Case C-80/00*, Italian Leather SpA v. WECO Polstermöbel GmbH & Co.*, European Court of Justice, 6 June 2002

- Published in Common Market Law Review 2003-40, p.953-964

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Abstract: This ruling further clarifies the position of provisional measures in European litigation. As was already shown by the Van Uden and Mietz rulings, sometimes the normal rules apply, and for other issues the nature of provisional and protective measures require a different approach. In this Italian Leather case the Court decides that as for the application of Article 27, paragraph 3 Brussels Convention (Article 34, paragraph 3 Regulation) there is no difference between two conflicting provisional measures and two conflicting judgments on the substance. Apart from the fact that the Court could have elaborated more on the issue of difference in procedural law with regard to the urgency requirement, this is in my opinion a desirable conclusion. It increases the value of these measures in international litigation, attributes to legal certainty and reduces the risk of forum shopping.

1. Introduction

This is the third time within four years that the European Court of Justice delivers a preliminary ruling concerning provisional and protective measures under the Brussels Convention on Jurisdiction and Recognition and Enforcement. The decision in this case, regarding enforcement of provisional measures and the notion of 'irreconcilability' within the meaning of Article 27, paragraph 3 Brussels Convention, is an important step in the clarification of the framework of provisional and protective measures. The position of these measures in international litigation, and more in particular under the Brussels Convention, has always been subject of a lively debate. This is mainly caused by the substantial differences between the national rules concerning these measures within the European Union. Furthermore, provisional and protective measures have gained importance in litigation over the last few decades, and their effect is no longer limited to the national borders. This raises a wide range of questions that can be divided in three main topics.

The first one is what can be understood by the term provisional and protective measures under Article 24 Brussels Convention? The Court of Justice mainly dealt with this question in the *Van Uden/Deco-Line* case.[1] The second main question is what the spe-

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Thanks to Fritz E. Siregar for making a summary of this case.

[1] *Van Uden/Deco-Line*, Case C-391/95 [1998] ECR I-7091. Also important in this regard is the *Hermès* ruling, which concerned the concept of provisional measures under the TRIPs Agreement, *Hermès*, Case C-53/96, [1998] ECR I-3637.

cial jurisdiction rules provided for in Article 24 implies, since its formulation is rather vague. This question was also mainly dealt with in *Van Uden/Deco-Line*. The third question is whether these measures are capable of recognition and enforcement in another country. The Court of Justice elaborated on this issue in the *Mietz* case.[2] In the present case, between an Italian company (Italian Leather) and a German Company (WECO Polstermöbel) this last question on enforceability was revisited on a more 'advanced' level. It deals with the issue of the irreconcilability of judgments, within the meaning of Article 27, paragraph 3 Brussels Convention. The question is whether this provision is applicable in case the state of origin granted a provisional measure whereas the state of enforcement refused such a measure between the same parties, and the difference in outcome is only attributable to a difference in the procedural requirements for granting such orders. [The jurisdiction rules for provisional and protective measures are more flexible than those regarding an ordinary judgment, because Art. 24 provides an extra forum. According to the *Van Uden* case Art. 24 can even serve as a ground for jurisdiction in case proceedings are already pending in another Member State. It is therefore not unlikely that measures are being rendered in more than one Member State, such as in the present case. If the judges of these Member States rule differently on the issue whether a provisional measure is justified in the light of the procedural requirements, such as urgency, the question is whether a situation of irreconcilability within the meaning of Art. 27, paragraph 3 occurs. The Court answers this question in the affirmative.]

It should be noted that on 1 March 2002 the Brussels Regulation replaced the Brussels Convention, except when Denmark is involved.[3] This does, however, not affect the relevancy of this judgment, since the applicable rules did not undergo substantial changes. Hereafter when mentioning a provision of the Brussels Convention, the corresponding articles of the Brussels Regulation will be added between brackets.

2. Facts and Procedure

Italian Leather SpA (hereafter: Italian Leather), domiciled in Italy, is a company that sells leather-upholstered furniture under the name 'LongLife'. WECO Polstermöbel GmbH (hereafter: WECO), domiciled in Germany, sells furniture of the same type. In 1996 Italian Leather closes an exclusive contract with WECO, granting WECO the right to distribute Italian Leather's goods for five years within a specified area. The contract contains a jurisdiction clause for the court of Bari (Italy). In 1998 WECO complains of defective performance of the contract by Italian Leather, and informs Italian Leather that it will not be party to any joint sales message at forthcoming exhibitions and that it will present its own WECO mark.

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2 *Mietz*, Case C-99/96, [1999] ECR I-2277.

3 See Article 68 and Article 1, paragraph 2 Brussels Regulation.

Italian Leather brings proceedings for interim relief (*einstweilige Verfügung*) against WECO before the District Court (*Landgericht*) of Koblenz (Germany), which is the court within whose jurisdiction WECO has its registered office. The jurisdiction of the German District Court is based on Article 24 Brussels Convention (Article 31 Regulation). Italian Leather requests to restrain WECO from marketing products presented as being 'easy care leather' under the brand name 'naturia longlife by Marizio Danieli'. On 17 November 1998 the District Court of Koblenz dismisses the application because there is no ground justifying the grant of interim relief.[4] The German District Court states that to grant this application would be tantamount to ordering WECO to perform the contract. However, Italian Leather has not proved that there is a risk of irreparable damage or definitive loss of rights, which are requirements for granting interim relief under German procedural law (§ 940 *Zivil Prozessordnung*). Furthermore, WECO had already taken steps to market its products with leather from other suppliers, and would also suffer considerable damage if the restraining order were granted.

A few days before the District Court Koblenz delivers its judgment, Italian Leather applies for an interim measure at the District Court (*Tribunale*) of Bari (Italy). The Italian court, contrary to the German court, holds that the urgency requirement (*periculum in mora*) is fulfilled, since Italian Leather will suffer big economic losses and there is a risk of irreversible extinction of its rights. On 28 December 1998 the Italian District Court grants the interim measure, prohibiting WECO from using the word 'LongLife' for the distribution of its leather furniture products in several Member States, including Germany.

On application by Italian Leather the District Court of Koblenz declares the Italian judgment enforceable, and couples it with a financial penalty according to German law (*Zwangsgeld* on the basis of § 890(1) *Zivil Prozessordnung*). WECO lodges an appeal against this declaration of enforceability. The Court of Appeal (*Oberlandesgericht*) varies the enforcement order, holding that the Italian judgment was irreconcilable, within the meaning of Article 27, paragraph 3 Brussels Convention, with the judgment rendered by the German District Court.

Italian Leather lodges an appeal at the Supreme Court (*Bundesgerichtshof*). The Supreme Court remarks that the case law of the Court of Justice on whether the legal consequences of different judgments are mutually exclusive has, until now, only concerned situations in which there were divergences in substantive law. In the present case, however, the conflict between the two decisions on interim measures is attributable to procedural requirements. The Supreme Court states that if those decisions are irreconcilable the state of enforcement should nevertheless have the power not to apply Article 27, paragraph 3 if it considers that the divergence is not sufficiently significant. The purpose of this provision is to prevent the rule of law in a contracting state from being disrupted by

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[4] The (original) German language version states that there is no '*Verfügungsgrund*'. The Dutch language version specifies that the urgency (*spoedeisendheid*) requirement is not met. This is probably because in the following Italian judgment the urgency requirement is specifically mentioned.

advantage being taken of two conflicting judgments. Furthermore, the Supreme Court observes that under Italian law there is no direct method of enforcement of restraining orders than payment of damages. The application of coercive measures provided for by German law (such as financial penalty, or in German: *Zwangsgeld*) in order to enforce the Italian restraining order would have more powerful effects than those of Italian law. The Supreme Court doubts whether Article 31 and 34 Brussels Convention permit or require such a solution. The Supreme Court refers three questions to the Court of Justice. Since the Court only answers the first question, regarding the interpretation of Article 27, paragraph 3 Brussels Convention, this annotation will only focus on this issue.[5]
"(1) Can judgments be irreconcilable within the meaning of Article 27(3) of the Brussels Convention when the only difference between them lies in the specific requirements for the adoption of a particular type of autonomous provisional measure (within the meaning of Article 24 of the Convention)?"

3. Judgment of the Court of Justice

The Court of Justice remarks by way of preliminary point that it assumes that, although the competent court on the substance being the District Court of Bari (Italy), the District Court of Koblenz (Germany) did not exceed the limits of the jurisdiction that it derived from Article 24 Brussels Convention (Article 31 Regulation). The Court dealt with this issue in the cases *Van Uden/Deco-Line* and *Mietz*.[6]

The Court considers that the first question consists of two parts. First, whether a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought, even though the respective effects of those decisions are attributable to divergences as to the procedural requirements for the grant of such an order. Second, whether a court of the latter State is required to refuse recognition of the foreign decision or whether the Brussels Convention allows it to refuse recognition only if it finds that the coexistence of two conflicting decisions would cause real and appreciable disruption to the rule of law in the State where recognition is sought.

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[5] The two other questions were: (2) May and must the court of the State of enforcement which has declared a foreign judgment requiring the party against whom enforcement is sought to desist from certain activities to be enforceable in accordance with the first paragraph of Article 34 and the first paragraph of Article 31 of the Convention at the same time order the measures necessary, under the law of the State of enforcement, for enforcement of a restraining order? (3) If the answer to Question 2 is in the affirmative, must the measures necessary, under the law of the State of enforcement, for enforcement of the restraining order be ordered even if the judgment to be recognized does not itself include comparable measures in accordance with the law of the State of origin, and that law makes no provision at all for the immediate enforceability of such restraining orders?

[6] See footnotes 1 and 2.

Regarding the first part of the question, the Court refers to the *Hoffmann v. Krieg* case.[7] In this case the Court decided that in order to ascertain whether two judgments are irreconcilable within the meaning of Article 27, paragraph 3 Brussels Convention (Article 34, paragraph 3 Regulation), it should be examined whether they entail legal consequences that are mutually exclusive. Subsequently, the Court establishes that it is not important whether the judgments at issue have been delivered in proceedings for interim measures or in proceedings on the substance. Article 27, paragraph 3 has general application since it refers to 'judgments', without further specification.[8] According to the Court it is also irrelevant that national procedures regarding interim measures vary more from one Member State to another than ordinary proceedings. The object of the Brussels Convention is not to unify the procedural rules, but to determine which court has jurisdiction and to facilitate the enforcement of judgments. As follows from the *Hoffmann* case, irreconcilability lies in the effects of judgments and does not concern the requirements governing admissibility and procedure.[9] In the present case the Italian court granted the application to prohibit WECO from using the LongLife brand name after the German court had dismissed an identical application made by the same plaintiff against the same defendant. The Court therefore concludes, in conformity with the opinion of the Advocate General, that the decisions are irreconcilable.

For the second part of the question the Court refers to the explanatory Jenard report, stating that 'there can be no doubt that the rule of law in a State would be disturbed if it were possible to take advantage of two conflicting judgments'.[10] Furthermore, Article 27, paragraph 3 Brussels Convention provides that a judgment is not to be recognized if it is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought. This ground of refusal is mandatory.[11] Finally the Court remarks that it would be contrary to the principle of legal certainty to interpret Article 27, paragraph 3 as conferring power to the State of enforcement to authorize a foreign judgment that is irreconcilable with a judgment given in that State.[12] The Court concludes that in case a foreign judgment is irreconcilable with a judgment given by the State of enforcement, the court of that State is required to refuse recognition of the foreign judgment.

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7 *Hoffmann v. Krieg*, Case 145/86, [1988] ECR 645.

8 The court also refers to the phrase 'judgments' in Art. 25, which also covers provisional measures. See the *Mietz* case (footnote 2).

9 See *Hoffmann v. Krieg* (footnote 7), para 22.

10 OJ 1979, C 59, p. 45.

11 This in contrast to Art. 28 Lugano Convention, which determines that a judgment 'may be refused', as the Court remarks.

12 The ECJ repeatedly held that legal certainty is one of the objectives of the Brussels Convention. See *Effer*, Case 38/81, [1982] ECR 825, para 6; *Groupe Concorde*,Case C-440/97, [1999] ECR I-66307, para 23; *Besix*, Case C-256/00, [2002], not yet published.

4. Comments

4.1 General remarks

This ruling is, compared to the other rulings of the Court concerning provisional and protective measures, quite short and clear. Though the reasoning of the court is convincing and sound, it also raises some questions. The Court leaves no doubt as to the question whether two provisional measures can be irreconcilable; for irreconcilability within the meaning of Article 27, paragraph 3 Brussels convention (Article 34, paragraph 3 Regulation) it is irrelevant whether it concerns two judgments in an ordinary proceedings or two provisional measures. But in case of provisional measures the consequences can be more far-reaching. The jurisdiction rules for these measures are much more flexible than for ordinary proceedings, because Article 24 (Article 31 Regulation) establishes an extra forum. Besides, in ordinary proceedings the rules concerning lis pendens in most cases prevent that two conflicting judgments are being rendered within the European Union. It is, however, not clear which role these rules play in provisional proceedings. In this case the Italian court did not consider declining jurisdiction because a similar provisional measure had already been applied for in German court.

Furthermore, the Court rules that for the question whether two provisional judgments are irreconcilable it is not relevant whether this results from material differences or procedural differences. But because the requirements for obtaining provisional measure are quite different in the various States of European Union, a situation of irreconcilability is more likely to occur. This is an obstacle for recognition and enforcement, whereas it only relates to procedural differences and not to substantial discrepancies.

The last issue that will be addressed is how the argument of legal certainty, as emphasized by the Court when discussing the question whether Article 27, section 3 obliges a national court to refuse enforcement, can be valued under the new Brussels Regulation.

4.2 Jurisdiction regarding Provisional and Protective Measures; lis pendens

The Court first remarks that it proceeds on the assumption that the District Court of Koblenz (Germany) has jurisdiction, although the District Court of Bari (Italy) has jurisdiction as to the substance of the case. For the jurisdiction of the German District Court, the Court refers to Article 24 Brussels Convention (Article 31 Regulation) and the interpretation in the cases *Van Uden* and *Mietz*.[13] From these cases it is clear that Article 24 can establish jurisdiction, although on the substance of the matter another court has jurisdiction. In the present case parties agreed upon an exclusive jurisdiction clause for the Italian court on the basis of Article 17 Brussels Convention (Article 23

[13] See footnotes 1 and 2.

Regulation). Nevertheless the District Court of Koblenz can, according to the *Van Uden* ruling, derive jurisdiction from Article 24, in case there is a real connecting link between the territory of that State and the subject-matter of the provisional measure. Because WECO – the defendant – is domiciled in the jurisdiction of the District Court of Koblenz, the requirement of the real connecting link is fulfilled.[14]

The German Court therefore had jurisdiction.[15] The next question is whether also the Italian Court had jurisdiction to grant a provisional measure, since an application was already pending in the German court. In other words: are the provisions regarding lis pendens and related actions (Article 21-23 Brussels Convention; Article 27-30 Regulation) applicable? It is clear that a situation of lis pendens does not occur when in one State main proceedings are pending and in another State an application for a provisional measure is made.[16] This follows from Article 24 and the *Van Uden* ruling, and one can also argue that a situation of lis pendens within the meaning of Article 21 Brussels Convention (Article 27 Regulation) does not occur, since a provisional measure by nature cannot have 'the same cause of action' as the main proceedings. A provisional measure can be ordered parallel to proceedings on the substance, and ceases to have effect as soon as a decision is rendered on the merits.[17] But what to think of the situation that two provisional procedures are commenced, such as in this case? The Court did not decide upon this issue, but nevertheless it is interesting because application of the lis pendens provisions would have prevented two irreconcilable judgments being rendered. The question therefore is: should the Italian court have declined jurisdiction?

An argument in favour of this is that the requirement that the proceedings must involve 'the same cause of action' seems to be fulfilled in case the concurrent provisional

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[14] The main rule of the Brussels Convention that the court of the domicile of the defendant has jurisdiction, see Art. 2. See on this issue X.E. Kramer, *Het kort geding in internationaal perspectief. Een rechtsvergelijkende studie naar de voorlopige voorziening in het internationaal privaatrecht* (Deventer: Kluwer 2001), pp. 131-136. See on the *Van Uden* ruling e.g.: B. Heß and G. Vollkommer, "Die begrenzte Freizügigkeit einstweiliger Maβnahmen nach Art. 24 EuGVÜ", IPRax (1999), pp. 220-225; X.E. Kramer, "De internationale bevoegdheid van de kortgedingrechter. Noot bij HvJ EG 17 november 1998, C-391/95 (Van Uden-Deco Line)", NTBR (1999), pp. 74-79; J. Normand, "Jurisprudence. Cour de justice des Communautés européennes–17 novembre 1998, Cour de cassation (1re Ch.civ.)-13 avril 1999. Convention de Bruxelles du 27 septembre 1968", RCDIP (1999), pp. 340-368; B.J. Rodger, "Interim relief in support of foreign litigation?", C.J.Q. (1999), pp. 199-202; P. Vlas, "The EEC Convention on Jurisdiction and Judgments. Article 24: Provisional Measures", NILR (1999), pp. 102-109.

[15] It is important that the limits of the jurisdiction of Art. 24 are not exceeded since this would, according *Mietz*, constitute a ground to refuse enforcement. See further section 4.3 below.

[16] See also e.g. L. Collins, *Dicey & Morris on the Conflict of Laws* (London: Sweet&Maxwell 2000), pp. 551; Kramer (footnote 14), p. 146-147.

[17] This is the rule under national procedural laws, and usually this refers to the situation that a court of the same state as that which ordered the provisional measure renders a decision on the substance. But it is logical to give the same effect to a decision on the merits by a foreign court when this judgments is enforceable, such as is the case when the Brussels Regulation applies.

measures both seek to prohibit a party to use a certain brand name. In the *Tatry* case the Court decided that for the question whether actions have the same cause, it is only relevant that the actions have the same purpose.[18] Also from a practical point of view application of the lis pendens provisions is desirable because of the flexible jurisdiction rules regarding provisional and protective measures, and the big variety of these measures within the European Union, the risk of irreconcilable judgments is considerable. An argument against the application of the provisions on lis pendens in this case is, however, that parties made an explicit choice of forum for the Italian Court, and this is a strong basis for jurisdiction. As follows from the *Van Uden* case, the court that has jurisdiction as to the substance of the case also has an unconditional jurisdiction for provisional and protective measures.

In my opinion the arguments in favour of application of the provisions on lis pendens should prevail.[19] That the Italian Court had a strong basis for jurisdiction on account of the forum clause is in my view irrelevant. Italian Leather chose to adjudicate the German Court first, and this obliges the court second seized to decline jurisdiction, regardless what the basis of its the jurisdiction is. Also the present decision of the Court of Justice regarding the irreconcilably of the provisional judgments points in this direction; the cause of two irreconcilable judgment being rendered is the direct result of two courts dealing with the case and the provisions on lis pendens could have prevented this. Furthermore, from the *Tatry* case it is clear that 'irreconcilability' within the meaning of Article 27 paragraph 3 Brussels Convention has a narrower scope than the provisions concerning lis pendens and related actions. Consequently, if in the present case the Court concludes that there is a situation of irreconcilability of judgements, the provisions on lis pendens are likely to be applicable as well. In my opinion the Italian Court should therefore have declined jurisdiction.

4.3 Enforcement and Irreconcilability of Provisional and Protective Measures

According to the *Mietz* ruling of the Court of Justice provisional and protective measures are in principle capable of recognition and enforcement under the Brussels Convention[20], unless they are ordered without the defendant being summoned.[21] However, recognition and enforcement must be refused if the court of origin violated the jurisdiction of Article 24 (Article 31 Regulation). This is not the case since the Italian Court had full jurisdiction on the basis of the forum clause. Furthermore, as is the case for a judgment rendered in ordinary proceedings, recognition and enforcement of a provisional or protective measure can be refused on the grounds set out in Article 27 and 28 Brussels

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18 See *The Tatry*, Case C-406/92, [1994] ECR I-5439.

19 See also Kramer (footnote 14), p. 147; P. Vlas, in: *Burgerlijke Rechtsvordering (loose leaf)*, Verdragen & Verordeningen. EEX, Art. 24, note 2.

20 *Mietz* (footnote 2).

21 See *Denilauler/Couchet*, Case 125/79, [1980] ECR 1553.

Convention (Article 34 and 35 Regulation). The Court of Justice emphasized in several rulings that the grounds of refusal of Article 27 have to be interpreted strictly.[22] These grounds constitute an obstacle to the fundamental objectives of the Convention, which is to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure.[23]

The most important decision on Article 27, paragraph 3 (Article 34, paragraph 3 Regulation) concerning irreconcilability is the *Hoffmann v. Krieg* ruling, which is also mentioned in the present case.[24] As stated above, the Court ruled that in order to ascertain whether two judgments are irreconcilable, it should be examined whether they entail legal consequences that are mutually exclusive. In the present case the Court repeats that the irreconcilability lies in the effect of the judgments, and adds that it does not concern the procedural requirements, which may vary per State. Furthermore, is it not relevant that it concerns provisional measures and not a decision on the substance of the case. In other words, there are no special rules to determine the irreconcilability of provisional measures.

In this case it is clear that the effect of the German decision on the one hand and the Italian decision on the other hand is irreconcilable. The refusal of the German District Court to grant the prohibiting order implies that WECO is still able to use the 'LongLife' brand name, whereas according to the Italian judgment this is prohibited. Since it concerns the same brand name for the same products and the same geographical area, the effect of these two decisions is obviously irreconcilable.

Although this reasoning and the outcome may be quite acceptable, it nevertheless requires some further reflection on this point. In the first place, the applicability of this ground to provisional measures means that they are put at the same level as judgments on the substance for this matter.[25] As set out above, this also means that the provisions of lis pendens and related actions are very likely to be applicable to provisional measures, which also limits the possibilities of forum shopping.[26]

In the second place, the Court emphasizes that irreconcilability does not concern the procedural requirements. But in this case the very issue at stake are the differences in procedural requirements. The German court did not refuse the measure because it did not think the use of the brand name by WECO to be unlawful, but because Italian Leather did not proved that there was a risk of irreparable damage or definitive loss of rights, as is required for granting a provisional measure under German law. What the

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[22] See *Solo Kleinmotoren v. Boch*, Case C-414/92, [1994] ECR I-2237; *Coursier v. Fortis Bank*, Case C-267/97 [1999] ECR I-2543 and *Krombach v. Bamberski*, Case C-7/98 [2000] ECR I-1395.

[23] See *Solo Kleinmotoren v. Boch* (previous footnote).

[24] *Hoffmann v. Krieg* (footnote 7).

[25] This does not mean that a decision on the substance and a provisional measure can be 'irreconcilable', since they do not have the same effect. The provisional measure will cease to have effect as soon as a judgment on the substance is rendered. See also section 4.2 above.

[26] See section 4.2 above.

Court probably meant is that it is not relevant whether the effect of the judgments is irreconcilable because of a procedural or a material difference, but that is in my view not the same as regarding procedural requirements and the differences in procedural laws irrelevant.

The third remark relates to these procedural aspects. In this case the irreconcilability is not attributable to a different view on the material aspects of the case.[27] The conflicting judgments are the result of the different rules concerning the 'urgency' requirement. Urgency is a requirement in basically every procedural – be it in a different wording and with exceptions – because it the ratio behind the existence of provisional measures.[28] Under some procedural laws the urgency requirement is explicitly regarded as a condition to confer jurisdiction upon a judge to provide for a provisional measure.[29] Also in the *Denilauler* and Van *Uden* ruling the Court emphasizes the provisional and urgent character – without explicitly mentioning 'urgency' though – as a condition to use Article 24 Brussels Convention (Article 31 Regulation) to establish jurisdiction.[30] This implies that one can argue that because the German court did not think there was an urgent situation, Article 24 was not even applicable and only the Italian court had jurisdiction. In this light it is only a matter of competency and not really a refusal of the prohibiting order. This would mean that the Italian court had jurisdiction to grant the order because there was no situation of lis pendens, ánd that there is no situation of irreconcilability. Of course this depends on how the urgency requirement is seen – as a requirement for jurisdiction or as a requirement for granting a measure – and for reasons of legal certainty I do not prefer to see at as a jurisdiction question, with the consequences as set out above. But still it shows that in my opinion the Court concludes a little too easily and without further motivation that the fact that it only concerned a difference in procedural requirements is irrelevant.

The outcome of this ruling is in my opinion nevertheless satisfying. It would be contradictory to the essence of Article 27, paragraph 3 Brussels Convention (Article 34, paragraph 3 Regulation) to allow enforceability of the Italian provisional measure in

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[27] It is not clear from the ruling what the German District Court thought of the material aspects, maybe it did not even consider them, but the German Supreme Court emphasizes that the difference only relates to the procedural requirements.

[28] It is derived from the Latin 'periculum is mora'. See e.g. S. Lehr, *Einstweiliger Rechtsschutz und Europaïsche Union. Nationaler einstweiliger Verwaltungsrechtsschutz im Widerstreit von Gemeinschaftsrecht und nationalem Verfassungsrecht*, (Berlin: Springer 1997), p. 16; Kramer (footnote 14), p. 100.

[29] This is obviously the case in for example Belgium, where Art. 9, para 1 Gerechtelijk Wetboek states that one of the conditions for the jurisdiction of the District Court in a 'kortgedingprocedure' is the urgent nature of the case. In other countries, such as France, the Netherlands and Germany this is less clear. The urgency or necessity is more in general formulated as one of the conditions for the 'competency' to provide for a provisional measure. See for a comparative overview of six countries and some international (harmonization) rules Kramer (footnote 14), p. 11-112.

[30] *Denilauler* (footnote 21) and *Van Uden* (footnote 1).

Germany, whereas the German court decided only a short time before that there was no ground to grant the same measure.

4.4 The Grounds of Refusal and Legal Certainty; the Brussels Regulation

The Court rules that the State where recognition is sought is obliged to refuse recognition and enforcement in case the foreign judgment is contradictory to a judgment rendered by its own court. The 'irreconcilibiliy'ground of refusal is in other words mandatory, and the court does not have discretion to put it aside. The Court basis this on the formulation of Article 27, paragraph 3, the explanatory Jenard report and the requirement of legal certainty.[31] In this context it is interesting to note that with the entering into force of the Brussels Regulation on 1 March 2002, the status of the grounds of refusal has changed. According to Article 41 the court of the Member State where recognition is sought no longer applies the grounds of refusal when a declaration of enforceability is requested. Only when an appeal is lodged against the declaration of enforceability the grounds of refusal will be taken into consideration, according to Article 45. The purpose of this change is to make enforcement easier and quicker, and it is a step towards the effectuation of one European procedural territory. This means that the mandatory character of the grounds of refusal, including the 'irreconcilability' ground laid down in Article 34, paragraph 3, is less pronounced under the Regulation. It is up to the party against whom recognition is sought to establish legal certainty in this respect. Furthermore, this leads to the maybe somewhat strange conclusion that if for whatever reason no appeal against the declaration of enforceability is lodged in such a case, two conflicting judgments will be enforceable in a Member State.

5. Concluding remarks

This ruling is a very welcome decision that, together with the *Van Uden* and the *Mietz* rulings, further clarifies the position of provisional measures in European litigation. As was already shown by the *Van Uden* and *Mietz* rulings, sometimes the normal rules apply, and for other issues the nature of provisional and protective measures require a different approach. In this *Italian Leather* case the Court decides that as for the application of Article 27, paragraph 3 Brussels Convention (Article 34, paragraph 3 Regulation) there is no difference between two conflicting provisional measures and two conflicting judgments on the substance. Apart from the fact that the Court could have elaborated more on the issue of difference in procedural law with regard to the urgency requirement, this is in my opinion a desirable conclusion. It increases the value of these measures in international litigation, attributes to legal certainty and reduces the risk of forum shopping.

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[31] See section 3 above.