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Special jurisdiction under Article 35 of the Brussels I recast Regulation vs. preparatory inquiries under Article 145 of the French Code of Civil Procedure

Pursuant to Article 35 of the Brussels I recast Regulation, the local judge may order provisional or protective measures, even though another judge has been given – or has accepted – jurisdiction to rule on the merits of the case, in particular under the terms of a jurisdiction clause.

In a decision handed down on January 27, 2021, the Court de Cassation (French Supreme Court) ruled on the French judge's power to order preparatory inquiries in futurum (literally for the future) and aligned its position with the autonomous notion of "*provisional, including protective, measures*" provided for by the Brussels I recast Regulation.

As per Article 35 of Regulation (EU) No. 1215/2012 known as the "*Brussels I recast Regulation*"[1], applications may be made to the courts of a Member State for provisional and protective measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter, in particular if there exists a jurisdiction clause.

Under French law, the issue of all preparatory inquiries *in futurum* – which can be ordered before any trial – has been addressed in the light of this Regulation.

Pursuant to Article 145 of the French Code of Civil Procedure, which is of great practical relevance:

> *"If there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of an ex parte motion or by way of summary proceedings."*

In concrete terms, can the French judge, in international matters, order preparatory inquiries *in futurum* without taking into consideration the competent judge on the merits possibly designated by a jurisdiction clause?

In a decision dated January 27, 2021[2], the First Civil Chamber of the *Cour de Cassation* confirmed that French courts have the power to order preparatory inquiries *in futurum*, provided that the judges assess the requested preparatory inquiries.

In that specific case, two French companies assigned to a German company the exclusive distribution rights to a film and a TV series, pursuant to contracts dated July 30, 2012 and May 26, 2014 respectively. Both contracts included a jurisdiction clause according to which the courts of Munich, Germany, had jurisdiction to hear any dispute between the parties.

A dispute arose between the parties regarding the proper performance of their obligations and the German company enjoined the French companies to provide it with documents evidencing the budget actually incurred for the production of the film and the series.

As the French companies refused to comply, the German company filed an application with the President of the Commercial Court of Salon-de-Provence to appoint a bailiff to carry out computer investigations and retrieve data.

This application was granted pursuant to court orders but the French companies sought the revocation of said orders.

The Aix-en-Provence Court of Appeals denied the jurisdiction of French courts, considering that the preparatory inquiries requested by the German company were neither provisional nor protective ones, but were intended to take evidence given the German company's lack of desire to maintain a *de facto* or *de jure* situation.

The German company lodged an appeal before the *Cour de Cassation*. The latter, relying on Article 35 of the Brussels I recast Regulation and Article 145 of the French Code of Civil Procedure, overturned the appellate decision for lack of legal basis.

Indeed, it noted that the Court of Appeals had made a general statement, without investigating whether the preparatory inquiries *in futurum* "*were not intended to protect the distributor against the risk of losing evidence, the preservation of which could be essential for the outcome of the dispute*".

Consequently, the *Cour de Cassation* held that it was up to the judges to assess *in concreto* whether the requested preparatory inquiries fell within the category of provisional or protective measures within the meaning of Article 35 of the Brussels I recast Regulation, or within the category of measures for the taking of evidence.

In this regard, the *Cour de Cassation* gets back to the position it had adopted[3] prior to the recent rulings of March 14, 2018[4] that suggested that the French judge was always competent to order any preparatory inquiries on the basis of Article 145 of the French Code of Civil Procedure.

Indeed, in these two rulings handed down on March 14, 2018, the First Civil Chamber of the *Cour de Cassation* held "*[…] without having to determine the court having jurisdiction to rule on the merits of the case, […] that the French court had jurisdiction to order, prior to any trial, expert investigations to be conducted in France and intended to preserve or establish proof of facts on which the outcome of the dispute might depend*."

In addition, the *Cour de Cassation* seems to align with the autonomous European law notion of "*provisional, including protective, measures*" set forth in Article 35 of the Brussels I bis Regulation.

The Court of Justice had adopted a restrictive approach to this notion, by excluding measures for the taking of evidence, since it has ruled that "*provisional, including protective, measures*" are to be understood as referring to "*measures which, in matters within the scope of the Convention* [Brussels I bis Regulation]*, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter*"[5]. Measures ordered for the purpose of enabling the plaintiff to assess the appropriateness of a possible action, to determine the basis for such an action and to assess the relevance of the legal arguments that may be invoked in this context, are not covered by the notion of "*provisional, including protective, measures*"[6].

By excluding measures for the taking of evidence from the scope of the special jurisdiction provided for by the Brussels I recast Regulation, the *Cour de Cassation* has returned to a pragmatic position that complies with European Union law. Indeed, measures for the taking of evidence, such as court-ordered expert investigations, have a close link with the merits of the case, which requires maintaining a unity between the evidentiary phase and the merits. On the other hand, the local judge is often the best-positioned to rule on provisional and protective measures, pending a decision on the merits of the case.

As pointed out by French legal writers[7], the question remains as to how judges ruling on the merits should assess the purpose of the preparatory inquiries requested by the litigant. Will it depend on the declared will of the party asking for the such inquiries or on their specific characteristics under French law?

In these circumstances, legal practitioners should be extra vigilant when setting forth the reasons for their request for preparatory inquires and devising their procedural strategy.

[1] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF

[2] 1st Civil Chamber of the *Cour de Cassation*, May 27, 2021, n°19-16.917

[3] 1st Civil Chamber of the *Cour de Cassation*, May 4, 2011, n°10-13.712

[4] 1st Civil Chamber of the *Cour de Cassation*, March 14, 2018, n°16-19.731; 1st Civil Chamber of the *Cour de Cassation*, March 14, 2018, n°16-27.913

[5] CJCEC, March 26, 1992, C-261/90, Reichert and Kockler

[6] CJEUE, April 28, 2005, C-104/03, St. Paul Dairy Industries NV / Unibel Exser BVBA

[7] H. MEUR, LEDICO, mars 2021, n°113u4,p.7