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English Worldwide Freezing Orders in Europe

A Pragmatic Search for Legal Certainty and the Limits of Judicial Discretion

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Abstract

A judgment creditor who obtains a freezing order in one EU Member State may seek to enforce it in another Member State. When judgment creditors seek to enforce such orders, the judgment debtors may appeal against the enforcement orders. This article examines how protective measures can be guaranteed pending such enforcement appeals under the Brussels legal regime. Relevant legal provisions and the case law of the Court of Justice are considered. There is also an examination of the recent English response to the Brussels legal regime and an argument that the judgment creditor is entitled to protective measures. Drawing support from public policy and mutual trust considerations, this article concludes that exercising judicial discretion in granting protective measures pending appeals undermines legal certainty.

Keywords

world wide freezing orders – English enforcement – appeals

1 Introduction

Courts may freeze the assets of judgment debtors to ensure judgment creditors can reap the fruits of their judgments through enforcement.[1] Otherwise,

1 In England, "freezing injunctions" were previously known as "*Mareva* injunctions". The latter took its name from the leading case of *Mareva Compania Naviera S.A.* v *International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509 (C.A.). See generally *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818.

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the fair and efficient administration of justice will be undermined.[2] Assets may be in countries other than those in which freezing orders were granted. Free movement within the European Union has given impetus to major companies and influential business people acquiring assets abroad.[3] Returning to the court to obtain a freezing order each time new assets are discovered in a new jurisdiction would be cumbersome and inefficient. This is especially so as modern technology promotes quick transfers of assets. The increasing complexity of international business transactions implies that such assets may be interconnected in different jurisdictions within or outside Europe.

The initial scepticism and even hostility towards Worldwide Freezing Orders (WFOs) endured for a long time. Such scepticism was particularly intense outside Europe,[4] but also significant in Europe which is essentially divided between influences or approaches of the common law and civil law jurisdictions.[5] There is, however, a growing acceptance of WFOs.[6] To illustrate the increasing acceptance of WFOs, English WFOs have been enforced by local attachment in European countries such as Switzerland,[7] France,[8] and Latvia.[9] The English courts are also willing to enforce WFOs from other Member States. The English High Court recently enforced a WFO obtained in Cyprus,[10] a country which asserted that its courts had the competence to grant WFOs a decade earlier.[11] In the same decade, the English High Court asserted its competence and willingness to enforce a Greek WFO under the Brussels Regulation 44/2001.[12]

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2 *Gambazzi v Daimler Chrysler Canada Inc* Case C-394/07; ECR I-02563 para. 30.

3 B. Akkermans, "Property Law and the Internal Market" in S. van Erp et al. (eds.), *The Future of European Property Law* (Sellier European Law Publishers, 2012) pp. 222–223.

4 B. Hess, T. Pfeiffer and P. Schlosser, *Report on the Application of Regulation Brussels I in the Member States* (Ruprecht-Karls-Universität, 2007) para. 707.

5 (n 4) para. 709.

6 For an overview of relevant laws in some EU Member States (including France, Belgium, Italy, Switzerland, and Germany), see M.S.W. Hoyle, *Freezing and Search Orders* (4th edn, Informa Law from Routledge, 2006) paras. 11.26–11.31.

7 Swiss Federal Tribunal ATF 129 III 626; Donzallaz, *La Convention de Lugano*, Berne 1997, N° 2450. See generally, art 27 of the Swiss Debt Enforcement and Bankruptcy Act. Fentiman describes this as "exporting the injunction". See R Fentiman, *International Commercial Litigation* (2nd edn, Oxford University Press, 2015) paras. 17.75–17.78.

8 *Stolzenberg v Societe Daimler Chrysler Canada*, Cour de Cassation, 1 re civ, 30 June 2004 See Fentiman (n 7) paras. 17.75–17.78.

9 Case C-559/14 *Meroni v Recoletos Ltd* EU:C:2016:120; EU:C:2016:349; [2017] QB 85.

10 *Cyprus Popular Bank Public Co Ltd v Vgenopoulos* [2016] EWHC 1695 (QB); [2017] 2 WLR. 67.

11 *Seamark Consultancy Services Limited v Joseph P Lasala et al.* [2007] *1 CLR 162.*

12 On the facts, the court decided that it was against public policy to do so since the order was no longer in force. See *Trisha D'Hover v Tritan Enterprises* [2009] EWHC 949 (QB) paras. 10 and 12.

This article focuses on the European judicial area with particular reference to the Brussels legal regime: the Brussels Regulation 44/2001 (Brussels I) and the Brussels Recast Regulation 1215/2012 (Brussels I *bis*), both of which trace their ancestry to the Brussels Convention of 1968.[13] Under the Brussels legal regime, there are provisions concerning appeals against enforcing judgments obtained in other jurisdictions.[14] As will be discussed in detail later,[15] the definitions of "judgment" in both Brussels I and Brussels I *bis* generally include provisional measures.[16] It is rather axiomatic that judgment debtors try to frustrate or delay the enforcement of judgments as much as they can. While an appeal against the enforcement of a judgment is pending, the judgment creditor needs to ensure the judgment debt can be realised should the appeal turn out to be in his favour. In fairness to the judgment debtor, it is important that no irreversible loss is suffered before the conclusion of the appeal because the judgment creditor may lose the appeal. Brussels I provides a mechanism by which judgment creditors can prevent the dissipation of assets pending an appeal against the enforcement of a freezing order obtained in another Member State.[17] This is based on an entitlement to protective measures regarding the assets while the appeal lasts.[18] There is, however, evidence that the English position rejects the provision of protective measures pending appeal as an entitlement and that such provision is discretionary. This article queries this position and it is necessary first to have a brief insight into the emergence of the English WFO.[19] The early history of English freezing orders is quite convoluted,[20] even as the scope and application of worldwide freezing orders have remained dynamic. For example, the Supreme Court of the United Kingdom recently decided that a respondent should not incur certain forms of debt which have the effect of reducing the respondent's

13 The Lugano Convention (which has similar provisions regarding protective measures) is referred to where necessary, especially in the context of Switzerland. See art 31 of the Lugano Convention 2007.

14 See art 38 of Brussels I and art 40 of Brussels I *bis*.

15 Section III of this article on "WFOs under the Brussels (and Lugano) Legal Regime". In particular, see Section III (b) on "Provisional, including protective, measures".

16 See art 32 of Brussels I and art 2 (second paragraph) of Brussels I *bis*.

17 Art 43 of Brussels I.

18 This is a core argument of this article.

19 The context that follows is stated generally because it will help to understand the post-Brexit (and possibly post-Brussels) discussion towards the end of this article.

20 See C. McLachlan, "International Litigation and the Reworking of the Conflict of Laws", *Law Quarterly Review* (2004) 584. See also: *The Siskina v Distos Compania Naviera S.A* [1979] AC 210; *Ashtiani v Kashi* [1987] QB 888 (CA).

assets.[21] This was in spite of the court's observation about a "settled understanding" that borrowings did not fall within the remit of the standard form of freezing order.[22] In upturning the decision of the Court of Appeal, the Supreme Court decided that proceeds of the loan agreements were "assets" within the extended definition in paragraph 5 of the standard form of freezing order.[23] Such enduring dynamism underscores the speed with which freezing orders have evolved in their application by the English courts.[24] It took less than two decades for the common law to catch up with and surpass the civil law remedies concerning freezing orders, as now encapsulated in WFOs.[25] Article 24 of the Brussels Convention of 1968 required Member States to make appropriate provisional or protective measures to assist the courts of other Member States.[26] To what extent the Brussels Convention of 1968 formed the foundation for statutory law in the United Kingdom to empower courts to grant WFOs is not particularly critical,[27] since Section 25 of the Civil Jurisdiction and Judgments Act (CJJA) specifically empowers the courts to grant WFOs.[28] Provisions in Brussels I *bis* concerning the foreign court's jurisdiction over the substance

21 This was in the context of the standard form of order. See *JSC BTA Bank v Ablyazov* [2015] 1 WLR 4754, 4767 (SC).

22 (n 21). See generally: *Cantor Index Ltd v Lister* [2002] CP Rep 25 and *Anglo Eastern Trust Ltd v Kermanshahgi* [2002] EWHC 1702 (Ch).

23 *Ablyazov* (n 21) 4768 para. 39. On further clarification of the definition of "assets" with respect to standard from freezing order and a wholly owned company, see *Latakamia Shipping Company Limited v Nobu SU* [2014] EWCA Civ 636 and *Group Seven Ltd v Allied Investment Corporation Ltd* [2013] EWHC 1509 (Ch).

24 In fact, in the Supreme Court's judgment in *Ablyazov* (n 21), the word "extended" appeared at least 16 times, all in the context of defining "assets".

25 McLachlan partly attributed this to the Brussels Convention which became effective in the UK in 1989, and on which basis the UK enacted local legislation to support litigation in other Convention countries. See McLachlan (n 20) 591. See also Republic of *Haiti v Duvalier* [1990] 1QB 202.

26 See art 31 of the Brussels 1 Regulation – Regulation (EC) No. 44/2001 and now art 35 of the Brussels Recast – Regulation (EU) No. 1215/2012. See also art 31 of the Lugano Convention of 2007.

27 In an earlier edition of Dicey, it was more significant. See Dicey, Morris & Collins, *The Conflict of Laws* (14th edn, Sweet & Maxwell, 2006) para. 8–024.

28 S 25(1) of the Civil Jurisdiction and Judgments Act 1982 [Interim Relief] Order 1997. See also s 37(1) of the Senior Courts Act of 1981. Since 1997, a decade after it became it became applicable to other Convention States, the power in s 25 (3) has been exercisable to States in the context of both the Brussels and Lugano Conventions. See Dicey, Morris & Collins, *The Conflict of Laws* (15th edn, Sweet & Maxwell 2012) paras. 8–027 to 8–029. See generally, *ICICI Bank UK plc v Diminico NV* [2014] EWHC 3124 (Comm).

of the dispute imply that WFOs granted pursuant to Section 25 of the CJJA will not be enforceable in other Member States[29] As will be discussed later in this article, however, the CJJA may assume greater practical importance if the United Kingdom's exit from the European Union implies that the Brussels legal regime will be disapplied. Discussions concerning a post-Brexit legal order are otherwise beyond the scope of this article and speculative as it is difficult to determine the fine details of a post-Brexit legal order. For now, it is important to understand why the English approach to WFOs seems inclined to a discretionary judicial attitude as is the case with injunctive and equitable reliefs generally.

Subject to the foreign court's jurisdiction concerning substantive proceedings, provisional or protective measures are obtainable and enforceable among Member States under the Brussels legal regime.[30] However, the English attitude to WFOs is particularly relevant for analysis in this article because of London's special international commercial status. The history and evolution of WFOs have created the tendency for English courts to demonstrate their competence and willingness to be flexible with a view to facilitating international commercial litigation and ultimately dispensing justice. In doing so, however, fresh challenges have arisen. This article examines whether a discretionary attitude is justifiable or desirable when judgment creditors seek protective measures with respect to WFOs in English courts during appeals against enforcement orders.

This article first briefly explains the nature of a WFO from an English perspective. Both Brussels I and Brussels I *bis* are considered because Brussels I continues to apply to proceedings instituted (and orders obtained) before 10 January 2015.[31] The article further explores the case law of the Court of Justice of the European Union (CJEU) and scholarly views concerning the provision of protective measures pending appeal in the court where enforcement is sought. The English position is then considered, especially a recent High Court case which clearly stated that granting protective measures pending appeals was discretionary. This article concludes, supported by public policy and mutual trust considerations, that the provision of protective measures pending appeal is an entitlement. A judicial discretion to grant protective measures pending appeals undermines legal certainty.

29 Fentiman (n 7) para. 17.220.

30 Recital 33 of Brussels I *bis*.

31 As earlier stated, the Lugano Convention is briefly considered in the context of Switzerland because orders are often made concerning that country. See Fentiman (n 7) para. 17.183.

2 The Nature and Enforcement of WFOs

Various European countries such as Germany,[32] the Netherlands,[33] France,[34] and Switzerland[35] have mechanisms for the protection of assets pending litigation. Since WFOs are enforced by the domestic mechanisms available, it is necessary to understand the purpose of a WFO. This explanation is from an English standpoint for two reasons. First, the English High Court made pronouncements in recent cases relevant to the main analysis in this article. Secondly, the English law and practice constitute the comparative baseline for this article.

Essentially, a WFO is designed to prevent a defendant against whom such an order was granted from dissipating or disposing of assets which could be the subject of enforcement in the event that the claimant succeeds in the main case.[36] However, this aim does not include giving the claimant security for a claim.[37] The preservation of such assets should also be subject to dealings in the ordinary course of business.[38] Otherwise, there would be a risk of oppressive

32 The *Arrest* and the *einstweilige verfügung* (provisional injunction). See para. 24 of C. Kessedjian, "Note on Provisional and Protective Measures on Private International Law and Comparative Law" Enforcement of Judgments Prel. Doc. No. 10 October 1998 https://assets.hcch.net/upload/wop/jdgmpd10.pdf (accessed 7 March 2017); W.D. Park and S.J.H. Cromie, *International Commercial Litigation* (Butterworth & Co (Publishers) Ltd 1990) p. 304.

33 E.g. protective attachment orders and the *kort geding* (summary procedure for interim payment). See C Kessedjian (n 32) para. 109.

34 *Mesures conservatoires* (protective measures). See generally, C. Kessedjian (n 32) paras. 87–89 and 95–97; W.D. Park and S.J.H. Cromie, *International Commercial Litigation* (Butterworth & Co (Publishers) Ltd, 1990) 302.

35 A sequestration order and injunctions to ensure provisional/protective measures (*vorsogliche Massnahme/ provisorische Massnahme*); Kessedjian (n 32) para. 122.

36 It is granted *in personam*. Dicey, Morris & Collins (n 28) para. 8–009. Recent English cases concerning WFOs generally include: *Haederle v Thomas* [2016] EWHC 3498 (Ch); *Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch); *SCF Tankers Ltd* (*Formerly Fiona Trust and Holding Corp*) *v Privalov* [2017] EWCA Civ 1877; *Great Station Properties v UMS Holdings* [2017] EWHC 3330 (Comm).

37 This is also known as the enforcement principle. The two other principles central to freezing orders are: the flexibility principle and strict construction principle. See *Ablyazov* (n 21) 4761.

38 *Ibid* 4763. See also *JSC BTA Bank v Solodchenko* [2010] EWCA Civ 1436; 2011 1WLR 888, 890 para. 52.

conduct against the defendant, which is not the aim of a WFO.[39] This underscores the need for a "clear and equivocal" order which must be "strictly construed" in favour of the defendant.[40]

A WFO may be granted in support of domestic or foreign proceedings and concerning assets within or outside the jurisdiction of the English court.[41] Considering the Brussels legal regime, judgment creditors can appeal against the orders that allow registration in the English courts.[42] The English court should have "no discretion to whether or not to grant an interim relief to prevent a dissipation of assets while such an appeal is pending".[43] In enforcing WFOs emanating from other Member States, the English courts have indicated a tendency to depart from the CJEU legal regime. For example, in the light of *van Uden*,[44] the CJEU stipulated some criteria for consideration in *Mietz v Internship YatchingSneek*.[45] Of particular note is the need for a connection between the subject matter of the measures which the applicant seeks and the territorial jurisdiction in which the applicant seeks those measures. Referring to an English decision concerning a WFO obtained in Greece,[46] Fentiman argued that the "English courts appear to have approached the enforcement of worldwide orders originating in other EU states without reference to the *Mietz*

39 Landmark cases in the context of mitigating the otherwise potentially draconian effects of freezing orders include: *Dadourian Group International Inc v Simms* [2006] EWCA Civ 399; [2006] 1WLR 2499; *Babanaft International Co. SA v Bassatne* [1990] Ch 13, 41 (CA); *Baltic Shipping v Translink Shipping Ltd* [1995] 1 Lloyd's Rep 673 (Comm).

40 This is also known as the strict construction principle. *Ibid* 4763. See also *Mercedes Benz AG v Leiduck* [1996] AC 284, 297 (PC).

41 In support of substantive English proceedings, see SCA 1981, s 37(1) and CPR r.25.1 On the position that there is no need to invoke s 25 of the CJJA 1982 or CJJA 1982 (Interim Relief) Order 1997 in support of English proceedings, see *Masri v Consolidated Contractors International Co SAL* [2007] EWHC 3010 (Comm); [2008] 1 All E.R. (Comm) 305.

42 Hoyle (n 6) 10.32–10.33; art 39 of Brussels I.

43 Holye reached this conclusion based on relevant authorities and reports including art 39 of Brussels I, the Jenard Report, and the CJEU decision of *Capelloni* v *Pelkmans* (C-119/84) which is discussed in detail later. See Hoyle (n 6) 10.34. See also the decision of the Irish High Court (there was "no discretion to refuse" pending an appeal against the enforcement order concerning an English judgment under the Brussels legal regime) in *Elwyn* (*Cottons*) *Ltd v Pearle Designs Ltd.* [1990] I.L.Pr. 40. Cf Hoyle (n 6) para. 10.35 on the English position.

44 Case C-391/95 *Van Uden Maritime B.V.* (*Trading As Van Uden Africaline*) *v Kommanditgesellschaft In Firma Deco-Line* [1988] ECR I-7091; [1999] Q.B. 1225.

45 Case C-99/96; [1999] ECR I-2277. Cf *Comet Group Plc v Unika Computer SA* [2004] I.L.Pr 1.

46 *Trisha D'Hoker v Tritan Enterprises* [2009] EWHC 949 (QB) para. 10.

test".[47] The jurisdictional link aside, there are other considerations for the English court.[48] Having considered some general principles underlying English WFOs, it is necessary to consider the Brussels legal regime in detail.

3 WFOs under the Brussels (and Lugano) Legal Regime

3.1 *Legal Provisions*

The first part of this subsection generally discusses legal provisions that are relevant to this article. The next part focuses on the meaning of "provisional, including protective measures" and its implications for obtaining protective measures pending appeals against enforcement orders. The Brussels legal regime and the Lugano Convention do not specifically mention the term WFOs.

Brussels I provides: "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter."[49] A weakness of Brussels I is that the foreign court could abuse jurisdiction in granting provisional measures. Brussels I *bis* seems to address this concern. There is now a distinction between cases where the foreign court had "jurisdiction as to the substance of the matter" and other cases where such jurisdiction does not exist. In the former case, there should be a free circulation of provisional measures. In the latter case, however, the effect of such provisional measures should be confined to the Member State from where the measures emanated and thus cannot be enforced in other Member States.[50] These provisions concerning the foreign court's jurisdiction over the substance of a matter should help to prevent any assertion of exorbitant jurisdiction.[51] Another implication of these provisions is that protective measures should be enforced more readily abroad if such measures comply with Brussels I *bis*. Thus, courts (including English courts) should have a clearer basis to ensure judgment creditors are entitled to protective measures that exist under the law of the Member State

47 Fentiman (n 7) para. 17.224.

48 In the next subsection, there will be a discussion of a substantive jurisdictional link in the foreign court. See Recital 33 of Brussels I *bis*.

49 Art 31 of the Lugano Convention is essentially the same as art 31 of the Brussels I.

50 Recital 33 of Brussels I *bis*. Art 35 of the Brussels I *bis*.

51 Although recital 33 "does open a window for national law" in enforcing provisional measures, this must be considered in the light of jurisdiction (including "as to the substance of the matter" under Brussels I. See F.M. Wilke, "The Impact of the Brussels I Recast on Important Brussels Case Law", *Journal of Private International Law* 11(1) (2015) 128, 135–136.

addressed.[52] Judgment creditors should be entitled to protective measures pending appeals against the enforcement of such judgments. The provisions of Brussels I *bis* do not diminish this entitlement. For example, recital 33 further emphasises that the protective measures must have emanated from proceedings in which the defendant was summoned to appear, or the defendant must otherwise have been notified before enforcement. It is difficult to appreciate why the defendant must be notified before enforcement if there is no opportunity to express a valid concern or even object to enforcement especially where an enforcement could imply an irreparable loss. During this period, the judgment creditor should be entitled to protective measures. This entitlement will be discussed in detail later.

Although there is no need for a "declaration of enforceability"[53] or the *exequatur* under Brussels I *bis*,[54] grounds for the non-recognition/enforcement of foreign judgment remain under this new legal regime.[55] The English attitude to enforcing WFOs under Brussels I remains relevant, despite the abolition of the *exequatur*, because the judgment debtor retains a right to obtain "any protective measures which exist under the law of the Member State addressed".[56] Furthermore, abolishing the *exequatur* does not necessarily imply that the domestic procedural law on the Member State of the court addressed is avoided. Arguably, "there is nothing in the adopted Recast that prohibits the court from suspending or limiting measures of enforcement during the time that the defender is allowed to lodge an appeal."[57] There is much to recommend in this view because legal provisions concerning appeals against judgments including provisional measures under Brussels I *bis* could be clearer. Under Brussels I *bis* for example, the courts addressed can allow the enforcement of judgments "subject to a limitation of the enforcement or to the provision of security" pending a challenge to the enforcement of a judgment.[58] When this provision is read vis-à-vis article 40 which provides that judgment creditors are entitled to protective measures, it is difficult to consider that abolishing the exequatur greatly diminishes the need to enforce provisional orders pending appeals.[59]

52 Art 40 of Brussels I *bis*.

53 Art 43(1) of Brussels I.

54 Art 39 of Brussels I *bis.*

55 Art 45 of Brussels I *bis*.

56 Art 40 of Brussels I *bis*.

57 L.J. Timmer, "Abolition of Exequatur under the Brussels I Regulation: ILL Conceived and Premature?", *Journal of Private International Law* 9(1) (2013) 129, 139–140.

58 Recital 31 of Brussels I *bis*.

59 Also, cf recital 33 and the definition of "judgment" under art 2.

Thus, legal analysis applicable to Brussels I is also insightful concerning Brussels I *bis*. Case law under Brussels I continues to apply with respect to Brussels I *bis* unless there is a clear departure from previous legal provisions.[60] Also, as will be discussed in the next section, the definition of "judgment" includes "order" under Brussels I and Brussels I *bis*. Under Brussels I, Brussels I *bis*, and the Lugano Convention, "provisional, including protective, measures" is of central importance in understanding why judgment creditors should be entitled to protective measures pending appeals against enforcement orders.

3.2 *"Provisional, Including Protective, Measures"*

Defining what would amount to "provisional, including protective, measures" is difficult but it is necessary to understand the term.[61] Provisional or protective measures ordinarily constitute something less than a full judgment.[62] Such measures are generally used to preserve factual and legal situations with a view to safeguarding relevant rights.[63] The measures may also provide non-final reliefs.[64] The critical point is that the measures do not decide issues definitively – a feature otherwise reflected in judgments generally.[65] Under the Brussels legal regime, the meaning of "judgment" is very wide and it includes "a decree, order, decision or writ of execution".[66] Brussels I *bis* clearly includes "provisional, including protective, measures".[67] Also, to fall within the remit of "judgment", the defendant must have had a chance to appear except the defendant is served with the relevant judgment or order before enforcement.[68] There have been efforts to define and delimit "provisional,

60 Recital 34 of Brussels I *bis*.

61 Maher and Rodger wrote in the context of art 24 of the Brussels Convention containing provisions similar to art 35 of the Brussels Recast. See G. Maher and B.J. Rodger, "Provisional and Protective Remedies: The British Experience of the Brussels Convention", *International and Comparative Law Quarterly* 48(2) (1999) 304.

62 T. Kruger, "Provisional and Protective Measures" in: A Nuyts and N Watté (eds.), *International Civil Litigation in Europe and Relations with Third States* (Bruylant, 2005) p. 313.

63 *Van Uden* (n 44) para. 37; see also para. 28 of *Banco Nacionalde Comercio Exterior SNC v Empresa de Telecommunicaciones de Cuba SA* [2007] [2007] EWCA Civ 662; [2008] 1WLR 1936. para. 28; Case C-261/90 *Reichert v Dresdner Bank* [1992] ECR I-2149 para. 34.

64 Kruger (n 62) 313.

65 For the view that a judgment which is otherwise final should not be less so because it is appealable, see P. Barnett, *Res Judicata, Estoppel, and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law* (Oxford University Press 2001) 17.

66 Art 32(1) of Brussels I; art 2(a) of Brussels I *bis*; art 32 of the Lugano Convention.

67 Art 2(a) second paragraph of Brussels I *bis*.

68 See generally arts 2(a); 43(1) and 45(1) (b) of Brussels I *bis*.

including protective, measurers" by the CJEU. In *Reichert v Dresdner Bank*,[69] the CJEU considered that the effects of the French *action paulienne* varied the legal position of relevant assets rather than merely preserve their legal position.[70] The French action enabled creditors to sue third parties who were related to debtors as successors in title. The action involved a detailed analysis of the merits resulting in a conclusive protection of the creditor's substantive rights. Since such a relief was irreversible, it was correct not to characterise the French action as provisional.[71] Where a provisional or protective measure involves an interim payment, such a payment would not be provisional if it is unconditional and does not guarantee the possibility of repayment.[72] This clarification is important because there are differences between European legal systems with respect to interim payments.[73]

Such measures are on the same pedestal as judgments under the Brussels regime.[74] Efforts to define what amounts to "provisional measures" have either been unsuccessful or arguably unnecessary. Such a definition would perhaps raise more questions than deliver answers.[75] Despite the absence of such a definition, WFOs are provisional measures within the meaning of the Brussels legal regime and may be enforced in other Member States.[76]

These provisions are important because they provide the bases on which judgment debtors can seek protective measures pending appeals against the enforcement of WFOs by judgment debtors. Under Brussels I, either party

69 (n 63).

70 *Reichert v Dresdner Bank* (n 63) para. 35.

71 I. Pretelli, "Provisional and Protective Measures in the European Civil Procedure of the Brussels I System" in V. Lazić and S. Stuij (eds.), *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme* (Asser Press/ Springer, 2017) p. 103.

72 Fawcett and Carruthers explained this in the context of the Dutch *kort geding.* See J Fawcett and JM Carruthers, *Cheshire, North and Fawcett: Private International Law* (14th edn, Oxford University Press 2008) 316–317. See also J. Hill and M.N. Shúilleabháin, *Clarkson and Hill's Conflict of Laws* (5th edn, Oxford University Press, 2016) para. 2.284.

73 In the context of anticipatory measures, which interim payment is subsumed under, see X.E. Kramer, "Harmonisation of Provisional and protective Measures in Europe" in: M Storme (ed.), *Procedural Laws in Europe: Towards Harmonisation* (Maklu Publishers, 2003) pp. 305–306. https://www.academia.edu/1555122/Harmonisation_of_provisional_and_protective_measures_in_Europe (accessed 7 March 2017).

74 See art 32(1) of Brussels I; art 2(a) of Brussels I *bis*; art 32 of the Lugano Convention. Cf *Banco Nacional* (n 63) paras. 1 and 29. On the facts, it was inexpedient to grant a WFO.

75 X.E. Kramer, *The Dutch Kort Geding Procedure in an International Perspective: A Comparative View on Provisional Measures and Private International Law*. Available on SSRN: file:///C:/Users/pnokoli/Downloads/SSRN-id1122344.pdf (accessed 7 March 2017).

76 Art 32(1) of Brussels I; art 2(a) of Brussels I *bis*; art 32 of the Lugano Convention.

may appeal against a declaration of enforceability within one month of service or within two months if the other party is domiciled in a Member State different from that in which the declaration of enforceability is given.[77] The applicant should not be prevented from taking advantage of "provisional, including protective" measures in accordance with the law of the court in which enforcement is sought.[78] In particular, "the declaration of enforceability shall carry with it the power to proceed to any protective measures."[79] During the appeal, only protective measures can be taken against the property of the respondent.[80] The requirement of a declaration of enforceability was abolished in Brussels I *bis*. Whether the judgment debtor should obtain such protective measures while an appeal against enforcing a WFO is pending requires a further examination of relevant legal provisions and case law.

4 The CJEU and Supporting Commentaries

In the *Brennero* case,[81] the CJEU observed that where an appeal was pending, the judgment creditor may "take only" protective measures against the property of the judgment debtor against whom enforcement is sought. No enforcement measures may be effective until the appeal is concluded. *Brennero* was insightful, but it turned out to be a foundation for a clearer and more specific pronouncement by the CJEU.

In *Capelloni v Pelkmans*,[82] the CJEU considered similar provisions in article 39 of the Brussels Convention and in the context of a Dutch judgment creditor who sought to enforce his judgment in Italy. A major issue was whether the judgment creditor could proceed directly with protective measures pending appeal, without any need for specific authorisation.[83] The CJEU decided that it was not necessary for the judgment creditor who had obtained authorisation for enforcement to obtain a separate authorisation to proceed with protective measures.[84] Such a party had "the right to take such measures".[85]

77 Art 43(1) and 43(5) of Brussels I; Lugano Convention.
78 Art 47(1) of Brussels I; Lugano Convention.
79 Art 47(2); Lugano Convention.
80 Art 47(3); Lugano Convention.
81 Case 258/83 *Brennero v Wendel* [1984] ECR 3871 para. 11.
82 (n 43).
83 *Capelloni* (n 43) para. 5.
84 *Capelloni* (n 43) para. 24.
85 *Capelloni* (n 43) para. 25.

Commenting on Section 47 of the Brussels Regulation, Pålsson suggested that the judgment creditor was "entitled to take any protective measures available under the law of the State requested" upon obtaining a declaration of enforceability.[86] The rationale behind this entitlement is that since the judgment creditor is unable to enforce the judgment (pending an appeal), the judgment debtor should be prevented from dissipating relevant assets and thus rendering future enforcement fruitless or even impossible. Pålsson emphasised that the entitlement "arises automatically and is unconditional".[87] Indeed, the judgment creditor neither needs to obtain a separate decision authorising the protective measures,[88] nor show probable cause for such a claim.[89]

Some other scholars have favoured the entitlement of the applicant to protective measures pending appeal less clearly but no less effectively. For example, on the need to maintain the status quo considering *Capelloni*, a Spanish judge seemed to support an entitlement. The judge noted: "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)."[90] Hovaguimian also observed that upon obtaining a declaration of enforceability, "the creditor gained direct and unconditional access to the protective measures of the enforcement state".[91] Furthermore, the abolition of the *exequatur* under Brussels I *bis* implies that protective measures are "immediately available to the creditor".[92]

Unlike *Capelloni* and supporting commentaries, the English courts have considered the entitlement to seek protective orders in a rather permissive

86 L. Pålsson, "Arts. 46–52" in: U. Magnus and P. Mankowski, *Brussels I Regulation* (2nd edn, Sellier European Law Publishers, 2012) p. 784.

87 Pålsson (n 86) p. 784.

88 Or a "judgment *a posteriori* confirming those measures". Pålsson (n 86) 784.

89 Pålsson (n 86) 784. On the entitlement to enforce a "provisional measure under Art 24 [of the Brussels Convention]" as a judgment, see P. Matthews, "Provisional and Protective Measures in England and Ireland and Common Law and under the Conventions: A Comparative Survey", *Civil Justice Quarterly* (1995) pp. 190, 199–200.

90 F.J. Martín Mazuelos, "Notes on Protective and Cautionary Measures in Brussels I Recast and Land Registration" available on https://www.elra.eu/wp-content/uploads/2017/02/8.-Francisco-Martin-Mazuelos-Protective-and-Cautionary-Measures-in-Brussels-I-Recast-and-Land-Registration.pdf (accessed 9 March 2017). For a similar perspective from the Spanish (First Instance) court in the context of *Capelloni,* see https://w3.abdn.ac.uk/clsm/eupillar/public/case/474 (accessed 10 March 2017).

91 This comment was made concerning art 47 of Brussels I.P. Hovaguimian, "The Enforcement of Foreign Judgments under Brussels I Bis: False Alarms and Real Concerns", *Journal of Private International Law* 11(2) (2015) pp. 212, 216–217.

92 (n 99) 217. See arts 39 and 40 of Brussels I *bis*.

manner. In other words, there is no focus on any right to obtain protective orders while appeals are pending. An example is *Premium Jet AG v Sutton*, a case decided considering Brussels I.[93] The claimant obtained an interim charging order against the defendant's property pursuant to article 38 of Brussels I. The court decided that the claimant was permitted to obtain the interim order for a preservation of property pending the final determination of enforcement of the judgment. Cases such as *Sutton* are relevant because references were made to *Capelloni* but without any specific consideration of entitlement to protective measures pending an appeal against a freezing order obtained in another Member State.[94] In the next section, there is an examination of the English position on entitlement to protective measures pending appeals and the extent to which this position reflects a significant detachment from the CJEU case law.[95]

5 The English Position: Mapping the Limits of Inconclusive or Undetermined Rights

5.1 *Cyprus Popular Bank Public Co Ltd v Vgenopoulos*

The English position may be illustrated by the recent case of *Cyprus Popular Bank Public Co Ltd v Vgenopoulos*, decided with regard to Brussels I.[96] This case is important because the judgment was detailed and it discussed the leading CJEU case of *Capelloni* which had been cited in support of the argument that the applicant was entitled to protective measures pending appeal.[97] The English High Court also cited two leading authors in support of its view that the applicant was entitled to seek, but not necessarily be granted, protective measures with respect to the relevant assets.[98]

The claimant, a Cypriot company, obtained an interim WFO against the first to third defendants. The order also prohibited the twelfth defendant from transferring assets to the first to third defendants. The claimant sought to register the WFO as an order of the English court in accordance with article 38 of Brussels 1. Upon registration, the claimant served the order and the WFO on a

93 [2017] EWHC 186 (QB); See also *Re Specification of A Deadline for Providing Security* [2008] I.L.Pr. 5.

94 The court referred to *Capelloni* (n 43). See *Sutton* (n 93) para. 25.

95 See generally notes 43–45.

96 (n 10).

97 (n 10).

98 (n 10) 98.

third party bank in England informing them that they were liable to contempt proceedings if they defaulted.[99] The defendant appealed against the registration and a major issue was whether a foreign judgment became effective and enforceable as soon as it was registered, or only when the time limit to appeal expired, or when any appeal lodged was concluded.[100]

The English High Court decided that a foreign WFO did not become fully effective and enforceable in England merely upon registration as a judgment of the High Court under article 38 of Brussels I. The period for bringing an appeal must have expired, or where an appeal was lodged within time upon conclusion of such an appeal.[101] The claimant had to apply for a domestic freezing order as a protective measure pending the appeal against registration under article 47(2) (3) of the Regulation. In granting the application for a domestic freezing order, the court observed that it was purely discretionary for it to grant a protective measure pending appeal against the enforcement of the WFO.[102] The English court partly relied on an important case, *Banco Nacional*, in drawing its conclusion that the judgment creditor was not entitled to a protective measure pending an appeal against a WFO. Thus, it is helpful to consider the case briefly.

5.2 *Banco Nacional v Empresa*

In *Banco Nacional*, the claimant obtained an Italian judgment against the defendant. The claimant then sought to enforce the judgment in several European jurisdictions including England. Pursuant to article 47(1) of Brussels I, the claimant obtained a domestic freezing order and subsequently a WFO that included an undertaking in respect of third party losses but which the claimant did not want. The Court of Appeal allowed the defendant's appeal to discharge the WFO and, among others, made two pronouncements particularly relevant to this article. First, matters which are not covered by specific provisions in the Regulation fall within the remit of the procedural law of the court in which enforcement is sought.[103] Secondly, applicants applying for provisional/protective measures "must take them as he finds them" in any jurisdiction where enforcement is sought.[104] These pronouncements are of particular relevance to the provisional measures that can be obtained during appeals. Under

99 Art 43(5) of Brussels I.

100 (n 10) 67–68.

101 (n 10) 80.

102 (n 10) 97–98.

103 *Banco Nacional* (n 63) para. 44.

104 *Banco Nacional* (n 63) para. 44.

article 47(1) of Brussels I, "nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested."[105] This provision clearly stipulates that the judgment creditor is entitled to seek protective measures. However, it is unlikely that an entitlement to seek such measures only was the sole intendment of the European legislator because ensuring the fruits of a judgment will be realised is a practical consideration. There should be more.

5.3 *Initial Case Analysis*

Arguably, the judgment creditor is entitled to protective measures pending appeal since the WFO in question cannot be enforced until the appeal is concluded. However, the English court's interpretation was that granting such protective measures was purely a matter for judicial discretion.

There are some implications of the English court's position. First, a pending appeal by the defendant in England where enforcement is sought will prevent the enforcement of a WFO. It is doubtful if this should be read as consistent with the spirit and rationale behind the automatic enforcement of judgments in the European Union. Secondly, the question of urgency and speed seem to be undermined. The appeal period thus exposes the claimant to possible loss since the WFO cannot be enforced until the conclusion of the appeal. Thirdly, the potential loss to which the claimant is exposed is compounded by the discretionary attitude of the High Court to grant a domestic freezing order pending the appeal. There is thus a need to reflect on the effects and limits that WFOs should have in Europe.[106]

Why should a litigant who obtained a WFO in a Member State risk a dissipation of assets because the court in which an enforcement is sought may decide that the judgment creditor is not entitled to protective measures pending appeal? This question is especially important as protective measures should not vary or cause any irreversible loss. If the process of enforcing the WFOs is not certain, how does that foster mutual trust in Europe?[107] First, a fundamental aim of WFOs is to avoid a dissipation of assets. If this cannot be guaranteed speedily, it is arguable that there is an implied recharacterisation of the WFO.

105 A declaration of enforceability under art 41 is not required for this. See art 47(1) of Brussels I.

106 In Fentiman's view, the requirement that the foreign court should have jurisdiction concerning the substance of the matter to ensure provisional measures are enforceable "diminishes the effectiveness of judgments obtained in the EU". See Fentiman (n 7) para. 17.221.

107 Mutual trust will be discussed later.

This implied recharacterisation does not foster legal certainty and predictability. Secondly, the rationale behind mutual trust in Europe indicates faith in judicial institutions other than those in the jurisdiction where enforcement of the foreign order is sought. Thirdly, the non-enforcement of a WFO because there is a pending appeal arguably needs to be reconciled with the enforcement of a WFO where there was no prior hearing of all the parties whose rights may be affected by such an order.

In the light of the foregoing analysis, it is interesting that the English High Court in *Vgenopoulos* partly found support in the leading English authority on the private international law: Dicey, Morris and Collins. In declaring that a judgment creditor was not entitled to protective measures pending an appeal against the enforcement of a WFO, the court observed that there was a "strong presumption in favour of the relief being granted".[108] This comment was made in the context of article 47(1) of the Brussels Regulation. The *Vgenopoulos* court also relied on Briggs which is particularly significant because Briggs first concedes that under *Capelloni*, there was a right to obtain protective measures. The *Vgenopoulos* court quoted a footnote: "In 119/84 *Capelloni v Pelkmans* [*1985*] *1 CMLR 388*, it was suggested that there was a right to obtain such measures, but the truth probably is that there is a right to apply and the court has a discretion, which it may exercise in the applicant's favour, to grant the relief applied for."[109] It is also significant that Briggs expressed doubt regarding his view that the court had a discretion in the matter.

Some other leading authors seem to have avoided the controversy. Fentiman noted that claimants who obtained judgments in Member States "may seek enforcement in England, supported by freezing and disclosure orders",[110] and he referred to relevant provisions of Brussels I and Brussels I *bis*.[111] Admittedly, his comment does not necessarily imply that the English court must grant protective measures pending appeals. This comment, however, also does not imply that the English court has a discretion regarding the application for protective measures. Arguably, the only clear deduction that can be made from the statement is that the applicant can apply for domestic freezing orders to support the enforcement of the judgment which was obtained in another

108 Dicey, Morris and Collins (n 28) para. 8–046.

109 A. Briggs, *Civil Jurisdiction in Judgments* (6th edn, Informa Law, 2015) para. 7.27 fn 274, quoted by the court at p. 98 of *Vgenopoulos*.

110 Fentiman (n 7) para. 17.16.

111 Art 40 of Brussels I *bis* and art 47(1) of Brussels I.

Member State.[112] In connection with article 47(1) of Brussels I, Dickinson argued that a claimant who obtained a judgment in another Member State "may seek protective measures under the law of the enforcing Member State, without obtaining a declaration of enforceability".[113] This is subject to the judgment being recognised under the Regulation.[114]

The common denominator between appeals and hearing people whose rights may be affected by a judgment, is whether and how rights may be determined conclusively and enforced. Such conclusiveness also implies the need to prevent a pre-emptive curtailment of individual rights or even loss. The enforcement of a WFO by a court of a Member State without a prior hearing of parties whose rights may be affected, was discussed at length in *Meroni*.

5.4 *Meroni v Rocoletos Ltd* – a Helpful Analogy From the CJEU

Unlike *Vgenopoulos* where the claimant sought to enforce a Cypriot WFO in England,[115] in *Meroni v Rocoletos Ltd* the claimant sought to enforce an English WFO in Latvia.[116] This case is insightful in the current analysis because it indicates the need to promote the free movement of European freezing orders among Member States by ensuring the defence of public policy is interpreted very narrowly. Also, *Meroni* invites reflection on whether there is any room for the English courts to be more liberal in supporting the free movement of European freezing orders vis-à-vis the Brussels legal regime.

In *Meroni*, the English High Court granted a freezing order which prohibited the defendant from dissipating his interests in a Latvian company. Those interests also extended to a Dutch company. The Latvian and Dutch companies were not parties to the English freezing order proceedings. However, under English law, a freezing order became effective on a third party upon notification and the third party was then entitled to contest the order. The director of the Dutch company appealed against the Latvian court's declaration that the English freezing order was enforceable in Latvia. On a reference by the Latvian Supreme Court, the question before the CJEU was whether the enforcement of an order from a Member State's court without a prior hearing of a third

112 At this stage, the English court cannot grant a WFO. See Fentiman (n 7) para. 17.16; Dicey, Morris and Collins (n 28) para. 8–046.

113 A. Dickinson, "The Revision of the Brussels I Regulation: Surveying the Proposed Brussels I *Bis* Regulation – Solid Foundations but Renovation Needed", *Yearbook of Private International Law* 12 (2010) 266.

114 Dickinson (n 113) 266.

115 (n 10).

116 (n 9).

party whose rights may be affected was "manifestly contrary to public policy in the Member State in which recognition is sought".[117] The CJEU answered the question in the negative, in so far as such a third party was entitled to assert his rights before that court in which enforcement of the foreign order was sought.[118] The third party could request that the order be varied or set aside.[119]

In *Vgenopoulos* (where the English High Court decided that it was discretionary to grant protective measures pursuant to a WFO enforcement pending appeal),[120] the claimant argued that *Meroni* supported his position that judgment creditors were entitled to protective measures in the enforcing court.[121] This was because there was no indication that the English freezing order "ceased to be enforceable or effective in view of the appeal brought against its recognition in Latvia after it had become enforceable".[122] In rejecting that argument, the *Vgenopoulos* court distinguished the *Meroni* case partly on the basis that it was necessary to apply for a declaration of enforceability and an interim protective measure.[123] In *Vgenopoulos*, the claimant applied for a declaration of enforceability but not an interim measure. The court in *Vgenopoulos* thus considered that applying for both at once was appropriate where the "judgment" sought to be enforced was a WFO.[124] Although the court considered that the facts of *Meroni* were not relevant to the issues before the *Vgenopoulos* court, *Meroni* itself indicated the CJEU's inclination to facilitate the free movement of judgments with little or no impediments. This inclination is underscored by the CJEU's very narrow and strict interpretation of public policy.

6 Public Policy

There is a public policy rationale behind preventing judgment debtors from handling their assets, especially when enforcement appeals are pending.

117 Case C-559/14 (n 9) para. 8.

118 *Ibid* (n 117) para. 55.

119 *Ibid* (n 117) para. 49.

120 (n 10) 97–98.

121 (n 10) 91.

122 (n 10) 91.

123 (n 10) 92. Under Brussels I *bis*, there is no need for a declaration of enforceability for a judgment given in a Member State to be enforced by another Member State. See art 39 of Brussels I *bis*.

124 (n 10) 92. Generally, cases such as *Vgenopoulos* remain relevant even under Brussels I *bis* because the focus was on enforcement rather than how the foreign court exercised jurisdiction.

Protecting such assets helps to ensure: the enforcement of judgments, conservation of resources, and the integrity of the legal process.[125] Admittedly, the interests of judgment creditors, judgment debtors and States should be considered. A balance should be struck between the claimants' need to access their funds and the defendants' need to avoid suffering disadvantages or even measures of enforcement that cannot be reversed.[126] Such a balance reflects core public policy considerations which underlie international commercial litigation.

European case law on the recognition and enforcement of foreign judgments provides a firm foundation for public policy to support the free movement of judgments. There has been a discussion of very recent cases in the specific context of protecting assets pending appeals against the enforcement of WFOs.[127] In addition, there are other landmark cases which provide a general indication of how public policy should be used positively. Guided by a reference to the CJEU,[128] the English Court of Appeal in *Orams v Apostolides* observed that it would be contrary to the spirit of Brussels I to ensure the free movement of judgments if a declaration of enforceability was dependent on "factual conditions"[129] regarding the enforcement of the judgment where it was given.[130] Nearly a decade earlier, the CJEU interpreted public policy in a manner that facilitated the free movement of foreign judgments considering BrusselsI.[131]

Maintaining a strict and narrow interpretation of public policy in the recognition and enforcement of foreign judgments under Brussels I *bis* underscores the need to consider how the free movement of judgments can be promoted. Article 41(1) of Brussels I *bis* provides that the procedure for the enforcement of judgments in another Member State shall be governed by the law of that Member State.[132] However, the question is whether there is much scope, if at all, for discretion or even interference by the court in which enforcement is sought. Arguably, the abolition of a declaration of enforceability drives the

125 Fentiman (n 7) para. 17.02.

126 A. Briggs, *Private International Law in English Courts* (Oxford University Press, 2014) para. 6.94. See also A. Dickinson, "Provisional Measures in the 'Brussels 1' Review: Disturbing the Status Quo?", *Journal of Private International Law* 6(3) (2010) 564.

127 E.g. *Meroni* (n 9).

128 Case C-420/07.

129 Such as an in-depth consideration of internal political intricacies.

130 See para. 98 of the Court of Appeal judgment; para. 62 of the CJEU judgment.

131 See generally, Case-7/98 *Bamberski v Krombach*; [2001] Q.B. 709.

132 See also art 41(2) of Brussels I *bis*.

Brussels jurisprudence towards facilitating the enforcement of WFOs.[133] If the enforcement of foreign judgments is automatic and subject to very narrow public policy exceptions, the court in which enforcement is sought should not exercise any discretion in protecting the assets which are the subject matters of appeals. There is a further implication of the new provisions of Brussels I *bis*. Unlike Brussels I which stipulated a definite time frame within which appeals against the registration may be brought, there is no order to appeal against under Brussels I *bis*.[134] The absence of a definite time frame arguably also implies that, in theory at least, there is no time limit to apply for an order refusing enforcement.[135] Such permutations notwithstanding, the abolition of a declaration of enforceability clearly signals a seamless procedure for the recognition and enforcement of foreign judgments among Member States. Such a procedure is driven not only by a narrow and positive interpretation of public policy, but also by an effective application of mutual trust.

7 Mutual Trust

One of the cardinal applications of mutual trust is that within the uniform European Union judicial space, litigants' rights can be protected efficiently before the courts of any Member State.[136] Mutual trust is particularly important with respect to foreign judicial acts.[137] The persistent advancement of mutual trust in the European Union judicial space is underscored by the removal of the *exequatur*.[138]

If mutual trust has the effect of foreign judgments obtained in Member States being essentially the same as local judgments in other Member States, effective control should promote this certainty. For control to have its full

133 Art 39 of Brussels I *bis* provides for enforcement in Member States without any declaration of enforceability.

134 Briggs (n 126) para. 6.103.

135 Briggs conceded that this should be different in practice. He also argued that the new provisions in Brussels I *bis* concerning applications and appeals against decisions could lead to "more… possibilities of appeal than is the case under Regulation 44/2001". See Briggs (n 126) para. 6.103.

136 Z.C. Reghizzi, "'Mutual Trust' and 'Arbitration Exception' in the European Judicial Area: the West Tankers Judgment of the ECJ", *Yearbook of Private international Law* 11 (2009) 438.

137 M. Weller, "Mutual Trust: In Search of the Future of European Private International Law", *Journal of Private International Law* 11(1) (2015) 100.

138 Weller (n 137) 82. See also art 52 of Brussels I *bis*.

effect, such control should be exercised by someone other than the person sought to be controlled.[139] The minimisation or even lack of such control in the context of third States may be justifiable,[140] but the scope of discretion in issues directly related to the free movement of judgments in Member States should be very narrow. This is evidenced by the very narrow interpretation given to the public policy exception in the recognition and enforcement of foreign judgments obtained in Member States.

The application and importance of mutual trust in facilitating the free movement of judgments can be illustrated by the Brussels legal regime and the case law of the CJEU. A relevant case is *Prism Investments BV v van der Meer*.[141] This case concerned a reference from the Dutch Supreme Court. The CJEU considered that in the light of recitals 16 and 17 in the preamble to Brussels I, the recognition and enforcement of foreign judgments framework was based on mutual trust concerning the administration of justice in the European Union. This implied that "judicial decisions delivered in one Member State are not only recognised automatically in another Member State, but also that the procedure for making those decisions enforceable in that Member State is efficient and rapid".[142] If this position was taken when there was a need first to obtain a declaration of enforceability,[143] it seems clear that the need for a judgment creditor to obtain protective measures pending appeal as of right is even more persuasive under Brussels I *bis*.

If European judgments are automatically enforceable, then it means that the judgment creditor has the "judgment" until the appeal against the enforcement is successful. Thus, the judgment creditor not only has a right to apply for protective measures but also a right to obtain them since such measures merely preserve the current legal or factual situation. There is much to recommend in the view that mutual trust should have its limits especially where facts on the ground suggest that mutual trust may be the "reality only to a limited degree".[144] Nevertheless, the nature of provisional or protective measures reinforces why mutual trust is a particularly useful tool. Such measures are neither

139 Weller (n 137) 71.

140 Residual rules of jurisdiction under the Brussels legal regime.

141 Case C-139/10; (2012) I.L.Pr. 13.

142 (n 141) para. 27.

143 See art 43(5) and 45 of Brussels I; *van der Meer* (n 141) para. 11, 38 and 43.

144 In the context of the November 2013 Eurobarometer on "Justice in the European Union", Weller contended that "a considerable number of EU citizens do not trust their own national justice system". See Weller (n 137) 66–67. See also X. Kramer: *Procedure Matters: Construction and Deconstructivism in European Civil Procedure* (Eleven International Publishing, 2013) p. 27.

irreversible nor conclusively determine litigants' rights and obligations. Emphasising such special features of WFOs invites reflection on whether subsuming provisional or protective measures under "judgment" is appropriate.

8 Possible (Re)characterisation of "Judgment" and Post-Brexit

8.1 *Judgment or Order?*

The question of what amounts to provisional measures or the characterisation of freezing orders as judgments is reflected in the effects of an appeal. Extending the effects of a judgment to a WFO has its advantages but such an extension also implies possible non-enforcement of a provisional or protective order. It may seem persuasive to argue that the discretion of the enforcing court to stay enforcement pending appeals depends on whether such an enforcement is reversible. However, this argument would also suggest that such a WFO should not have been granted in the first place and that its characterisation as a provisional or protective order was misplaced.

The adaptation of the WFO to whatever exists locally seems practical.[145] However, such adaptation is another reason to consider if the current characterisation of judgments under the Brussels legal regime suffices or if there is a need for a separate legal regime for "provisional, including protective, measures".[146]

8.2 *A Post-Brexit Legal Order*

The definition of "judgment" under the Brussels I *bis* implies that "provisional, including protective measures" can only be ordered by courts which have jurisdiction over the substance of the dispute.[147] This implies that an English WFO may be enforced in another Member State but would not be enforceable if such a WFO is granted pursuant to Section 25 of the CJJA.[148] This Act is at the centre of many controversies regarding English WFOs and it is possible, but perhaps unlikely, that its relevance in a post-Brexit Europe may not be discounted altogether. Notwithstanding the perception that the United Kingdom was probably not the most fastidious Member State vis-à-vis the Brussels legal

145 Art 54(1) of Brussels I *bis*.

146 See generally, Hess, Pfeiffer and Schlosser (n 4) para. 782.

147 Art 2 of Brussels I *bis*.

148 Fentiman (n 7) para. 12.217. See (n 28).

regime even before Brexit,[149] it would be speculative to have an in-depth discussion concerning a post-Brexit Europe in this article.

If the United Kingdom's exit from the European Union involves a complete disapplication of the Brussels legal regime, there could be a default application of rules that apply to third States. Thus, applications made outside the Brussels legal regime or the Lugano Convention, i.e. Section 25 of the CJJA, may require the same jurisdictional terms as the court would adopt when considering if it would be expedient to grant a protective order.[150] This would imply a greater degree of judicial discretion generally and the judicial decisions concerning protective measures would be more difficult to monitor or enforce.[151] Such discretion may be reflected in ostensible flexibility with all the attendant risks. Any flexibility outside the Brussels legal regime should be exercised in a manner that promotes legal certainty but this is very difficult, if not impossible, to guarantee.[152] Corollary issues such as comity may also arise in the context of third States.[153]

9 Conclusions

The need to enforce freezing orders from other countries is underscored by the increasing complexity of international commercial transactions and underpinned by free movement within the European Union. Sometimes, it can be challenging to strike a balance between individual Member States' judicial practices, including discretion, and the overarching Brussels legal regime. However, it is critical to attain such a balance and defer to the Brussels legal regime if legal certainty is to be ensured in the European judicial area. This

149 In addition to the arguments in this article, the UK did not adopt Regulation 655/2014 "which established the European Account Preservation Order procedure to facilitate cross-border recovery in civil and commercial matters."

150 Dicey, Morris and Collins (n 28) para. 8–046; *Banco Nacional* (n 63). See also (n 28).

151 Hill and Shúilleabháin (n 72) para. 2.288–2.289.

152 Kruger argued that even Brussels I regarding provisional measures was "formulated vaguely and responsible for much uncertainty". See Kruger (n 62) 341. See also, J. Weber, "Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation", *Max Planck Private Law Research Paper* 75 11/7 (2011) 619, 644.

153 Hatzimihail and Nuyts observed that WFOs raised similar questions as anti-suit injunctions. See N. Hatzimihail and A. Nuyts, "Judicial Cooperation between the United States and Europe in Civil and Commercial Matters: An Overview of Issues (1)" in: A. Nuyts and N. Watté (n 62) p. 9.

certainty is especially necessary for judgment creditors who obtain freezing orders from other Member States and need to ensure that judgment debtors' assets are not dissipated pending appeals against the enforcement of such foreign orders.

A balancing act is necessary from at least two perspectives: public policy and mutual trust. The Brussels legal regime indicates a clear gravitation towards a strict limitation of national public policies. This article argues that a pragmatic application of public policy should promote the entitlement of judgment creditors to have assets protected during appeals against the enforcement of worldwide freezing orders. Furthermore, although mutual trust is a core principle underlying the Brussels legal regime, it is also critical to strike a balance between "(far-reaching) trust and residual control".[154] This balance is particularly necessary in the context of enforcing freezing orders obtained in other Member States.

Whether an entitlement to protective orders can be ensured by recharacterising "judgment" under the Brussels legal regime or providing a separate and complete legal framework will help, is a matter for some other research. For now, the question is why a judgment creditor should be uncertain about obtaining protective measures pending an appeal against the enforcement of a freezing order emanating from another Member State. Neither public policy, mutual trust nor residual control should undermine the free movement of judgments in the European judicial area, especially with the abolition of the *exequatur*.[155]

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154 Weller (n 137) 102.

155 Recital 2 and art 39 of Brussels I *bis*. Freudenthal described the abolition of the *exequatur* as "the most far-reaching consequence of the principle of 'mutual trust'". See M. Freudenthal, "Attitudes of European Union Member States Towards the Harmonisation of Civil Procedure" in: C.H. van Rhee and A. Uzelac (eds.), *Enforcement and Enforceability – Tradition and Reform* (Intersentia, 2010) p. 6.