; the judge has to participate more actively in the proceedings and parties have the duty to co-operate. The procedure has to become more efficient, which means that the duration of the process should be more acceptable whereas the quality remains guaranteed.

It is noticeable that the functioning of the most important provisional procedure in the Netherlands, the *kort geding* procedure (originally derived from the French *référé*) is not subject to criticism. In the Netherlands, practitioners as well as legal scholars, are usually quite satisfied with this procedure, that is regarded as effective, quick and of good quality. The Dutch *kort geding* practice probably is the most dynamic and liberal in Europe.⁸ The reform of the Code of Civil Procedure will only bring about minor changes to the provisions regarding the *kort geding*, except for the introduction of a new article.⁹ This new rule implements the obligation to commence the main proceedings within a certain period of time in intellectual property cases that are covered by the TRIPs-agreement. This results from the preliminary ruling of the European Court of Justice in the *Hermès* case of 1998.¹⁰ In this case the court decided that the obligation to commence the main proceedings – as laid down in art. 50, section 6 of this convention – also applies to the Dutch *kort geding* procedure. This implies a limitation of Dutch legal practice in intellectual property cases that is regretted by many legal practitioners and scholars.

4. The harmonisation of procedural law

The current efforts to come to a harmonisation or unification of procedural law, including rules concerning provisional measures, can be distinguished in a regional – European – and a universal approach. The *Storme* Working Group chose to formulate rules that apply to all proceedings, regardless whether they are national or transnational, that are conducted in the European Union.¹¹ Since this report was published in 1994, several other initiatives were employed to come to a harmonisation of procedural law. These projects have a different point of departure, but are nevertheless worth while looking at to see what tendencies can be discerned in the development of procedural law, and in particular regarding provisional and protective measures.

⁶ C. Plant e.a. (ed.), *Blackstone's Guide to the Civil Procedure Rules*, Londen: Blackstone Press 1999, p. 157-159.

⁷ Wetsvoorstel (draft) herziening van het procesrecht voor burgerlijke zaken, in het bijzonder de wijze van procederen in eerste aanleg, *Kamerstukken II 1999-2000*, 26 855.

⁸ About 10 to 12% of the civil cases are commenced by way of the *kort geding*, and only in about 5 % of the cases parties do commence main proceedings parallel to or after commencing a *kort geding*. Especially in the field of intellectual property and for interim payments, the *kort geding* is a very important legal measure.

⁹ Art. 2.13.7 of the draft.

¹⁰ ECJ 16 June 1998, C-53/96, ECR [1998] p. I-3637. See also para 5 below.

¹¹ Storme (ed.) 1994 (note 1), p. 62.

4.1 *Universal harmonisation of procedural law*

Several institutes offer contributions to a universal harmonisation of procedural law. The projects set up by these institutions aim at a 'world-wide' harmonisation, as opposed to the *Storme* Working Group, that focuses on the approximation of European procedural law. The International Law Association (ILA) published rules regarding provisional measures in international litigation in 1996 (Helsinki Principles).¹² Furthermore, a working group of the American Law Institute (ALI) begun its work on the so-called 'Transnational Rules of Civil Procedure'.¹³ In 1999 ILA and UNIDROIT formed a combined working group, that published a draft in 2001.¹⁴ In paragraph 5 below these initiatives will be discussed more in detail as far as they concern provisional and protective measures.

4.2 *European harmonisation of procedural law*

Since the draft of the *Storme* Working Group was published, no harmonisation projects concerning national procedural law were undertaken. Article 65 EC Treaty, that was brought about by the Treaty of Amsterdam that entered into force in 1999, empowers the European Union to take measures in the field of judicial co-operation. The work that has been done since shows that harmonisation of private international law and procedural rules have a high priority within the European Union. Five Regulations have meanwhile been established, all concerning procedural matters. Legal unity is further promoted by the Tampere conclusions.

Furthermore, the harmonisation of substantive private law has meanwhile also taken up interest of many European scholars.¹⁵ Harmonisation of substantive law also has procedural implications.¹⁶

These developments necessitate further deliberations on the harmonisation of procedural law in Europe. The efforts to reform procedural law in many European countries and the desire to improve access to justice and improve efficiency of litigation can be regarded as a receptive ground as well.¹⁷

5. Other proposals on harmonisation of provisional and protective measures

Besides the *Storme* Working Group also other working groups and committees made recent proposals for harmonising procedural law. The most important drafts concerning provisional and protective measures will be discussed in order to widen our view and see whether they can be valuable for a harmonisation in the European context as well.

¹² Crawford en M. Bijers (eds.), *The International Law Association. Report of the sixty-seventh Conference held at Helsinki, Finland 12 to 17 August 1996*, Londen: Cambrian Printers 1996, p. 185-204 (second interim report provisional and protective measures in international litigation).

¹³ The American Law Institute, *Transnational Rules of Civil Procedure*, Discussion Draft No 1 (December 1998, March 1999).

¹⁴ The American Law Institute, *ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure*, Discussion Draft No. 2 (April 12, 2001). See e.g. R. Stürmer, Modellregeln für den internationalen Zivilprozeß?, *ZZP* 1999, p. 185-216.

¹⁵ See amongst others: A.S. Hartkamp (ed.) *Towards a European Civil Code*, Nijmegen: Ars Aequi Libri 1994 and 1998.

¹⁶ M. Storme, Procedural Consequences of a Common Private Law for Europe, in: Hartkamp (ed.) 1994 (see note 15), p. 87-99; D. Kerameus, Procedural Implications of Civil Law Unification, in: Hartkamp (ed.) 1998 (see note 15), p. 121-132.

¹⁷ See on the current problems in (European) procedural law: A.A.S. Zuckerman, *Civil Justice in Crisis*, Oxford: Oxford University Press 1999.

The Committee on International Civil and Commercial Litigation of the International Law Association (ILA) formulated the Principles on provisional and protective measures in international litigation (Helsinki Principles). The purpose of these Principles is to indicate, for the potential assistance of law reformers both at the national and international level, the Committee's views on a range of issues concerning provisional and protective measures in international litigation.¹⁸ They are not intended to be exhaustive, but meant as a potential approach. Principle 1 reads as follows:

Provisional and protective measures perform two principal purposes in civil and commercial litigation:

- (a) to maintain the status quo pending determination of the issues at trial; or
- (b) to secure assets out of which an ultimate judgment may be satisfied.

An interim payment is not regarded as a provisional measure, according to Principle 22:

The procedure in domestic law under which the court may order an interim payment (i.e. an outright payment to the plaintiff which may be subsequently revised on final judgment) is not a provisional and protective measure in the context of international litigation.

The scope of these rules, or in other words: the concept of provisional and protective measures, is narrower than in the *Storme/Tarzia* draft (see Article 10.1). Only measures to maintain the status quo *during trial* and conservatory measures are regarded as provisional or protective measures. This concept seems to be a bit too narrow for a European perspective.¹⁹

Principle 16 confers jurisdiction to the court that exercises jurisdiction over the substance of the matter. According to Principle 17 courts that do not have jurisdiction as to the substance of the case, can nevertheless exercise jurisdiction over assets located within its jurisdiction.

On the granting of a provisional or protective measure Principle 4 states:

The grant of such relief should be discretionary. It should be available:

- (a) on a showing of a case on the merits on a standard of proof which is less than that required for the merits under the applicable law; and
- (b) on a showing that the potential injury to the plaintiff outweighs the potential injury to the defendant.

Provisional and protective measures can be recognised and enforced according to Principles 18, 19 and 20. A court should co-operate where necessary in order to achieve the efficacy of orders issued by other courts.

Although these Principles seem to be more orientated on the common law than on European continental law and are meant for *international* litigation, they look well-balanced and some of them could be taken into consideration when drafting rules for a European harmonisation.

The draft of the American Law Institute in co-operation with UNIDROIT of 2001 is apparently based on a common law (American) model. The purpose of these Rules is to offer a system of fair procedure for litigants involved in legal disputes arising from *transnational* transactions.²⁰ Rule 17.1 reads as follows:

¹⁸ Crawford and Bijers (eds.) 1996 (note 11), p. 192.

¹⁹ See also para 2 above.

²⁰ ALI/UNIDROIT 2001 (note 14), p. 14.

In accordance with forum law and subject to applicable international conventions, the court may issue an injunction to restrain or require conduct of any person who is subject to the court's authority where necessary to preserve the status quo or to prevent irreparable injury pending the litigation. The extent of such a remedy shall be governed by the principle of proportionality.

Rule 17.1.1 allows *ex parte* measures in very urgent cases. According to Rule 17.1.3 the applicant is liable for full indemnification if it turns out that the injunction was wrongly granted. The granting of the measure can be subject to a bond (Rule 17.1.4). The kinds of measures that may be requested are set out in Rule 17.2:

An injunction may restrain a person over whom the court has jurisdiction from transferring property or assets, wherever located, pending the conclusion of the litigation and require a party to promptly reveal the whereabouts of its assets, including assets under its control, and of persons whose identity is relevant.

According to Rule 17.3, recognition and enforcement are governed by the law of the country where the property or assets are located, and by means of an injunction by the competent court of that country. Rule 1 states that jurisdiction should be exercised within the limits of generally recognised principles of international law, including conventions adopted in the forum state.

Although these Rules of course have their value as a source of harmonisation of laws concerning provisional and protective measures, I am of the opinion that these particular rules are so clearly orientated on American law, that they cannot serve as a base for harmonisation in a European context.

6. Provisional measures in Regulations and Conventions

The *Storme* Working Group rightfully started its orientation on provisional and protective measures with Article 24 Brussels Convention as an important European provision for these measures. In 1998 and 1999 the European Court of Justice delivered three important preliminary rulings on provisional and protective measures. The first one concerned the concept of 'provisional measures' in Article 50 of the TRIPS Agreement (this agreement was brought about after the publication of the *Storme*-report). The second and third decision concerned Article 24 Brussels Convention.

6.1 Article 24 Brussels Convention and Lugano Convention – Article 31 Brussels Regulation

Within six months the Court of Justice gave two preliminary rulings on the interpretation of Article 24 Brussels Convention (= Article 31 Brussels Regulation). The first one is the *Van Uden/Deco-Line* case of 17 November 1998.²¹ The second one is the *Mietz* case of 27 April 1999.²² Both cases concerned questions about the Dutch '*kort geding* procedure'. This is an important provisional procedure, which can be commenced in urgent cases, independently from the main proceedings. Although in legal respect the measure provided

²¹ ECJ November 17, 1998 (C-391/95), (1998) ECR, p. I-7091, 46 NILR, p. 102 (1999).

²² ECJ April 27, 1999 (C-99/96), (1999) ECR, p. I-2277.

for in this procedure, has a provisional character, in practice it is in most cases accepted as a 'final' judgment, because parties do not start the main proceedings afterwards.²³

In the *Van Uden* case, the Dutch Supreme Court (*Hoge Raad*) conferred preliminary questions to the Court of Justice on the position of this *kort geding* procedure under the Brussels Convention. The two most crucial questions were, however, whether the *kort geding* procedure, and especially an interim payment, can be regarded as a provisional measure within the meaning of Article 24 and whether on the basis of this provision the national jurisdiction rules are unimpeded. The Court did not explicitly state that in general measures provided for in the *kort geding* procedure can be regarded as provisional measures within the meaning of the convention. The Court merely repeated the decisions of the *Denilauler/Couchet* case²⁴ and the *Reichert and Kockler* case.²⁵ In *Denilauler* the Court held that the granting of these measures requires particular care and detailed knowledge of the actual circumstances in which they are to take effect; the court of the place where the assets are located, are those best able to assess these circumstances. In the *Reichert* case, the Court ruled that Art. 24 covers measures 'which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case.' In *Van Uden*, the Court added that interim payments do not constitute a provisional measure, unless the repayment to the defendant is guaranteed if the main proceedings are unsuccessful, and the measure relates only to specific assets of the defendant located, or to be located, within the confines of the territorial jurisdiction of the court to which the application is made. Furthermore, the granting of provisional and protective measures on the basis of Article 24 is conditional on the existence of a *real connecting link* between the subject-matter of the measures sought and the territorial jurisdiction of the state of the court before which those measures are sought. For interim payments, as can be derived from the definition, this criterion means that the jurisdiction on the basis of Article 24, is narrowed down to the courts of the place where specific assets of the defendant are located, or to be located. For other measures, the open criterion of the real connecting link applies.

In the *Mietz* case, the German Supreme Court (*Bundesgerichtshof*) referred to the Court of Justice for a preliminary ruling, concerning the recognition and enforcement of a Dutch *kort geding* measure. The question was, once again, whether an interim payment, ordered in *kort geding*, is a provisional measure within the meaning of Article 24. This was relevant because the Dutch *kort geding* judge did not have jurisdiction on the basis of Articles 2-18 (= 2-24 Regulation). Moreover, possibly Article 14 (= 16 Regulation) was applicable – the German Supreme court also asked preliminary questions about the applicability of the provisions for consumer contracts –, the violation of which constitutes a ground of refusal for recognition and enforcement according to Article 28, s. 1 (= 35, s. 2 Regulation).

The Court of Justice argued, in the first place, that it was not relevant whether this case concerned a consumer contract or not, because Article 24 enables a court to order a provisional measure although it has no jurisdiction as to the merits of the case. This time the Court plainly stated that the *kort geding* is a procedure of the type envisaged in Article 24. The Court came to this decision after considering the features of this procedure

²³ See X.E. Kramer, *Het kort geding in internationaal perspectief. Een rechtsvergelijkende studie naar de voorlopige voorziening in het internationaal privaatrecht* ('The Dutch kort geding in an international perspective. A comparative view on provisional and protective measures and private international law,'); with English summary at p. 363-375), Deventer: Kluwer 2001.

²⁴ ECJ May 21, 1980 (C-125/79), (1980) ECR, p. I-1553.

²⁵ ECJ March 26, 1992 (C-261/90), (1992) ECR, p. I-2149.

according to Article 289 *ff* of the Dutch Code of Civil Procedure. Secondly, the Court determined that in principle, the recognition and enforcement of a provisional or protective measure can only be refused on the grounds set out in Article 27 and 28. But when the court that orders the measure has no jurisdiction as to the substance of the case, *and goes beyond the limits of the jurisdiction of Article 24*, recognition and enforcement must be refused. In this case Article 24 had been violated, because the interim payment could not be regarded as a provisional measure within the meaning this Article.

Some conclusions can be drawn on the basis of these decisions. In the first place, the concept of ‘provisional and protective measures’ seems to be rather broad. In the *Mietz* case the Court clearly stated, under reference to Dutch law, that the *kort geding* is a procedure that is covered by Article 24 (= 31 Regulation), although sometimes far reaching, clearly anticipatory, measures are granted in this procedure. It is, however, according to the Court important that when a measure is granted on the basis of Article 24 that a national court considers the need to impose conditions to guarantee the provisional character.²⁶ The limitations for interim payments are in compliance with national European laws. The guarantee of repayment is a requirement in most countries.²⁷ The requirement that assets of the defendant must be present within the jurisdiction is only important for international jurisdiction, and if these rules were to be taken into consideration for a harmonisation of procedural law, national litigation would not be effected by this requirement.

6.2 Article 50 TRIPS Agreement

Another important international rule on provisional measures is contained in Article 50 Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS Agreement). In several European countries, such as Belgium, France and the Netherlands, provisional measures play an important role in the enforcement of intellectual property rights. In the Netherlands these rights are usually effected through the *kort geding* procedure, at least until a few years ago. Principal proceedings were seldom commenced. Article 50, section 6 TRIPS, however, states that upon request by the defendant, the provisional measure shall be revoked or otherwise cease to have effect in case the principal proceedings are not commenced within a reasonable period.²⁸ The question was whether the Dutch *kort geding* can also be regarded as a provisional measure within the meaning of this provision. In 1998, a few months before the *Van Uden* decision, the European Court of Justice decided in the *Hermès* case that the *kort geding* is a provisional

²⁶ To me it is still not completely clear whether the term ‘provisional, including protective, measures’ has an autonomous meaning under the convention. On the one hand, in the *Reichert* case a general definition was given and also in the *Van Uden* and *Mietz* case, a more or less clear description of an interim payment as provisional measure was provided. On the other hand, Article 24 refers to measures ‘as may be available under the law’ of a state, and in the *Mietz* case the Court established that the Dutch *kort geding* is a provisional measure, because the Dutch law provides thus. Maybe it is neither purely autonomous, nor only up to the *lex fori*. In my opinion, it can be argued that in principle it is up to the *lex fori* of the court to which application is made to determine whether or not it is a provisional or protective measure. This is clear for the interim payment. An interim payment can be provided for by the courts on the conditions of their own law, but this involves the risk of non-enforcement when the court has no jurisdiction on the merits, and the provisional character is not guaranteed by taking into account the conditions for the application of Article 24. The effect of these measures is limited to the territory of that state. In other words, the outer limits are determined by the convention.

²⁷ See e.g. for the Netherlands, Belgium, France, Germany, Switzerland and England: Kramer (note 23), p. 126.

²⁸ This period is to be determined by the court; if the court does not, this the maximum period will be 20 working days or 31 calendar days.

measure within the meaning of this Article.²⁹ This means that the obligation to commence the main proceedings also applies to the Dutch *kort geding* procedure and similar proceedings in other countries, such as the French *référé* as well.

This ruling is very important for some countries and also leads to harmonisation of the use of provisional measures in intellectual property cases. It should be taken into account when discussing harmonised rules for the European Union.³⁰

6.3 Draft Hague Convention on Jurisdiction and Enforcement

In the context of the proposal for a Hague Convention on Jurisdiction and Recognition and enforcement, the initial plan was to include a definition on 'provisional and protective measures' in the provision on jurisdiction regarding these measures. This definition needed to be more specific than the resolution of the International Law Association (see under 5 above).³¹ A few years later, however, the Special Commission deliberated the following.³²

The question of how to define the concept of 'provisional and protective measures' is a tricky one to resolve. It seems that, in view of the great variety of measures of this kind in the different legal and judicial systems involved, a definition is difficult to find. Besides, its value is not obvious. It could, in fact, complicate rather than simplify issues. For this reason it should perhaps be avoided.

During the nineteenth session of the Hague Conference in June 2001, the working group on provisional and protective measures came up with another proposal for a jurisdiction rule, that nevertheless contains a paragraph on what is meant by provisional measures and protective measures.³³ Article 13, section 3, of this proposal states that it means:

- (a) a measure to maintain the status quo pending determination of the issues at trial; or
- (b) a measure providing a preliminary means of securing assets out of which an ultimate judgment may be satisfied; or
- (c) a measure to restrain conduct by a defendant to prevent current or imminent future harm.

This definition seems to be a bit stricter than Article 10.1.2 en 10.1.3 of the *Storme/Tarzia* draft. Pure anticipatory measures and interim payments are excluded. This project shows again how difficult it is to come to a consensus of what should be regarded as 'provisional and protective measures'.³⁴

In Article 13, section 1, jurisdiction is conferred upon the court that has jurisdiction as to the substance. In section 2 a limited jurisdiction besides section 1 is created for an order in respect of property.

²⁹ ECJ 16 June 1998, C-53/96, ECR [1998] p. I-3637.

³⁰ It must be noted, however, that this provision does not have a direct effect in the member states. See ECJ 14 December 2000, C-300/98 (*Tuk/Dior*) and ECJ 13 September 2001, C-89/99 (*Schieving-Nijstad/Groeneveld*).

³¹ Kessedjian, Synthesis of the work of the Special Commission of June 1997 on international jurisdiction and the effects of foreign judgments in civil and commercial matters (Prel.Doc.No 8), November 1997, p. 49.

³² Document de discussion des questions portées à l'ordre du jour de la commission spéciale de juin 1999/Issues paper for the agenda of the Special Commission of June 1999, Mei 1999, p. 17, no 14.4.

³³ Work Doc. No 95 E & F, Commission II, Jurisdiction and Foreign Judgements in Civil and Commercial Matters, Nineteenth Session, 18 June 2001.

³⁴ A draft on the revision of the Brussels Convention of the Commission (OJ 1999, C-33/05) also contained a definition of provisional measures, but this was not adopted.

7. Desirability and necessity of harmonisation; evaluation of the *Storme/Tarzia* draft

The *Storme/Tarzia* draft on provisional and protective measures is divided into eight subjects or parts: 1. the kind of measures that can be granted, 2. the conditions for provisional remedies, 3. the right to be heard (the procedure), 4. jurisdiction, 5. recourse, 6. variation or withdrawal of the remedy, 7. absence of *res judicata* and annulment of the judgment, 8. execution. Below, these topics will be shortly discussed, as well as the need of harmonisation for each topic.³⁵ Number 1 and 7, and number 5 and 6 will be discussed together. The point of departure is that a certain kind of harmonisation in the field of provisional and protective measures is desirable.

7.1 The concept, contents and character of provisional and protective measures

In Part 10.1 of the *Storme/Tarzia* draft a rather broad concept of provisional and protective measures is employed. Not only conservatory and regulatory measures, but also some anticipatory measures are covered. This seems to me to be a good approach from a European perspective.³⁶ The concepts of the ILA and ALI/UNIDROIT drafts (see para 5 above) are in my opinion too narrow.³⁷ I think that there is no need for a further harmonisation in this respect, and this might even be undesirable. In the field of provisional and protective measures the courts should have a certain discretion, dependant on for example the duration of normal proceedings in certain cases and other measures that are at hand in a particular legal system to safeguard certain rights (e.g. fast-track proceedings). Civil justice might come at stake when the scope and contents of provisional measures is narrowed, whereas there are no other means to guarantee a relatively quick and cheap judgment. For example in the Netherlands the *kort geding* procedure is also used to fill the gap that would otherwise exist in legal protection, because of the growth of legal procedures, and the (subsequent) high costs and long duration of normal proceedings. The rules regarding the *kort geding* are for the greater part formulated in practice, and differ per field of law. Nevertheless the *kort geding* is very popular and regarded as an effective measure that guarantees the rights of both plaintiff and defendant.

The description of the character of the measure in Part 10.7 is in my opinion useful. These provisions are the real essence of what a provisional measure is: it lacks *res judicata* in any subsequent proceedings (Article 10.7.1), and the judgment is automatically annulled by a judgment which declares that the right for protection of which the provisional remedy was granted does not exist (Article 10.7.3). It could, however, be desirable to explain what exactly the consequences of the annulment are, because this differs per country. In the Netherlands the decision remains valid for the period before the principal judgment was rendered. This means for example that ‘contempt fines’ (*dwangsommen, astreinte, Zwangsgeld*) that the defendant had to pay because he did not comply with the provisional judgment are still due. Further explication in order to come to a real harmonisation seems to be necessary.

³⁵ These comments are of course partly the result of my familiarity with especially the Dutch *kort geding*, and ‘deviating’ provisions will possibly raise more questions in my view, whereas for foreign lawyers it might be a clear and acceptable provision.

³⁶ See also para 2 above.

³⁷ The provisional definition of the draft Hague Convention comes close to that of the *Storme/Tarzia* draft.

7.2 Jurisdiction regarding provisional and protective measures

The jurisdiction rule laid down in Article 10.4 is in my opinion useful, but too narrow. It is not in compliance with the Brussels Convention/Regulation and the rulings of the Court of Justice. Article 10.4.1 confers jurisdiction upon the court of the defendant and the court where the measure is to be enforced. According to Article 24 (= 31 Regulation) and the rulings of the Court of Justice, however, all courts that have jurisdiction in the principal proceedings also have jurisdiction regarding provisional and protective measures. Furthermore, all other courts whose territory is closely connected to the measures, have jurisdiction.³⁸ This is in the first place of course the court of the place where the measure is to take effect, but also other circumstances might constitute a real connection.³⁹ The Court also decided that jurisdiction on the basis of Article 24 remains in tact when the proceedings are already commenced somewhere else.⁴⁰ Maybe in national proceedings it is more logical to apply for provisional measures in the same court as where the main proceedings are pending, but since the draft also covers international proceedings, the formulation is somewhat lacking; at least in my opinion the difference between national and international litigation should be more profound.

7.3 Conditions for granting provisional and protective measures

Part 10.2 on the conditions for granting a measure seems to be in conformity with the character of provisional measures. The court should have a certain discretion whether to grant a measure or not, depending on the circumstances. As a harmonisation proposal it is in my opinion sufficient; the open formulation is in this regard only a positive feature.

7.4 The procedure

Article 10.3.1 states that in principal the procedure will be contradictory. In very urgent and exceptional circumstances the measures can, however, be granted *ex parte*. This possibility can be found in many national rules for provisional measures, but not in all countries. In the Netherlands, the *kort geding* is always *inter partes*. The same goes for the French *référé*. The strength and legitimacy of the *kort geding* is partially created by the guarantee that the defendant is always heard. Conservatory measures, such as the conservatory attachment (*conservatoir beslag*) are however not handled in a regular *kort geding*, and can be granted *ex parte*. In these cases the applicant must start the main proceedings within a certain (short) period, otherwise the measure will cease to have effect. It might be an idea to consider whether the possibility to grant measures *ex parte* should be limited to certain measures. It would in my opinion not be appropriate to grant for example anticipatory measures or far reaching measures in the field of intellectual property without the defendant being heard. Also the European Court of Justice ruled that measures granted *ex parte* are not to be recognised and enforced under the Brussels

³⁸ See para 6.1 above.

³⁹ In my Ph.D. Thesis (see note 23) I made the following proposal for the Brussels Convention/Regulation on the basis of the *Van Uden* decision: "The preceding provisions do not effect the jurisdiction of the courts of other member states to order provisional or protective measures as may be available under their law, provided that there is real connecting link between the subject-matter of the measure sought and the territory of that state. In any case a real connecting link is present if the measure, or part of it, is to take effect in that state". (see the English summary, p. 368).

⁴⁰ See *Van Uden* (para 6.2 above), no 48.

Convention.⁴¹ This draft does not seem to attach this consequence to remedies that were granted *ex parte*.

7.5 Recourse and withdrawal

Article 10.5.1-3 on recourse are a valuable contribution to the harmonisation of provisional and protective measures. To me it is not fully clear whether further appeal (in cassation) is also possible. For example in the Netherlands, France and Belgium the provisional decision (*kort geding*; *référé*) can be appealed at the Court of Appeal and also be brought before the Supreme Court (*Hoge Raad*, *Cour de Cassation*, *Hof van Cassatie*) for cassation. In other countries, such as Germany, cassation at the Supreme Court is not possible (see § 545,2 *Zivilprozeßordnung*).⁴²

Article 10.6.1-2 on variation and withdrawal of the remedy are also useful and necessary for harmonisation. But the rules in this regard are not the same in the European countries, and some explication might be needed. For example, must the request to vary, set aside or reverse the decision be done at the same court/judge that ordered the first measure, and is this procedure to be commenced in the same way as an initial procedure leading to a provisional measure?⁴³

7.6 Enforcement of provisional measures

Article 10.8.1-2 are in my opinion also fundamental for harmonisation of provisional measures. These provisions seem to me to be quite clear. But maybe the decisions of the Court of Justice regarding the enforcement of provisional and protective measures are also of importance in this regard. In the *Denilauler* case, the Court decided that *ex parte* measures cannot be enforced under the Brussels Convention.⁴⁴ It seems to me that not hearing the defendant is not an obstacle under this draft (see also 7.4 above), whereas in international litigation it is, at least when the enforcement is to take place in another country.

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⁴¹ *Denilauler/Couchet* case, see note 24.

⁴² See Kramer 2001 (note 23), p. 32, 54-55, 74

⁴³ E.g. in the Netherlands a second *kort geding* must be commenced (in the same way as the first one) in order to get another measure. However, the request to set aside a measure that falls under the scope of Article 50 TRIPS agreement is not a *kort geding*, but just a formality.

⁴⁴ Also the *Mietz* case (see para 6.1) might have implications for international enforcement, but this is still not very clear, and also dependant upon the rules of jurisdiction.