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CONTEXTUALISATION OF PROVISIONAL MEASURES IN CROSS BORDER CASES IN THE WESTERN BALKANS – STRIKING A BALANCE BETWEEN FINALITY AND LEGAL CERTAINTY

Ilija Rumenov, PhD, Associate professor
University Ss Cyril and Methodius – Skopje, Faculty of Law "Iustinianus Primus"- Skopje
Bul. Goce Delcev 9, 1000 Skopje, N. Macedonia
i.rumenov@pf.ukim.edu.mk

Milka Rakocević, PhD, Associate professor
University Ss Cyril and Methodius – Skopje, Faculty of Law "Iustinianus Primus"- Skopje
Bul. Goce Delcev 9, 1000 Skopje, N. Macedonia
m.rakocevic@pf.ukim.edu.mk

ABSTRACT

Provisional measures as legal instruments are intended to be of effect for a limited period conditioned by occurrence of a certain event or passing of a specific period. Therefore, in essence, these measures are not final and for a long time their circulation in cross border cases was disputed. However, their frequent use in practice provides for them to be able to be recognized and enforced from one jurisdiction to another. The importance of these measures in the European Union is acknowledged by the possibility provided in the Brussels I, Brussels Ibis, Brussels IIter, Maintenance and Succession Regulation for their recognition and enforcement. Moreover, some European national acts, such as the Spanish Act on international judicial cooperation in civil matters have provided for their circulation under certain conditions. However, such effect of these measures remains in the "grey" zone for the countries in the Western Balkans. Recent trends in the North Macedonian case-law show certain acceptance of the foreign provisional measures and their recognition and enforcement. This paper is intended to contextualize the provisional measures in cross border cases within the legal doctrine and the jurisprudence of the Western Balkan countries and show the importance of the balance between finality and legal certainty.

Keywords: *provisional measures, recognition and enforcement, foreign decisions, civil and commercial matters, Western Balkan*

1. INTRODUCTION

Legal certainty is one of the most important goals of law. The importance of legal certainty in cross-border cases is increased because these cases are immanently more complex and thus more uncertain. Theoretically, the creditors satisfaction in legal proceedings should be effectuated with the final decision. Still the debtor uses its possibility to deter the creditor to settle its claim. For that purpose, the majority of the legal systems consider the creditors need to obtain interim relief pending final determination of a lawsuit.[1] Because of its complexity, cross border cases have even greater importance to provide the creditor with this interim protection. This is vital, because the diversity of jurisdictions may facilitate strategic movement of assets by opportunistic defendants in order to frustrate the effectiveness of a final judgment and on the other hand, to have certain balance, a possibility has to be given to the debtor (respondent) to articulate its rights, by not exposing it to an irrevocable decision reached within accelerated proceedings with limited opportunity of defense, or by possibility of holding the claimant liable for damages.[2]

In this aspect, legal certainty lingers between these two antipodes. Despite the frequent use of "legal certainty" in law, its understanding differs from regions, continents and legal systems.[3] Moreover, its meaning and understanding is conditioned based on the legal field from which is observed.[4] From macro perspective of the EU, legal certainty can be understood in the following direction:

> "Legal certainty as a general principle of European law requires, above all, that those subject to the law must know what the law is so that they can abide by it and plan their lives accordingly."[5]

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1 Hau, W., *Provisional Measures*, Encyclopedia of Private International Law in: Ruhl, G.; Ferrari, F., de Miguel Asensio, P. A.; Basedow, J. (eds.), Edward Elgar Publishing, 2017, p. 1142.

2 Garcimartín F., Provisional and Protective Measures in the Brussels I Regulation Recast, Yearbook of Private International Law Vol. XVI, 2014/15, p. 58. Spain has taken into consideration these two aspects and introduced a new specific rule on recognition and enforcement of provisional measures in their national legal acts. Article 41(4) of the Law on International Judicial Cooperation in Civil Matters provides that recognition and enforcement of protective and provisional measures is possible when their denial entails a violation of effective judicial protection and provided that they have been adopted after hearing the opposing party.

3 Kruger, T., The Quest for Legal Certainty in International Civil Cases, Collected Courses of The Hague Academy of International Law - Recueil des cours, Volume: 380, p. 294; Maxeiner, James R., Some Realism About Legal Certainty in the Globalization of the Rule of Law, June 13, 2008, Houston Journal of International Law, Vol. 31, No. 1, p. 28.

4 Kruger, T., *op. cit.*, note 3, p. 295.

5 Maxeiner, James R, Legal Certainty and Legal Methods: A European Alternative to American Legal Indeterminacy?, 15 Tul. J. Int'l & Comp. L. 541, 2007, p. 549.

Such notion of legal certainty was further developed by the CJEU to the following components: objective legal certainty (rules of law must be clear and precise) and subjective legal certainty (rules of law must be predictable as regard their effects, especially where they have unfavorable consequence for individuals or companies).[6] Objective legal certainty is found in the legal provisions themselves. These legal provisions must be of general application, rational, consistent, transparent, published, clear and accessible.[7] Subjective legal certainty is focused on the end user, the persons involved in legal situations, where these persons based on their legitimate expectation as rational beings could settle their accounts and predict their own situation according to the provisions which they have information about.[8] So, for the persons which are involved in cross border complex situations, legal certainty is particularly important. That's why, the idea that foreign decisions should retain their effects across borders is synonymous with legal certainty.[9] If for example, the creditors decision is deprived of such cross-border effect, then the settlement of the dispute becomes uncertain since the debtor could easily use the divergence of legal systems and shift the assets from one system to another and severally harm the creditor. Such position is even more important regarding provisional measures, since the recognition and enforcement of a final judgment becomes a too-late stage for satisfying the creditor.

The main impediment for recognition and enforcement of a foreign provisional measure in the countries that are not a part of the EU[10] is the finality of these decisions (or the lack of it). Somehow, such position is paradoxal, since finality of the decisions or their *res iudicata* effect should be one of the main pillars upon which legal certainty is build. Finality is centered around the subjective legal certainty, because it tends to help with the predictability of the legal situation, or to maintain a stable legal environment. Such position in context of cross border recognition and enforcement of foreign provisional measures is not correlated with one other goal that provisional measures intend to achieve i.e., enhancing the efficacy of the litigation.[11] Therefore, it is very important to depict the nature of the provisional measures, their cross-border context and importance in order to understand and

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6 CJEU C-282/12 Intelcar v. Fazenda Publica (Portuguese Treasury) par.44

7 Kruger T., *op. cit.*, note 3, p. 298.

8 *Ibid.*, p. 300.

9 *Ibid.,* p. 426.

10 Nishioka K.; Nishitani Y., Japanese Private International Law, Hart Publishing, 2021, p., 208; Станивуковић М., Живковић М., МЕЂУНАРОДНО ПРИВАТНО ПРАВО - ОПШТИ ДЕО, (2023), pp. 451-452; Varadi T. and others, Međunarodno privatno pravo, deseto izdanje, JP „Službeni Glasnik', Beograd, 2008, p. 545.

11 Nathan Park S., Recognition and Enforcement of Foreign Provisional Orders in the United States: Toward a Practical Solution, 38 U. Pa. J. Int'l L. 999, 2017, p. 1013.

improve the objective and subjective legal certainty for natural and legal persons that are found in international legal traffic.

2. DEFINITION AND PURPOSE OF PROVISIONAL MEASURES

Provisional measures are considered as relief aimed at creating conditions for the future fulfillment of the creditor's claims based on a decision that will be made or that has already been made regarding the merits of the case. In this regard, provisional measures are means that should eliminate or reduce the possibility of preventing or obstructing the future fulfillment of the creditor's claim, means that are accessory, subsidiary and conservatory in its substance in relation to the main procedure regarding the merits of the case.[12] Furthermore, the aim of the provisional measure can also be temporary regulation of certain legal relations between the parties in a dispute.[13] In that respect, it can be said that the function of the provisional measures is threefold. Provisional measures are considered as: 1) means of time-limited security of the future fulfillment of the claim (conservatory function); 2) means that temporarily settle the claim, partially or completely, before it is determined with an enforcement title (anticipatory function); and 3) means that provisionally regulate the relations between the parties until their final settlement with a final or enforceable title (regulatory function).[14] Provisional measures are usually determined if the existence of the claim appears probable or if it appears probable or there is a risk that without such measure the realization of the claim would be impossible or significantly more difficult, or if the measure is necessary to prevent violence or occurrence of irreparable damage, or if for other important reasons it is necessary to temporarily regulate the disputed relation between the parties.[15]

There are certain qualities that are considered inherent to the provisional measures: 1) they are auxiliary since they aim to the effectiveness of the decision regarding the merits of the case; 2) their nature is provisional, since they are not final and definitive; 3) they are considered temporary since they are granted for a certain period of time; 4) they have variable character due to the fact that they can be modified or finished; and 5) they are regarded as proportional to the objectives of the parties.[16]

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12 Dika, M., Građansko ovršno pravo, Narodne Novine, Zagreb, 2007, p. 847.

13 *Ibid.*, p. 847-848.

14 *Ibid.*, p. 850.

15 *Ibid.*

16 Esplugues C., Provisional Measures in Spanish Civil Procedure, in: Stürner; R.; Kawano, M., (eds.), Comparative Studies on Enforcement and Provisional Measures, Tübingen, Mohr Siebeck, 2011, p. 210.

Generally, provisional measures consist of orders and prohibitions and in that regard they are usually of condemnatory nature, but the possibility that such measures are of constitutive nature in a form of permissions or regulation of relations between the parties is not excluded. They can also have the character of dispositions that directly determine coercive measures that should be applied in order to secure a certain claim or establish a certain legal situation.[17]

Their immediate goal is not the definitive realization of the creditor's claim, but creation of conditions for its future realization. The determination and implementation of provisional measures is carried out in a special procedure for security of claims, which represents a special system of legal protection within the enforcement procedure.[18] The means of coercion that are taken, in its substance, represent certain interferences in the debtor's legal sphere and have a provisory character and they usually remain in force until the preconditions for enforcement are met or as long as the need for provisional protection is needed.[19]

Given that the provisional measure primarily protects the interests of the creditor, but at the same time impinges the rights and interests of the debtor or third parties, the court has to be rather careful regarding their issuance, since the unjustified determination of the provisional measure can have multiple damaging consequences. That is why, the court has the obligation to carefully and responsibly assess the existence of the conditions for issuing a provisional measure, estimate its proper duration and determine the type of measure that is most adequate in the specific case, carefully assessing all the circumstances.

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17 Јаневски А., Зороска Камиловска Т., Граѓанско процесно право, книга трета, извршно право, Скопје 2011, p. 211.

18 According to the ECtHR case-law, proceedings like those concerned with the grant of an provisional measure such as injunctions, were not normally considered to "determine" civil rights and obligations. However, in 2009, the Court departed from its previous case-law and took a new approach. In Micallef v. Malta (Micallef v Malta, Application no. 17056/06, Judgment of October 15, 2009, para 80-86), the Court established that the applicability of Article 6 to provisonal measures will depend on whether certain conditions are fulfilled, since not all interim measures determine such rights and obligations. Firstly, the right at stake in both the main and the injunction proceedings should be "civil" within the autonomous meaning of that notion under Article 6 of the ECHR. Secondly, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinized. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable.

19 Јаневски А.; Зороска Камиловска Т., *op. cit.*, note 17, p. 183.

3. RECOGNITION AND ENFORCEMENT OF PROVISIONAL MEASURES IN THE EU AND IN THE CONTEMPORARY HCCH INSTRUMENTS

Provisional measures in the EU are able to circulate based on the provisions of the Brussels I[20], Brussels Ibis[21], Brussels IIter[22], Maintenance[23] and Succession Regulation[24] or based on the provisions of the Conventions of the Hague Conference on Private International Law (HCCH Conventions).[25] The principle of circulation in the EU regulation is that these measures are considered to be part of the term "decisions" and thus the same provisions for recognition and enforcement is applied towards them.[26] Moreover, the position of provisional measures in the EU has been clarified based on the jurisprudence of the CJEU.[27] On the basis of Article 27 par.2 of the Brussels Convention[28] (right of defense) the CJEU derived the standpoint that only decisions from an adversarial procedure (even if it may have remained unilateral through default by the defendant) can be recognized and enforced, but not decisions deriving from so-called *ex parte* procedures.[29] Such position is upheld in the Brussels Ibis Regulation in Article 2 (a) where it is expressively stated:

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20 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, 16 January 2001, pp. 1–23.

21 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ L 351, 20 December 2012, pp. 1–32.

22 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) ST/8214/2019/INIT OJ L 178, 2 July 2019, pp. 1–115.

23 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations OJ L 7, 10 January, 2009, pp. 1–79.

24 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession OJ L 201, 27 July 2012, pp. 107–134.

25 For more on this issue see, Pogorelčnik Vogrinc N., Provisional Security of Creditors in Cross-border Civil and Commercial Matters, LEXONOMICA Vol. 12, No. 2, pp. 129–148., December 2020; Pretelli I., *Provisional and Protective Measures in the European Civil Procedure of the Brussels I System, in Brussels Ibis Regulation Changes and Challenges of the Renewed Procedural Scheme*, Lazic, V., Stuij, S. (eds.), T.M.C. Asser Press, The Hague 2017, p. 100; Garcimartín F., *op. cit.,* note 2, p. 58; Poretti P., *Privremene mjere u europskim građanskim parničnim postupcima, Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća* / Rijavec, V. *et al.* (eds.). Split, 2015, pp. 301-330.

26 Hau, W., *op. cit.*, note 1, p. 1446.

27 Case C-125/79; Case C-80/00.

28 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters /* Consolidated version CF 498Y0126(01) */ OJ L 299, 31.12.1972, pp. 32–42.

29 Hau, W., *op. cit.*, note 1, p. 1446.

> […judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement;].

In order to apply the Brussels Ibis Regulation on recognition of provisional measures, it follows from this provision that first, the Court that rendered the provisional measure needs to have jurisdiction based on the provisions of the Regulation, and secondly, the respondent was granted the right to be heard before the measure was issued or that the decision was served upon him before it is enforced. This position is based on the logic that the court that has the substantive jurisdiction is better placed to decide on the interim protection, since it may evaluate not merely the *fumus boni iuris* and the *periculum in mora* but also the merits of the case.[30] What is important in this Regulation is that Recital (33) paves the way for Member States to provide provisions in their legal system in order to recognize and enforce foreign provisional measures.[31]

Other aspect in the EU are the cases where the provisional measures are rendered based on EU law. Namely, the Regulation No.655/2014 provides for a system of establishing a procedure for issuing a European Account Preservation Order.[32]

On the other hand, the situation in the HCCH Conventions is different. In general, the HCCH instruments in context of recognition and enforcement of foreign decisions, lean towards circulation of final judgments. For example, the HCCH 2019 Judgment Convention[33] and the HCCH 2005 Choice of Court Convention[34] are expressively excluding provisional and interim measures from circulation based on these instruments.[35] Such stance relates to measures that either provide a preliminary means of securing assets out of which final judgment

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30 Pretelli I., *op. cit.,* note 25, p. 100, Garcimartín F., *op. cit.*, note 2, p. 58.

31 Recital (33) states "…This should not preclude the recognition and enforcement of such measures under national law.".

32 Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters OJ L 189, 27 June 2014, pp. 59–92.

33 HCCH Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

34 HCCH Convention of 30 June 2005 on Choice of Court Agreements.

35 See Article 3(1)(b) of the HCCH 2019 Judgments Convention and Article 4(1) of the HCCH 2005 Choice of Court Convention - "An interim measure of protection is not a judgment".

may be satisfied or maintain the *status quo* pending determination of an issue at trial.[36] Moreover, measures relating only to procedural or enforcement aspects are also not covered by these Conventions because these Conventions are only applicable towards "decisions on the merits", so for example order to freeze the defendants assets are excluded from these instruments.[37]

The HCCH Child Protection Convention[38] and the HCCH Adult Protection Convention[39] contain similar but not identical provisions that confer jurisdiction to the Contracting State in whose territory the adult/child is present to take measures of a take urgent measures of a temporary character.[40] For the HCCH 2000 Adult Protection Convention, this jurisdiction relates to the possibility of taking measures of a temporary character for the protection of adults which have a territorial effect limited to the State in question conditioned that such measures are compatible with those already taken by the authorities which have jurisdiction under Articles 5 to 8, and after advising the authorities having jurisdiction under Article 5.[41] In the case of the HCCH 1996 Child Protection Convention this jurisdiction is extended not only towards the children, but also to their property.[42]

HCCH Maintenance Convention[43] contains different approach. It confers power to the Central Authorities 'to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance applica-

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36 Garcimartín F.; Saumier G., Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention), The Hague Conference on Private International Law – HCCH Permanent Bureau, 2020, p. 75 par. 99.

37 Hau, W., *Judgments, Recognition, Enforcement, in The HCCH 2019 Judgments Convention Cornerstones, Prospects*, Outlook, Weller M. *et al.* (eds.) Hart Publishing, 2023, p. 28.

38 HCCH Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

39 HCCH Convention of 13 January 2000 on the International Protection of Adults.

40 See Article 12 of the HCCH 1996 Child Protection Convention and Article 11 of the HCCH 2000 Adult Protection Convention.

41 Article 11 of the HCCH 2000 Adult Protection Convention.

42 Article 12 of the HCCH 1996 Child Protection Convention. For more on the difference between Article 11 of the 2000 Adult Protection Convention and Article 12 of the HCCH 1996 Child Protection Convention see, Lagarde P., Explanatory Report on the Hague Convention of 13 January 2000 on the International Protection of Adults, The Hague Conference on Private International Law Permanent Bureau, 2017, p. 66-67 par. 83-85.

43 HCCH Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

tion.[44] This provision is intended to serve as a preemptive action in order to secure the debtors asset and thus provide assistance in the enforcement proceedings.[45]

4. PERCEPTION OF RECOGNITION AND ENFORCEMENT OF PROVISIONAL MEASURES IN THE WESTERN BALKANS LEGAL DOCTRINE

The notion present in the legal doctrine in the region was that recognition and enforcement of provisional measures is at least controversial. In this context, there are two predominant arguments supporting this claim. The first argument was the lack of finality, in the sense that they do not bring conclusion to the dispute between the parties, and second referring to the mere nature of the provisional or protective measures,[46] which is directly linked with the means of enforcement. As such, they were considered to be within the exclusive jurisdiction of the judicial authorities of the State where they were rendered.[47] However this position has been shifting towards more liberal acceptance of recognition and enforcement of foreign provisional measures.[48] It is undisputed that decisions which are final and are *res iudicata,* and also which are suitable for recognition and enforcement, can be considered enforcement titles, however, there is no clear standpoint whether provisional or protective measures can have the same consideration. So, this ambiguity is particularly important for the Western Balkan region since there were considerable transformation of the national PIL[49] but with certain resistance towards the cross-border effect of provisional measures.[50]

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44 Article 6(2)(i) of the HCCH 2007 Maintenance Convention.

45 Walker L., Maintenance and Child Support in Private International Law, Hart Publishing, 2015, p. 183.

46 Varadi, T.. *et al., op. cit.*, note 10, p. 545; Živković M.; Stanivuković M, *Međunarodno privatno pravo (opšti deo),* Beograd, Službeni glasnik, 2006, p. 418; Vuković Đ., Međunarodno građansko procesno pravo, Informator, Zagreb, 1987, pp. 150-151.

47 Kessedjian C., Note on Provisional and Protective Measures in Private International Law and Comparative Law, Preliminary Document No 10 of October 1998 for the attention of the Special Commission of November 1998 on the question of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters, 1998, par. 34 and 108.

48 *Ibid.,* par.108.

49 Rumenov, I., Perspectives from Southeast European and EU Candidate Countries, in The HCCH 2019 Judgments Convention Cornerstones, Prospects, Outlook, Weller M. *et al.* (eds.), Hart Publishing, 2023, p. 212; Rumenov, I., Europeanisation of the Macedonian Private International Law – Legal Evolution of a National Private International Law Act, EU and Comparative Law Issues and Challenges Series (ECLIC), 4, pp. 299–328.; Jessel-Holst C., 'The Reform of Private International Law Acts in South East Europe, with Particular Regard to the West Balkan Region', 2016, 18 Anali Pravnog fakulteta Univerziteta u Zenici, Zenica pp. 133, 135–137.

50 Varadi, T. *et al., op. cit.*, note 10, p. 545; Jakšić A., Međunarodno privatno pravo, Beograd, 2008, p. 210.

4.1. The recognition and enforcement of provisional measures in the Western Balkan countries

The situation of the recognition and enforcement of foreign provisional measures in the Western Balkans can be described as perplexed. In essence most of these jurisdictions do not allow circulation of foreign provisional measures. Albania, has certain limitations in its legal framework of recognition and enforcement, giving focus on judgment as enforcement titles, limiting the possibilities of recognizing other such as authentic instruments or settlement agreements.[51] Such restrictive attitude is reflected also towards foreign provisional measures, with exception in some of the bilateral agreements.[52]

B&H and Serbia, have specific situation. These countries still apply the old Yugoslavian PILA (The Law on Resolution of Conflict of Laws with Regulations of Other Countries).[53] Its provisions did not provide a clear situation regarding the recognition and enforcement of provisional measures so it generally divided the legal doctrine. In the former Yugoslavian doctrine, there were different interpretation to the recognition or the non-recognition of foreign provisional measures. Poznić stated that the reasons for the non-recognition of provisional measures according to the old Yugoslavian PILA are: lack of substantive finality of the provisional measures; its supportive role to the final judgment and the fact that this decision does not relate to the claim per se.[54] Vuković, provided indirectly, that based on the interpretation of Art. 265 and Art.268 of the Enforcement Act, if domestic provisional measures could be recognized and enforced abroad, than based on the reciprocity principle, foreign provisional measures should be recognized in Yugoslavia.[55] Such ambiguity was reflected in the decision by the Supreme Court of Serbia which decided to recognize and enforce a foreign provisional measure that was met with fierce reaction by the legal doctrine.[56] The contemporary judi-

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51 Gugu Bushati A., Country Report: Albania, in Cross-border Recognition and Enforcement of Foreign Judicial Decisions in South East Europe and Perspectives of HCCH 2019 Judgments Convention, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), 2021, p. 20.

52 Exceptionally, the Agreement between Albania and Bulgaria on Mutual Legal Assistance in Civil Matters provides in art. 19 that the term "judgment" capable of recognition and enforcement means final and interim judgments as well, *Ibid.*, p. 20.

53 Official Gazette of SFRY, No 43/82 and 72/82.

54 Познић, Боривоје. 6/1983. О ПРИЗНАЊУ И ИЗВРШЕЊУ СТРАНИХ СУДСКИХ И АРБИТРАЖНИХ ОДЛУКА Анали Правног факултета у Београду, p. 1055.

55 Vuković Đ., *op. cit.,* note 46, pp. 150-151.

56 Supreme Court of Serbia, Gž. 46/93 (as cited by, Varadi T. *et al.*, *op. cit.,* note 10, p. 545). On the criticism of this decision see also Varadi T. *et al.*, *op. cit.,* note 10, p. 545; Jakšić A., *op. cit.,* note 50, p. 210.

cial practice in these two countries follow the more restrictive approach and do not recognize and enforce foreign provisional measures.[57]

In Montenegro, the situation is a bit clearer. The recognition and enforcement of foreign judicial decisions is regulated with the PILA and the Law on Enforcement and Securing of Claims.[58] With application of Article 19 of the LESC on foreign decisions, as enforcement titles in Montenegro the following are considered: foreign condemnatory judgment from civil proceedings and foreign condemnatory decision from civil, non-litigious and executive proceedings, foreign judicial decision on security, foreign payment and other foreign court orders, foreign arbitration awards, a foreign court settlement concluded before a court.[59]

Kosovo in 2022 adopted a new PILA.[60] However its stance on recognition and enforcement of provisional measures has not been changed and still, foreign provisional measures cannot be recognized and enforced in Kosovo.[61]

4.2. The recognition and enforcement of provisional measures in the Republic of North Macedonia

The position of recognition and enforcement of foreign provisional measures in the Republic of North Macedonia is still ambiguous. To clarify whether this type of decisions can pass the national filter and be enforced it is essential to understand the national recognition and enforcement system. This system is modeled according to the Regulation 44/2001 and it is consisted of three stages: first *ex parte* stage, second contentious stage and thirdly, the appellate stage. In the first stage, the recognition and enforcement is decided by a sole judge, that observes if

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57 Povlakić M., Country Report: Bosnia and Herzegovina: in Cross-border Recognition and Enforcement of Foreign Judicial Decisions in South East Europe and Perspectives of HCCH 2019 Judgments Convention, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), 2021, p.71; Đorđević S., Country Report: Serbia, in Cross-border Recognition and Enforcement of Foreign Judicial Decisions in South East Europe and Perspectives of HCCH 2019 Judgments Convention, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), 2021, p. 196.

58 Private International Law Act ("Official Gazette of Montenegro" no. 1/2014, 6/2014–corr., 11/2014–corr., 14/2014 and 47/2015 – other law); Law on Enforcement and Security of Claims ("Official Gazette of Montenegro" no. 36/2011, 28/2014, 20/2015, 22/2017, 76/2017 and 25/2019).

59 Kostić-Mandić M., Country Report: Montenegro, Cross-border Recognition and Enforcement of Foreign Judicial Decisions in South East Europe and Perspectives of HCCH 2019 Judgments Convention, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), 2021, p. 132.

60 Law NO. 08/L -028 on Private International Law, Official Gazette of the Republic of Kosovo No. 30/2022.

61 Qerimi D., Country Report: Kosovo, Cross-border Recognition and Enforcement of Foreign Judicial Decisions in South East Europe and Perspectives of HCCH 2019 Judgments Convention, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), 2021, p. 108.

there are any circumstances that prevent the recognition and enforcement. These circumstances are provided in Articles 159-163 of the Private International Law Act (hereafter PILA)[62]. They are inspected ex officio and if the judge finds that there are no circumstances that prevent the recognition, then it will issue a decision for recognition of the foreign decision. Second stage, starts with the service of this decision to the opposite party, that can object this decision in a timeframe of 30 days from the day when they received the decision. In this stage, the procedure becomes adversarial, and the court must hold hearing, where the opposing party to the decision can contest the recognition based on the infringement of the right of defense in the country of origin of the foreign decision. In this stage, the court decides as a council, consisted of three judges. The last stage is the appellate stage, where the unsatisfied party can file an appeal to the appellate court.

In context of the foreign provisional measures, the court would apply the same procedure. So, the main concerns regarding the effectuation of the foreign provisional measure would be: first, whether the foreign provisional measure fulfils the Article 1 criteria; secondly whether this decision can be considered to be a foreign judicial decision: and thirdly whether this decision is in legal force, i.e whether it is considered final and biding.

4.2.1. Do foreign provisional measures fall under the scope of Article 1 of the PILA?

One of the most commonly used arguments of denying provisional measure to have a cross border effect is that these measures do not fall under the scope of application of Article 1 of the PILA.[63] Article 1 of the PILA specifies the scope of application of the Law and it refers to the following aspects:

> [This Law establishes rules for the determination of the applicable law in respect of private law relations having an international element, rules on jurisdiction of courts and other authorities with respect to the said relations, rules of procedure, and rules on the recognition and enforcement of foreign court decisions and decisions of other authorities of foreign states.].

Moreover, the PILA when defining the term "foreign decisions" that are eligible for recognition and enforcement, covers not only foreign judgments and foreign court settlements, but also:

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62 Private International Law Act (Official Gazette of Republic of North Macedonia, No 32/2020).

63 Jakšić, A., *op. cit.*, note 50, p. 210.

> […A foreign decision shall also deemed to be a decision of another authority which in the state in which it was given is considered equivalent to a court judgment, or a court settlement, if such a decision regulates the relations referred to in Article 1 of this Law.].[64]

On first glance, it looks, like only the territorial aspect of the decision is decisive whether to initiate the recognition and enforcement procedure - opposite of the approach taken with the determination of the applicable law and the international jurisdiction, where it is specifically provided that the PILA applies in situation of "… private law relations having international element…". This aspect is cleared in Article 157 par. 3 of the PILA where the additional criterion to the territorial is that the foreign decisions "…regulates relations referred in Article 1 of this Law." By this interpretation is clear that in order to apply the provisions for the recognition and enforcement of foreign decision in the PILA, the foreign provisional measure should relate to "…private law relations having international element…". So, the question that arises is: do provisional measures in essence regulate private law relations having international element?

Legal relation is defined as a relation in society that is regulated by law, legal norms, i.e., relationship according to which persons are obliged to act upon legal norms.[65] In context of the elements of the legal relations, provisional measures are much more indirect then direct, because they do not refer to the subjective rights element of the legal powers, instead they are part of the protective mechanism of the legal relation, effectuated by the jurisdictional component of the legal powers.[66] Nonetheless, even indirectly, these measures are not standalone measures, since they are steamed out of a legal relationship, but with specific purpose, to conserve the legal relationship until the court could substantively settle the legal issue. If the domestic legal system provides possibility to recognize and enforce the foreign decisions on the merits, then these decisions which are integral part of the procedure should circulate also.[67] To deprive these measures a certain cross border legal effect, means that there is intolerance of the foreign legal procedure and certain distrust in its legal system. Another question is, whether they should fulfill other criteria which are specific to the nature of these decisions. Such nivellation of the procedural standards applied by the court of origin with the procedural standards of the country of recognition is in line with the immanent difference of the internal procedural laws.

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64 Article 157 par.3 of the PILA.

65 Лукић Р., Кошутић Б., Увод у право, Београд, 2008, p. 201.

66 *Ibid.*, p. 204.

67 *In contrario* see, Познић, Б., *op. cit.,* note 54, p. 1055.

4.2.2. Are provisional measures considered as foreign decisions according to PILA?

The second test, regarding the recognition and enforcement in the Republic of North Macedonia is whether they are considered to be judicial decisions under PILA? Article 157 of the PILA refers to the question of which type of decisions are recognized and enforced in the Republic of North Macedonia. The provisions in Article 157 are very broad and do not refer to specifical type of decisions (except of court settlements[68]). The delimitation of domestic and foreign decisions is provided by the principal of territoriality of the court that rendered the decision, i.e., foreign judicial decision is considered to be a decision that was rendered by a foreign court. Moreover, this provision is broadened by incorporating other non-judicial decisions that are rendered by other authority (except Courts) but who regulate relations that fall under the substantive scope of application of the PILA.[69]

The analysis of these provisions provides that there is a broad interpretation of the term "foreign decisions" in the PILA. The intention of the law is not to limit itself to the terminological aspect of the type of foreign decision (judgment, decision, or other) but to leave to the interpretation of the court of recognition whether the conditions in Article 157 are met. These conditions refer to two aspects: first territorial - that they are rendered by a court or other authority of a foreign country and secondly substantive - that the foreign decisions fall under the substantive scope of application of the PILA (…private law relations having international element…). Specifically, regarding provisional measures, it is undisputed that they represent decisions. If they were rendered by a foreign court, they would need to undergo the recognition and enforcement system of the PILA. On the other hand, the other issue is whether they fulfill the substantive criterion.

So, the second aspect which is problematic is the aspect of the existence or non-existence of the foreign element in provisional measures. These decisions are intended to provide effect in the territory of the court that rendered this measure. Often it was provided in the legal doctrine, that there is exclusive jurisdiction of the court that hears the case on the merits to enforce the provisional measures.[70] So, as a consequence in cross border cases the interest party should apply for another provisional measure to be rendered at the place where this measure should take effect.

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68 Article 157 par. 2 of the PILA.

69 Article 157 par.3 of the PILA.

70 Станивуковић М., Живковић М., *op. cit.*, note 10, pp. 451-452.

It is evident from Article 18 of the PILA, that there is territorial jurisdiction of the authorities of the Republic of North Macedonia to render provisional protective measures based on the law of the Republic of North Macedonia, for natural persons. Their duration is until foreign state does not render decision or takes the necessary measures. This provision is extended towards the property of that natural person, or a absent person.[71] However, there is ambiguity wheatear these decisions could extend towards third countries. For example, a provisional measure to provide for an effect of a temporary custodial in situation when it needs to escort the person under protection in a third country. So, it is vital for these measures to be able to have international element, since the legal relations that these measures are essential part of, can have cross border implications.

4.2.3. Do provisional measures contain the feature of finality?

Another common argument that was given as a reason for the non-recognition of provisional measures was that such decisions are lacking the attribute of finality i.e. they are not considered as decisions that resolve a certain relation in a definite manner. Such position of non-recognition is based on Article 159 of the PILA. This article provides that if the applicant seeks for recognition of foreign decision, a certificate of finality of the foreign decision should be provided together with the foreign decision.[72] Moreover, if the foreign decision is eligible for enforcement, then together with the certificate of finality, a certificate of enforceability should be also provided.[73] All of these documents that are submitted for recognition and enforcement must be translated into the language of the court.[74]

In context of provisional measures, it is undisputed that these decisions lack the substantive feature of finality. Also, it is undisputed that provisional measures have the feature of formal finality. So, the question here is transferred to Article 159 of PILA and weather it requires finality, i.e., in terms that the provisional measure lacks a definitive regulation of a certain legal relation, since in its substance, it is of provisory nature.

The goal of this provision is that the decision that requires recognition, is final and could not be later altered by the same authorities that rendered this decision. In that regard, the goal of Article 159 is to uphold the cross border legal certainty and restrain itself from annulment of the decision of recognition. Such position is

71 Article 18 par.3 of the PILA.

72 Article 159 par. 1 of the PILA.

73 Article 159 par. 2 of the PILA.

74 Article 159 par. 3 of the PILA.

especially important and applicable towards foreign final judgments in civil and commercial matters which bear the quality of *res iudicata*. However, the feature of finality depends on the substantive aspect of the foreign decision. Foreign final judgments in family matters regarding children do not posses the same quality of *res iudicata*, as do foreign final judgments in civil and commercial matters. These decisions depend on the factual situation and they can be altered depending on the situation (parental responsibilities could be shifted if some of the parents show certain negligence etc.). So, it is undisputed, that these foreign decisions could be recognized and enforced although they are having different feature of substantive finality.

The situation with provisional measures is different, since their goal is different. These decisions do not aim to permanently settle the dispute between the parties, but to temporarily conserve the factual situation in order to allow the court of origin to render a judgment that would settle the dispute and to create conditions for future fulfillment of the creditor's claims. On the other hand, these decisions are rendered in a certain legal system and are enforceable there. In other words, the court of recognition lingers in a peculiar position, between the cause and the consequence of the finality of the foreign decision. Both paths have arguments to follow, which puts the judge in an ambiguous position. If the court does not recognize the foreign provisional measure based on the lack of *res iudicata* effect, then a potential breach of the creditors right (from the original proceedings in the country of origin) becomes immanent since often recognition of foreign judgments becomes an almost too-late stage of cooperation.[75] The other alternative, to allow the provisional measure to produce effect in the country of recognition, that could potentially harm the debtors rights from irrevocable decision obtained through an accelerated proceedings with limited opportunities for a defense.[76] If we evaluate these two positions of the court, we could say that the later is much more protected. If the judge dismisses the request for recognition, it puts the creditor in an uncertain place, to initiate proceedings for rendering protective measure in the country of recognition, i.e where the property is located. But if the judge upholds the position that the foreign provisional measure possesses finality and it passes this filter, then still the provisional measure could not pass the other PILA criteria such as breach of defense and public policy and thus protect the foreign creditor.

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75 Noodt Taquela, M.B., International Judicial Cooperation as the Architecture of Engagement, in Diversity and Integration in Private International Law, Ruiz Abou-Nigm, V.; Noodt Taquela, M. B. (eds.), Edinburgh University Press, 2019, p. 118.

76 Hau, W., *op. cit.*, note 1, p. 1442.

In a specific case in front of the Basic Civil Court in Skopje, the Court recognized a foreign provisional measure that intended to prevent further disposition of the assets of the legal entities that were present in the Republic of North Macedonia.[77] What is interesting is that the Court specifically referred to the finality of the foreign provisional measure in the country of origin and this fact was in correlation with Article 158 of the PILA. Moreover, it highlighted that the foreign provisional measure is not against the public policy of the Republic of North Macedonia.

5. CONCLUSION

It is evident that there is immanent need for cross border circulation of provisional measures. The problem lies in the method of their incorporation. For the Member States of the EU, this position is much easier since the Brussels Ibis Regulation facilitates certain cross border circulation of provisional measures in civil and commercial matters. Moreover, other types of provisional measure are also facilitated. On the example of Spain, it can be seen that such solutions are present in the national legal systems that allow under certain conditions circulation of provisional measures. However, for the countries of the Western Balkan, still there is great objective and subjective legal uncertainty. So, what is the most appropriate approach to achieve this goal? There are two possible scenarios. First, to upkeep the status quo, and through judicial interpretation of the current legal provisions to allow their circulation. Although this approach in the Republic of North Macedonia is boldly uphold, however it does not solve the issue. Indeed, the judicial interpretation should provide for creation of the objective legal certainty and it is essential part of it, but if we look at the divergent interpretation of this problem in the regional legal doctrine and its effect that some countries recognize and others don't, we cannot with certainty say that this is the appropriate approach. Maybe it would be better to introduce specific recognition and enforcement provisions in the national private international law acts regarding provisional measures. They can be simple and transparent as the objective legal certainty requires, modeled to legal culture of the countries. Also, they could learn from the EU approach, get inspiration from their experience and balance between the practical need for recognition and enforcement of provisional measures and the finality. It is evident that there are still opponents to their circulation, however, it is more than clear, that the complexity and uncertainty of the cross-border cases dictates a solution. This solution needs to satisfy the subjective aspect of the legal certainty, to allow the natural and legal persons bring a predictable decision for their affairs. With other words we should let legal certainty and finality come to the same position from both directions at once.

[77] Decision of the Basic Civil Court Skopje, ІВПП no.820/20 from 14 November 2023.

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