Provisional and Protective Remedies

PROVISIONAL AND PROTECTIVE REMEDIES: THE BRITISH EXPERIENCE OF THE BRUSSELS CONVENTION

GERRY MAHER and BARRY J. RODGER*

I. INTRODUCTION

IT is a well-known facet of litigation that the first step is often more important than any to follow. Virtually all legal systems bestow on litigants a variety of interim and provisional remedies. These remedies have a number of different functions and rationales but two in particular are thought to be fundamental.[1] First, protective remedies provide a litigant with a degree of protection by ensuring that the status quo is preserved while the litigation is proceeding; second, these remedies secure the position of a litigant not only during the course of an action but also once it is over and he has judgment in his favour. This second function is usually achieved, in one way or another, by tying up and freezing the property of the other party to the action.[2] However, protective remedies also serve other functions. Some remedies exist to promote the interest of a party in the advancement of his case (e.g. orders for disclosure of evidence), whereas others provide a litigant with part of the overall final remedy or judgment that he is seeking to gain from the action (e.g. interim payment or interim damages).

Moreover, there is a further level of interest in provisional and protective remedies. This lies not so much in their direct function but in their use as part of the strategy of litigation. Many court actions do not proceed beyond the initial stages, resulting in settlement between the parties, or abandonment by one of them. Often not only the terms but also the very fact of settlement or outcome is a reflection of the provisional remedies obtained at the earliest stages of the action.[3]

* Professor of Law and Lecturer in Law respectively, the Law School, University of Strathclyde, Glasgow. We are grateful to our research assistant Lorna Young for her valuable work in checking and revising earlier drafts of this article. Our thanks are also due to Professor Th. M. de Boer of the Faculty of Law at the University of Amsterdam and to Miss Juliette van Doorn, Loeff Claeys Verbeke, Amsterdam, for comments on earlier drafts of the paper.

1. Lawrence Collins, *Essays in International Litigation and the Conflict of Laws* (1994), pp.10–15.

2. It must not be thought that protective remedies are measures available only to parties who raise actions. For example, in many legal systems the defendant may apply for an order whereby the plaintiff has to take steps to ensure payment of costs in the event of his losing the action. In principle there is nothing to prevent a defendant to an action seeking a provisional or protective measure under Art.24 of the Brussels Convention.

3. A. Zuckerman, "Interlocutory Remedies in Quest of Procedural Fairness" (1993) 56 M.L.R. 325.

Accordingly, protective and provisional remedies have a crucial role to play in the strategy of litigation.

All these features of provisional and protective remedies apply with even greater force where the litigation is international in nature. The fact that one party may have a weak link with the country of the forum, or at least a weaker link than that of the other party, tends to increase the pressure to settle or quit, and in international litigation the place of provisional remedies may well be even more significant than their undoubted role in court actions between parties resident in the country of the court.

The aim of this article is to consider one particular aspect of international litigation. This is the operation of Article 24 of the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments. Article 24 accords jurisdiction to courts in contracting States to grant provisional and protective remedies even although the courts of another contracting State have jurisdiction over the substance of the action. Article 24 of the 1988 Lugano Convention is in identical terms. Accordingly, the range of these provisions is extremely wide and applies to all actions within the scope of the two Conventions throughout the whole European judicial area. In this article we examine various issues concerning Article 24 of the Brussels Convention. This examination is timely for several reasons, not least that the Brussels and Lugano Conventions are currently under a process of detailed review, and the topic of provisional and protective measures has already been identified as a key issue in that process.[4] Furthermore, the Hague Conference on Private International Law has included the topic of a worldwide judgments convention as part of its forthcoming programme of work and the issue of protective remedies will form part of the discussion on that convention.[5] In addition, there has been a recent judgment by the European Court of Justice, on a reference from the Hoge Raad in The Hague, which has dealt directly with some but not all of the core issues of Article 24 in relation to certain forms of Dutch interim measures.[6]

This article is in three main parts. First, there is an analysis of the terms of Article 24 along with a discussion of a range of issues and problems

4. See e.g. *Operation of the Brussels and Lugano Conventions* (Consultation Paper issued by the Lord Chancellor's Department and the Scottish Courts Administration, Apr. 1997), esp. pp.32–35; *Towards Greater Efficiency in Obtaining and Enforcing Judgments in the European Union* (Commission Communication to the Council and the European Parliament, 26 Nov. 1997), esp. pp.13–15. For a useful discussion see P. R. Beaumont, "A United Kingdom Perspective on the Proposed Hague Judgments Convention" (1998) 24 Brooklyn J. Int. L. 75.

5. See Hague Conference on Private International Law, *Preliminary Document No.7 of April 1997*, para.126; *Preliminary Document No.8 of November 1997*, paras.62–64; *Preliminary Document No.9 of July 1998*, para.115. For discussion see Beaumont, *ibid.*

6. In Case C-391/95, *Van Uden Maritime BV* v. *Kommanditgesellschaft in Firma Deco-Line, Peter Determann KG*, judgment of the ECJ, 17 Nov. 1998.

which commentators have identified as arising from its provisions. In Part III we shall consider the guidance given on the solution of these problems in the official reports on the Convention and in the decisions of the European Court of Justice. Part IV will consider the legislative and judicial approaches taken in England and Wales and in Scotland towards the general implementation of Article 24 and to its interpretation and application in detail.

II. ARTICLE 24: ISSUES FOR ANALYSIS

ARTICLE 24 of the Brussels Convention is in the following terms:[7]

> Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.

Commentators have identified a range of issues which may arise in seeking to understand and give effect to these provisions. Three issues in particular are worthy of more detailed consideration.

A. Scope of Measures Covered by Article 24

Perhaps the single most important matter concerning Article 24 is the meaning to be given to the expression "provisional, including protective, measures". A primary point here is whether this classification is to be determined by each legal system in accordance with its own concepts and principles or whether classification is made by reference to autonomous or independent "European" principles. With regard to various key concepts in the Convention, such as matters relating to a contract in Article 5(1) and the idea of tort, delict or quasi-delict in Article 5(3), the European Court of Justice has emphasised the need for autonomous classification and interpretation.[8] On the other hand, the Court has also stated that where several identical actions have been raised under the Convention in different countries, the question of which court is that first seised in terms of Article 21 is a matter for national laws to determine.[9] This last point has special significance in the present context for this part of Article 21 relates to procedural matters where it would not be as easy for the European Court to develop independent principles as is perhaps

7. The wording of Art.24 of the Lugano Convention is identical. The terms of Art.24 have remained unchanged by any of the accession treaties.

8. See e.g. Case 34/82, *Peters* v. *ZNAV* [1983] E.C.R. 987; Case C-26/91, *Handte* v. *TMCS* [1992] E.C.R. I-3967; Case 189/87, *Kalfelis* v. *Bankhaus Schroder Munchmeyer Hengst & Co.* [1988] E.C.R. 5565; Case C-68/93, *Shevill* v. *Presse Alliance SA* [1995] E.C.R. I-415; Case C-364/93, *Marinari* v. *Lloyds Bank plc* (*Zubaidi Trading Co. intervening*) [1995] E.C.R. I-2719.

9. Case 129/83, *Zelger* v. *Salinitri* (*No.2*) [1984] E.C.R. 2397.

the case when dealing with matters drawn from substantive law such as contract or delict.

It should not be thought that this question of the basis for classification is directly answered by the terms of Article 24 itself, which refers to provisional including protective remedies "as may be available under the law" of the State whose courts are granted jurisdiction under the Article. Article 24 does not by itself *create* any type of provisional or protective remedy or measure. Rather, it is concerned with such measures that exist in the different legal systems of contracting States. But clearly it does not follow that whilst a legal system of any contracting State provides for a particular type of protective remedy under its internal law that remedy is necessarily a protective or provisional remedy for the purposes of Article 24.

This point may appear obvious but is worthy of direct statement because of the range of different types of remedy which different legal systems classify as provisional, protective or "interim". It may be noted that the Convention itself does not use the term interim and several writers have argued that interim remedies which are in effect part judgments such as interim payments or interim damages do not fall within the range of the provisions of Article 24.[10] This conclusion would be *a fortiori* as regards proceedings in national law which provide for final judgment under procedures that by-pass full-blown litigation such as summary decree or summary judgment in Scots and English law.

At the other end of the spectrum the type of remedy which falls clearly within the scope of Article 24 is one which freezes the defendant's assets as security for eventual judgment in favour of the plaintiff. Other remedies whose rationale are protective may less clearly fall within Article 24. For example, in Scots law in certain circumstances the court may order the defender to consign into court the whole or part of the sum sued for to await the outcome of the action.[11] However, it may be noted that Article 24 refers to provisional, *including* protective, remedies; and from this it can be inferred that its scope goes beyond measures which protect parties during litigation with a view to securing ultimate judgment in the case. Of particular interest here are measures which deal with evidence. Remedies relating to the *preservation* of documents or other property which has evidential value in a case are clearly protective in nature. However, such remedies are not concerned with securing ultimate judgment but with preserving material which has a bearing on the course of the action. Some writers have argued that Article 24 is not concerned

10. See e.g. Collins, *op. cit. supra* n.1, at pp.5, 37–39; P. Matthews, "Provisional and Protective Measures in England and Ireland at Common Law and Under the Conventions: A Comparative Survey" (1995) 14 Civil Justice Q. 190, 198–199.

11. Macphail, *Sheriff Court Practice* (2nd edn, 1998), pp.357–360.

with remedies which deal with the production or recovery of evidence during an action or for taking of evidence on commission or appointment of an expert witness.[12] A distinction can no doubt be drawn between provisional and protective remedies which deal directly with the relationship between the parties and those which are concerned with the course of procedure of the action itself. The problem here is that some remedies may serve both functions. For example, in Scots law the court may allow evidence to be taken on commission where the witness is suffering from illness or is of an advanced age. One rationale for this procedure is that the witness may no longer be alive or will be unable to attend when a trial is heard. Yet at the same time the report which results from examination of the witness on commission can undoubtedly be used as evidence at the subsequent trial.

Accordingly, what is required in order to give effect to this key point of Article 24 is a set of principles which throw light on the range of provisional, including protective, measures and which guide the classification of the vast range of types of provisional remedy known to the national legal systems of contracting States as falling within or outside the terms of Article 24.

B. The Jurisdictional Bases of Article 24

Article 24 is contained in section 9 of Title II of the Brussels Convention (and likewise in respect of Article 24 of the Lugano Convention). This point is worth noting for Title II deals with the topic of jurisdiction and Article 24 should accordingly be understood as conferring jurisdiction on courts to grant provisional, including protective, measures in the circumstances referred to, viz. where a court of another contracting State has jurisdiction under other provisions of the Convention over the substance of the dispute. A number of issues arise from the jurisdictional nature of Article 24. On one reading Article 24 grants jurisdiction in any one action to courts in every contracting State and the question then arises whether it has to be given a narrow interpretation. In interpreting various provisions of Article 5 of the Convention, the European Court has emphasised that the primary ground of jurisdiction under the Convention is the domicile of the defender; since the grounds of jurisdiction in Article 5 are derogations from that fundamental ground, the provisions of that Article are to be read narrowly.[13]

This issue is linked to the earlier discussion about the nature of provisional and protective remedies covered by Article 24. If it were to be

12. Matthews, *op. cit. supra* n.10, at pp.197–198; Collins, *op. cit. supra* n.1, at p.37.

13. Case 33/78, *Somafer* v. *Saar-Ferngus AG* [1978] E.C.R. 2183; Case 9/87, *Arcado SPRL* v. *Haviland SA* [1988] E.C.R. 1539; *Kalfelis*, *supra* n.8.

established that measures which deal with the substance of the case (e.g. interim damages) are indeed beyond the scope of Article 24, the question of a narrow interpretation of the jurisdictional aspects of that Article would not arise. On this basis Article 24 on its own terms would not be concerned with jurisdiction over the substance of an action but solely with the supplementary issue of provisional and protective remedies, and its provisions would not derogate from any basic principle of jurisdiction over the substance of the dispute. By contrast, there would be a competition of jurisdiction as to the substance of an action where a court other than that of the main proceedings issued provisional measures (such as interim damages) which dealt, even if only on a partial or interim basis, with the substantive outcome of the action. This approach provides support for the view that measures which deal with the substance of a case are beyond the scope of Article 24. The difficulty here is precisely that there is yet no clear statement of the types of measure which fall within the scope of that Article.

A second point is whether Article 24 by itself confers jurisdiction on courts in contracting States to grant provisional or protective measures or, alternatively, whether these courts require an *additional* jurisdictional base before they can grant these measures. A simple reading of Article 24 is that, once there is some matter over which a court has jurisdiction as to the substance under the Brussels Convention in an action, that fact by itself is sufficient to confer jurisdiction on courts in other contracting States to grant Article 24 measures. As against this view Article 24 refers to provisional, including protective, measures which may be available under the law of the State where application is made. This expression may be read as referring only to the various types of provisional or protective measure; or, alternatively, may be wider in meaning and refer to all the circumstances appropriate for granting provisional or protective measures, including jurisdiction under national law. A further aspect of this question is whether jurisdiction for Article 24 purposes can be based on the exorbitant grounds of jurisdiction set out in Article 3 of the Convention. However, these exorbitant grounds are excluded only in relation to the rules of jurisdiction in sections 2 to 6 of Title II of the Convention. (Article 24, it will be noted, is in section 9 of Title II.) By implication it follows that grounds of jurisdiction other than those in sections 2 to 6, including the exorbitant grounds mentioned in Article 3, may be available in respect of Article 24 jurisdiction. Furthermore, Article 3 is concerned with the situation where a person domiciled in a contracting State may be *sued* in another contracting State, and the idea of being "sued" suggests an action on a substantive matter, not a remedy within Article 24.

C. Relationship of Article 24 to Other Provisions of the Convention

The final broad heading of issues which commentators have noted about Article 24 concerns the relationship between that Article and other

provisions of the Convention. We have already noted one example of this broad issue in the discussion of the jurisdictional bases of Article 24 and its possible interaction with Article 3, which deals with exorbitant and other impermissible grounds of jurisdiction. Two other main issues have been noted about Article 24 and other provisions of the Convention.

1. Article 24 and exclusive jurisdiction

Under the jurisdiction provisions of the Convention, exclusive jurisdiction (other than jurisdiction based on the defender's domicile) may arise in two ways: under Article 16 and Article 17. Article 16 lists a number of situations where the courts of the specified contracting States have exclusive jurisdiction regardless of the domicile of the defender. It may be that with the majority of Article 16 grounds, it would be difficult to envisage provisional, including protective, measures in *other* legal systems which would have a bearing on the main action (e.g. proceedings about the validity of entries in a public register) but other Article 16 grounds may not involve this problem (e.g. proceedings concerning immoveable property). More to the point, Article 16(5) gives exclusive jurisdiction in proceedings concerned with the enforcement of judgments to the courts of the contracting State dealing with the enforcement. This last ground may involve a fairly direct overlap with Article 24 in that in some legal systems (as is the case in Scotland) there is no sharp distinction between provisional measures used during an action to secure final judgment and those post-judgment measures used to enforce it.

Similarly, Article 17 provides that where parties agree to deal with a dispute in the court of a contracting State, that court has exclusive jurisdiction. Does the fact that jurisdiction in an action derives from Article 17 preclude parties from applying in other legal systems for protective remedies under Article 24?

Again, a solution is possible if a distinction is accepted between provisional remedies which go to the substance of a case (and which lie outside the scope of Article 24) and such remedies which do not go to the substance (and therefore which fall within the Article's scope). It can then be argued that this distinction is recognised in Title II of the Brussels Convention. Jurisdiction over substantive issues is dealt with in sections 1 to 6 (i.e. Articles 2 to 18), and there are other secondary or subsidiary matters which are concerned with other aspects of jurisdiction. Sections 7, 8 and 9 (which contains Article 24) are not concerned with the allocation of jurisdiction in substantive proceedings but with issues arising from the preceding sections. On that basis, the fact that a court in one contracting State has exclusive jurisdiction over the substance of the dispute does not preclude application elsewhere under Article 24 for provisional, including protective, measures in respect of that litigation.

2. Article 24 and the recognition and enforcement of judgments

Title III of the Brussels Convention contains provisions on the recognition and enforcement of judgments. Judgments for this purpose

are defined widely as including any judgment given by a court of a contracting State, including judgments under that name but also a decree, order, decision or writ of execution. Accordingly, a court order or judgment in relation to a provisional, including protective, measure would come within the scope of the recognition and enforcement provisions of the Convention. The question that arises, however, is whether the recognition and enforcement provisions were intended to have any application to Article 24 measures or were meant to be restricted to judgments of courts with jurisdiction over the substantive disputes. Since Article 24 confers jurisdiction on courts in *all* contracting States in addition to that of the court of the substantive action, it could be argued that there is no necessity for enforcing a provisional or protective measure beyond the country of the forum which provided it. Thus, where an action is raised in Germany, the plaintiff can seek provisional measures in that country. If he wishes to seek protective measures as regards assets in France, there is no need to enforce the German protective measures in France but the plaintiff can make application in France for the equivalent provisional, including protective, measure under French law. A similar course of action would follow for each contracting State where a provisional, including protective, measure was sought so that the plaintiff would have no need to enforce the German (or indeed the French) provisional, including protective, measure in Spain but could make a further Article 24 application in the Spanish courts.

This issue is not necessarily dependent on whether or not the provisional or protective measure granted in one legal system has extraterritorial effect as far as concerns that system. Much depends here on how the extraterritorial effect is deemed to work. For example, the *Mareva* injunction of English law has effect in respect of assets situated beyond England but *Mareva* injunctions are worked through by the personal obligations imposed on the enjoined party and not by attaching the property or placing restrictions on it (whether in England or elsewhere). On the other hand, if a provisional or protective measure purports to have effect on property situated beyond the legal system of the court granting it, this will not be effective until an appropriate remedy is obtained in the country of the *situs*. This last consideration by itself does not necessarily indicate that provisional and protective measures are covered by the provisions of the Convention on recognition and enforcement, for it still leaves open the possibility of separate application in the country of the *situs* for provisional or protective measures in that legal system. The crucial point here is not whether by the law of the country of the original provisional or protective measure the remedy has extraterritorial effect but whether it is a type with no exact equivalent in the law of the *situs*. In this situation there may be advantages in seeking to have the original measure enforced in the country of the *situs* under the

Convention provisions, although any gain here would depend on the courts of the *situs* enforcing the measure in precisely the way the measure itself provides.

A further point in the argument whether and to what extent the recognition and enforcement provisions of the Brussels Convention apply to Article 24 measures concerns the exact procedure for enforcement which the Convention contains. Where application is made for the enforcement of judgments in another contracting State, the application is dealt with expeditiously. There are only limited grounds for refusing an application which is heard *ex parte* and the party against whom enforcement is sought is given notice only once enforcement is authorised. In this situation that party is given the right to appeal against the authorisation of enforcement. Under Article 39, until any such appeal is made or dealt with, the original applicant for enforcement cannot enforce the judgment apart from using "protective measures against the property" of the other party. Several points arise from the possible interaction of Articles 24 and 39. First, the consequences appear very odd if Article 24 remedies are indeed subject to the Convention's recognition and enforcement procedures. An applicant for enforcement cannot take full enforcement measures until the appeal period expires or any appeal lodged is dealt with but, as already noted, may take protective measures. But if the original judgment itself is a protective measure this leads to using protective measures to support protective measures. Second, Article 39 deals only with the situation where enforcement has been authorised. There may still be circumstances where Article 24 remedies are granted after judgment in the main action has been pronounced but before steps are taken to enforce it either in the country of the original forum or elsewhere.[14] Third, the types of measure referred to in Article 39 are possibly narrower in scope than those of Article 24. Article 39 does not include the wider category of provisional measures, only those which are protective in nature; furthermore, Article 39 is restricted to remedies which are taken against the *property* of the party against whom enforcement is sought. This would therefore exclude protective measures which do not affect the property rights of that party. It is important to be clear as to the impact which this restriction might have on particular types of protective remedy used in the legal systems of the United Kingdom. For example, the English remedy of the *Mareva* injunction has no consequences on the real rights of the property of the enjoined party, whose liability for breach of the injunction is personal.

III. GUIDANCE FROM THE INTERPRETATIVE REPORTS AND THE CASE LAW OF THE EUROPEAN COURT

A. The Interpretative Reports

Very little guidance is given to the solution of these sorts of problem in the

14. G. Hogan, "The Judgments Convention and Mareva Injunctions in the United Kingdom and Ireland" (1989) 14 E.L.Rev. 191, 197–200.

various reports on the Conventions and accession treaties. The Jenard Report[15] notes that, as regards the measures which may be taken under Article 24, reference is to be made to the internal law of the country to which application is made. This view suggests, though in hardly conclusive terms, that classification of a remedy as being provisional, including protective, is not something to be done on an autonomous, independent basis. The Schlosser Report[16] notes the variety of provisional, including protective, measures in the laws of Ireland and the United Kingdom which may give rise to difficulties where these measures are to be enforced in another contracting State. This statement clearly presupposes that Article 24 measures are subject to the recognition and enforcement provisions of the Convention.[17]

B. European Court of Justice Decisions

Article 24 has been the direct focus for decision by the Court in several cases, though a number of other decisions have thrown incidental light on certain aspects of the place of provisional and protective measures in the Brussels Convention. However, despite the existing jurisprudence of the Court, to date many important issues concerning Article 24 remain subject to speculation.

1. The nature of provisional, including protective, measures

Four cases deal with the issue of what constitutes a provisional, including protective, measure. In *Reichert and others* v. *Dresdner Bank AG*[18] a German bank raised an "*action paulienne*" in France against two persons of German domicile in respect of a transfer of property situated in France. The transfer was said to have been made contrary to the rights of the bank as the creditor of the defenders. One basis for the French court's jurisdiction, it was argued, was Article 24 and this in turn involved the characterisation of the *action paulienne* in French law as a provisional, including protective, measure. In argument various parties referred to the passage in the Jenard Report that reference was to be made to the internal law of the forum as regards provisional and protective measures

15. (1979) O.J. C59/1, 42, section 9.

16. (1979) O.J. C59/71, 126, para.183. Schlosser also notes (p.134, para.221) in discussing Art.39 that the Convention does not guarantee specific measures of enforcement, or the procedure used to obtain them (e.g. application to the court, or a huisser or similar institution).

17. The Evrigemis and Kerameus Report notes that jurisdiction to grant a provisional, including protective, measure is in principle separate from jurisdiction in the substantive action but does not pursue the implications of this distinction (1986) O.J. C298/a, 3. The Cruz, Real and Jenard Report contains no discussion of Art.24 (1990) O.J. C189/35, 38, nor does the Jenard and Moller Report on the Lugano Convention (1990) O.J. C189/57, 61.

18. Case C-261/90, [1992] E.C.R. I-2149.

as well as to various writings in French law which supported the characterisation of the *action paulienne* as a protective measure.

It was accepted that the *action paulienne* in French law was a remedy available only to a creditor who claimed that a transfer of property by a debtor was in breach of his interests and that, as regards protection of those interests and only for that purpose, the transaction was rendered void by the judgment in the action. The European Court set out a general description of a provisional, including protective, measure as one intended to preserve a factual or legal situation so as to safeguard rights which were subject to litigation elsewhere in a court with jurisdiction over the substance of the matter. The Court held that the *action paulienne* in French law did not meet this description because its effect went beyond merely preserving some factual or legal situation but actually varied the legal situation (i.e. position) of the relevant assets by revoking the prior transaction. It may be noted that the Court did not consider itself bound by the characterisation of the *action paulienne* in French law in deciding whether that remedy satisfied the definition of a provisional or protective measure and instead seemed to be saying that this issue of characterisation would be made on an independent basis.[19] The problem with the *Reichert* v. *Dresdner Bank* definition of a provisional or protective measure as a measure preserving a factual or legal situation is that it does not sit easily with forms of protective measure which though prohibitory in effect also act to confer a preference on the creditor using them.

In *CHW* v. *GJH*[20] a court in the Netherlands made an order for the delivery by one party to another of a document of evidential value in a dispute between the parties. Under the law of the Netherlands this remedy was classified as a form of interim relief in interlocutory proceedings. The question arose whether it came within the scope of Article 24. The Court did not give this question a direct answer and instead issued a response dealing with the question of the scope of the subject matters of the Convention. However, no objection was made to the idea that an order in respect of preservation of evidence could be regarded as a provisional or protective measure.

Another aspect of the definition of a provisional or protective measure as set out in *Reichert* is that such a measure itself must fall within the scope of the Brussels Convention. However, it is not clear that this requirement has any effect in relation to Article 24 measures. In *De Cavel*[21] a divorce action was raised in France and the French court granted an order

19. The independent basis of characterisation of a provisional, including protective, measure for the purposes of Art.24 was made in argument by the European Commission in *CHW* v. *GJH*, *infra* n.20, at p.1195.

20. Case 25/81, [1982] E.C.R. 1189.

21. Case 143/78, *De Cavel* v. *De Cavel (No.1)* [1979] E.C.R. 1055.

freezing the property of the parties in Germany, including a bank account there. The question arose whether this order was subject to the recognition and enforcement provisions of the Brussels Convention. Clearly matters relating to the status of natural persons or to matrimonial property are outside the scope of the Convention by virtue of Article 1, but it was argued that the protective orders of the French court were orders of a separate type and fell within the scope of the Convention. The Court held that whether or not a judgment or order fell within the scope of the Convention applied equally to definitive judgments as to provisional or protective orders but, as regards the latter, the question of inclusion in the Convention was to be determined not so much by the nature of the measure itself but more by the type of rights it was seeking to protect. In *De Cavel*, accordingly, it was held that the order of the French court was concerned with rights relating to matrimonial property and thus was outside the scope of the Convention.[22] However, the Court also pointed out that this issue (i.e. whether a provisional or protective measure falls within the scope of the Convention) did not involve Article 24 as that Article came into play only where there was a court in another contracting State which clearly had jurisdiction under the Convention over the substance of the dispute. The question then is: where Article 24 does apply (i.e. there is a court in another contracting State with jurisdiction over the substance of the dispute), does there require to be consideration of provisional or protective measures as relating to rights or interests concerning a topic *not* within the scope of the Convention? In *CHW* v. *GJH* the Court stated that Article 24 could not be relied on to bring within the scope of the Convention provisional or protective measures relating to matters excluded from it. This statement must be read in the context of the facts of that case. The Court had held that a provisional order in connection with a document which could have evidential value did not come within the scope of the Convention because the matter to which it related was one of the topics excluded from the Convention.[23] The statement about Article 24 was made to rebut an argument that that Article could itself bring such an order within the scope of the Convention. However, its essential point is that on the facts of the case Article 24 did not apply as there was no court in another contracting State which had jurisdiction over the substance of the case.

Finally, the *van Uden* case concerned a dispute between van Uden, a company based in the Netherlands, and a German company, Deco-Line. The parties had concluded a contract in terms of which Deco-Line were

22. See also Case 120/79, *De Cavel* v. *De Cavel (No.2)* [1980] E.C.R. 731, which reached the same conclusion as regards an interlocutory order for payment of maintenance during the divorce action.

23. I.e. rights in property arising out of a matrimonial relationship.

due to make various payments to van Uden. The contract also contained an arbitration clause. Van Uden claimed that Deco-Line had refused to make payments of invoices and raised arbitration proceedings in the Netherlands pursuant to the contract. At the same time van Uden also applied to the courts in the Netherlands to obtain measures by way of interim relief. The measure sought, and granted, required Deco-Line to make payment of a specified sum of money to cover the debts due under the contract and which were the subject matter of the arbitration proceedings. Deco-Line disputed the basis on which this order was made and eventually, on appeal to the Hoge Raad, reference was made to the European Court for a preliminary ruling on a number of issues.

One of these issues was the nature of the order for interim payment as a provisional or protective measure in Article 24. In *van Uden* the Court accepted the description of provisional and protective measures given in *Reichert* v. *Dresdner Bank* but held that it was not possible to state in a general or abstract manner whether an order for interim payment of a contract debt did or did not fall within the scope of Article 24. In some cases an order of this type might well protect a plaintiff's position. However, the Court also noted that orders for interim payment might have more than a merely protective function. The Court accepted that very often an order for interim payment would pre-empt the decision on the substance of the dispute, and this would be even more likely where the order was made by the courts of a plaintiff's domicile rather than by the courts of the defendant's domicile. However, the Court held that an order for interim payment could be covered by Article 24 where it was truly protective of the plaintiff's interest and no more. For this to arise two preconditions had to be met. The first is that the defendant must be guaranteed repayment of the sums paid by him under the interim order if the plaintiff is unsuccessful on the substance of the claim. The second is that the order is restricted to specific assets of the defendant which are located in the territory of the court making the interim order.[24]

2. *Basis of jurisdiction*

Several decisions of the European Court have touched upon the nature of the jurisdictional base of Article 24 orders. In *De Cavel* v. *De Cavel (No.1)* the Court stressed that the terms of Article 24 itself require that jurisdiction under that Article arises only where the court in another contracting State has jurisdiction under the Convention over the substance of the matter.[25] What Article 24 does not specify is whether that other court must actually have exercised or be about to exercise its Convention-based jurisdiction or, alternatively, whether it suffices that

24. *Van Uden*, *supra* n.6, at paras.37–39.
25. *De Cavel (No.1)*, *supra* n.21, at p.1067; *De Cavel (No. 2)*, *supra* n.22, at 740.

such a court exists though no action is likely or in contemplation. This point is involved in the somewhat puzzling background to *CHW* v. *GJH*. This case concerned two actions (one of divorce, the other relating to the parties' property) both proceeding in the Netherlands between two Dutch nationals who were resident in Belgium. Doubts arose as to whether the Dutch courts had jurisdiction and one of the grounds of jurisdiction argued for was based on Article 24. It might have been thought that the most straightforward response to this type of argument was that Article 24 did not apply because there was no action proceeding or about to proceed in another contracting State over the substance of the dispute to which the Dutch court's jurisdiction related by way of a provisional or protective measure. On hearing the report of the Judge Rapporteur and the opinion of the Advocate General, the Court itself did query why the issue of the application of Article 24 was being raised.[26] However, in its decision the Court, while noting that Article 24 refers to the court of another contracting State having jurisdiction over the substance of the matter, dismissed the argument in the following way:[27]

> That provision in fact has in view cases in which provisional measures are ordered in a Contracting State where "under this Convention" a court of another Contracting State has jurisdiction as to the substance of the matter. Therefore it may not be relied on to bring within the scope of the Convention provisional or protective measures relating to matters which are excluded from it.

The basis of jurisdiction under Article 24 was also touched upon in the *van Uden* reference, where the Court made two points. The first concerned the situation, as in that case, where the court dealing with the Article 24 application based its jurisdiction on one of the grounds of jurisdiction prohibited by Article 3 of the Brussels Convention. The Court accepted the argument that, as Article 24 was not contained in sections 2 to 6 of Title II of the Convention, the prohibited grounds of jurisdiction in Article 3 did not apply to Article 24 applications.

More problematic in the *van Uden* case is the second of the Court's views on jurisdiction and Article 24. The Court noted that where a court had jurisdiction under the Convention it may use its normal range of powers relating to protective and provisional remedies, and no issue of the jurisdictional basis of this power would arise. However, in that case the parties' contract contained an arbitration clause, and indeed arbitration proceedings had commenced, and accordingly any application for protective measures could be based only on Article 24. Somewhat surprisingly, the Court held that the existence of the arbitration clause or

26. *CHW*, *supra* n.20, at p.1194.
27. *Idem*, p.1204.

of the arbitration proceedings did not preclude the application of Article 24. It argued that what the measures envisaged by Article 24 were concerned with were rights of a sort which fell within the scope of the Convention, such as in the present case rights under a contract. The measure sought by van Uden was not in any sense ancillary to the arbitration proceedings themselves but were, rather, protective of their contractual rights. It therefore followed that Article 24 conferred jurisdiction on the Netherlands court, despite the arbitration proceedings, as the provisional measure related to a right of van Uden's which fell within the scope of the Convention.[28] This reasoning is, to say the least, far from convincing. It is simply not possible to reconcile this part of the Court's decision with the clear words of Article 24 itself. That Article gives jurisdiction in respect of protective and provisional measures to the courts of one contracting State, where the courts of *another* contracting State have jurisdiction as to the substance of the dispute. But in the present case the effect of the arbitration clause was that no court of any contracting State could have jurisdiction. In these circumstances one would have thought that Article 24 had no application at all.

3. Recognition and enforcement

A further broad issue is the relationship between Article 24 and the recognition and enforcement provisions of the Convention. No case has ruled directly on the point that an Article 24 measure could be the subject of enforcement in a contracting State other than that in which it was pronounced. However, it seems clear that an Article 24 order could meet the requirements for enforcement under the provisions of Title III of the Convention. The decision in *Denaulier* v. *Couchet Frères*[29] is of some significance in this respect. In that case a French court which was the court with jurisdiction over the substance of the dispute made a provisional order freezing assets of the defendant in Germany.[30] The European Court held that a provisional order of this sort was one which could be subject to the recognition and enforcement provisions. However, the Court stressed that, as with other types of judgment, a provisional order would have to satisfy the requirements of Article 27, which states that for a judgment to be enforced under the Convention the defendant must have been given sufficient notice of the action. While it was accepted that the whole point of a provisional or protective measure often requires that the order is obtained on an *ex parte* basis, nonetheless the Court rejected an argument that because of this feature of provisional orders the requirements of notice under Article 27 should not apply to them.

28. *Van Uden*, *supra* n.6, at paras.19–25, 28–34.
29. Case 125/79, [1980] E.C.R. 1553.
30. In *De Cavel (No.1)*, *supra* n.21, a similar sort of order was made.

This decision concerned provisional orders made as part of the main action but in principle exactly the same reasoning would apply to provisional or protective measures made on the basis of Article 24 jurisdiction. Indeed the general rationale of Article 24 orders is touched upon in the arguments used in this case. For example, it was argued that if provisional measures in the main action were automatically covered by the recognition and enforcement provisions of the Convention, Article 24 would be redundant. Indeed the opposite was the case. Given that provisional and protective measures usually involved *ex parte* applications, which meant that they could not be enforced in a different contracting State from that where granted, the remedy of the party who had obtained it was to make application under Article 24 for a provisional or protective measure in every State where such a measure was required. This procedure would protect the plaintiff's interests in obtaining a protective remedy at speed in relative secrecy. Furthermore, it was argued that Article 24 might in this situation provide a more suitable procedure than would result from using the recognition and enforcement provisions of the Convention in enforcing a provisional measure from the court of the substantive action. Provisional measures involve a balancing of the interests of both litigants, and the relative weight to be attached to providing security for ultimate judgment to the plaintiff as against avoiding unfair prejudice to the defendant's use of his assets, is something better achieved by a local court, often after fuller enquiry than that possible by using the Convention's enforcement procedures. At the same time it was admitted that this scheme of subsidiarity for provisional and protective measures would be effective only if the measures in each contracting State were similar in effect.

This idea of subsidiarity was also touched upon in *van Uden*, where the Court was dealing with an order for interim payment. The Court stated that the granting of a measure under Article 24 would be conditional upon a real connecting link between the subject matter of the measure and the territorial jurisdiction of the court which granted it. Furthermore, the Court held that the classification of an order for interim payment of a disputed contractual debt as a measure covered by Article 24 depended in part on whether the measure related to specific assets of the defendant which were located in the territorial jurisdiction of the court granting the measure.[31] Implicit in this description of a protective measure is the view that a measure of this particular type does not call for enforcement outside the country in which it was granted. However, in *van Uden* the Court did not need to consider the use of the recognition and enforcement provisions of the Convention in respect of other types of protective measure.

31. *Van Uden*, *supra* n.6, at paras.39–47.

Two further problems about enforcing provisional measures, whether pronounced in the main action or under Article 24, may be mentioned. One is that for a judgment to be enforced under the Convention there must be produced a document showing that under the law of the State of origin the judgment is "enforceable". In *Brennero* v. *Wendel* it was noted that in certain legal systems (as in this case under Italian law) a provisional measure could not be declared enforceable as such until final judgment was given.[32] Second, in the same case it was pointed out in argument that problems might arise from the application of Articles 38 and 39 to provisional and protective orders. Article 39 refers to the procedure whereby, once initial authority is given for enforcement in the State of enforcement, a period is allowed for appeal against that decision. Until such an appeal is finally disposed of only protective measures against the property of the judgment debtor may be taken. This provision does not sit easily with enforcement of a judgment which itself is only provisional in nature.

IV. APPROACHES IN BRITAIN

A. England and Wales

1. The statutory provisions

To appreciate how Article 24 operates in English (as indeed in Scots) law it is necessary to bear in mind that by UK law an international convention which has been signed by the UK government has no effect in internal law in the United Kingdom until legislation has been passed to give effect to the terms of the convention. As far as the Brussels Convention is concerned this process was brought about by the enactment of the Civil Jurisdiction and Judgments Act 1982. By section 2 of the 1982 Act the Brussels Convention has full effect in the United Kingdom.[33] Accordingly, Article 24 is part of the different legal systems in the United Kingdom.[34] However, further specific provisions on provisional and protective measures are contained in the 1982 Act and for English law these are to be found in section 25 of the Act, which allows the High Court to grant provisional and protective remedies in the absence of substantive

32. Case 258/83, [1984] 3 E.C.R. 3971, 3980.

33. This applies to the Brussels Convention itself, the 1971 Protocol on the ECJ, and the various accession treaties. The texts of these various conventions are set out in Schedules to the 1982 Act.

34. Sched.4 to the 1982 Act contains a modified version of the Brussels Convention as amended in respect of inter-UK jurisdiction. Where the provisions of an article in Sched.4 are identical to those of the Brussels Convention (as is the case with the respective versions of Art.24), the courts in the UK are in effect under a duty to apply the caselaw of the ECJ in questions of interpretation of Sched.4: *Kleinwort Benson Ltd* v. *Glasgow City Council* [1997] 4 All E.R. 641, 646, 660, 667.

proceedings in England or Wales. Earlier, the House of Lords decision in *The Siskina*[35] precluded the grant of interim measures in cases in which the English courts did not have jurisdiction over the substance. This was effectively superseded to a great extent by the introduction of section 25(1) of the 1982 Act, which sought to bring into effect Article 24 of the Convention by giving the English courts power to grant interim relief where:

(1) proceedings have been or are to be commenced in the courts of another contracting State or in any part of the United Kingdom outside England and Wales;[36] and
(2) their subject matter is within the scope of the Brussels or Lugano Convention.

The power under section 25(1) has recently been extended by two important developments. First, the Arbitration Act 1996 extends the power in respect of foreign arbitral proceedings.[37] Even more importantly, power exists under section 25(3) of the 1982 Act to extend the power to grant interim relief granted by section 25(1) in respect of non-contracting States and matters not governed by either Convention. This power has been exercised by way of the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997.[38] As a result, interim relief "may now be sought from the English court in support of court or arbitral proceedings which are to be, or have been, instituted anywhere in the world without the need to establish any basis upon which the English court could assert jurisdiction as to the substance".[39] In addition, interim relief may now be granted even where the subject matter of the proceedings is not a civil or commercial matter. Accordingly, section 25 now provides for jurisdiction in Article 24 cases and situations falling

35. *Siskina (Cargo Owners)* v. *Distos Cia Naviera SA (The Siskina)* [1977] 3 All E.R. 803.

36. As amended by para.12 of Sched.2 to the Civil Jurisdiction and Judgments Act 1991 (c.12). It should be noted that s.25 also applies in relation to proceedings which have been or are to be commenced in a part of the UK other than that in which the High Court exercises jurisdiction.

37. S.25(3)(c) of the 1982 Act (which allows for the extension of s.25(1) measures to arbitration proceedings) was repealed by s.107(2) of the Arbitration Act 1996 with effect from 31 Jan. 1997. However, by a combination of ss.2 and 44(3) of that Act certain forms of interim relief can now be granted in support of foreign arbitration proceedings.

38. S.I. 1997/302. This effectively reversed the decision in *Mercedes Benz AG* v. *Leiduck* [1996] A.C. 284. For discussion see D. Capper, "The Trans-Jurisdictional effects of Mareva Injunctions" (1996) 15 Civil Justice Q. 211. The important effect of the extended power provided by this Order in relation to interim relief in the context of international insolvency litigation has been noted by P. St J. Smart, "Insolvency Proceedings and the Civil Jurisdiction and Judgments Act 1982" (1998) 18 Civil Justice Q. 149.

39. A. Lenon, "Mareva Injunctions in Support of Foreign Proceedings" (1997) New L.J. 1234, 1234. See also Practice and Procedure (1997) 16 Civil Justice Q. 185.

outside Article 24. The only reference to the exercise of the discretion in granting interim relief under section 25(1) is provided in section 25(2):

> On an application for any interim relief under subsection (1), the court may refuse to grant that relief, if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings makes it inexpedient for the court to grant it.

Unfortunately, there has been little discussion of the discretion which exists under Section 25 (except in relation to extraterritorial interim relief discussed below), in comparison with the exercise of the jurisdiction to grant interim relief in non-section 25 situations.

2. Interim relief and "provisional, including protective, measures"

The text of Article 24 does not provide a definition of what constitutes provisional, including protective, measures and the European Court has yet to provide a definitive ruling on the scope of the term. Further, the relevant statutory provisions bringing Article 24 into effect do not provide the English courts with any detailed guidance as to what forms of "provisional, including protective, measures" are covered. Indeed, section 25 does not utilise the terminology adopted in Article 24 but refers to "interim relief", which is itself defined negatively. Section 25(7) provides that the interim relief which may be granted under section 25(1) is:

> interim relief of any kind which that court has power to grant in proceedings relating to matters within its jurisdiction, other than—
> (a) a warrant for the arrest of property; or
> (b) provision for obtaining evidence.

Two issues require to be considered briefly here. First, what are the broad range of types of interim relief available generally in the English courts, and, second, to what extent do they constitute provisional, including protective, measures for the purposes of Article 24? Readers are referred to both O'Malley and Layton[40] and Rose[41] for more detailed consideration of the types of interim relief available in various European systems, including England. However, it is clear that the principal form of interim relief available in the English courts is the interlocutory or interim injunction, often granted on an *ex parte* basis, and the power to grant this generic form of relief exists under section 37(1) of the Supreme Court Act 1981. Of this general category, perhaps the most significant type of interlocutory injunction is the *Mareva* injunction. Another type of interim measure which has gained prominence in recent years is the *Anton Piller*

40. S. O'Malley and A. Layton, *European Civil Practice* (1989).
41. N. Rose (Ed.), *Pre-Emptive Remedies in Europe* (1992).

order. The basis of the *Anton Piller* order is the directions which the order may include to direct any person to permit anyone described in the order to enter premises and on those premises to carry out a range of tasks, for instance search and take copies of relevant documentation. The court's jurisdiction for granting *Anton Piller* orders has now been given a statutory basis by section 7 of the Civil Procedure Act 1997. Section 7 states that the court may make an order for the purpose of securing, in the case of any existing or proposed proceedings in court (a) the preservation of any relevant evidence or (b) the preservation of property which may be the subject matter of proceedings or in relation to which any question may arise in the proceedings. However, in the context of interim relief in aid of foreign proceedings, section 25(7) of the Civil Jurisdiction and Judgments Act 1982 excludes issues relating to the gathering of evidence from the forms of interim relief which may be granted under section 25. This may have the effect that *Anton Piller* orders cannot be granted in connection with Article 24, but the position is uncertain.

No clear guidance has been given, by either statute or the courts, as to whether the term "interim relief" covers certain types of monetary award, as for example interim damages, where an interim award is made where liability is admitted or the court is satisfied the plaintiff will recover, and provisional damages where the plaintiff may apply at a later stage for the damages issue to be reconsidered.[42] There has been no case law involving orders for interim damages or provisional damages under section 25 in the English courts. It is unlikely that the latter will be deemed to constitute interim relief and, with respect to interim damages, even if they fall within section 25(1) as interim relief, the English courts are likely to adopt a fairly conservative approach to this issue where they do not have jurisdiction over the substance and utilise the inexpediency proviso in section 25.

The extent to which an English court is "required" to provide remedies under Article 24 was considered in *Republic of Haiti* v. *Duvalier*.[43] In that case, Staughton LJ, in the Court of Appeal, suggested that the Convention required a contracting State court to provide such measures as it may have granted if it was dealing with the substance of the action.[44] This view was approved by Leggatt LJ in an obiter statement in *Alltrans Inc.* v. *Interdoms Holding Ltd*[45] in the Court of Appeal. In that case the interrelationship between Article 24 and section 25 was considered. This was important as proceedings had been commenced in the Netherlands

42. See O'Malley and Layton, *op. cit. supra* n.40, at p.1448.

43. [1989] 1 All E.R. 456.

44. *Idem*, p.463. Nonetheless the "requirement" to provide provisional, including protective, remedies, under Art.24 has been doubted by Collins, *op. cit. supra* n.1, at p.37.

45. [1991] 4 All E.R. 458, 468.

before the Accession Convention had come into effect and it was argued therefore that the English court did not have jurisdiction as Article 24 did not apply to the proceedings. However, the court confirmed that section 25 and Article 24 are not co-extensive and section 25 provided the English courts with a wider jurisdiction to grant interim relief. This was clearly confirmed by the introduction of the provisions in the Arbitration Act 1996 and the 1997 Order under section 25(3) of the 1982 Act.

(a) Granting Mareva *injunctions in non-section 25 cases.* A *Mareva* injunction is a court order restraining the defendant from disposing of assets held by him in such a way as to defeat an award the plaintiff is likely to obtain if successful in his action.[46] The basis of the *Mareva* injunction is that it is an *in personam* order directing the defendant not to deal with or dispose of any assets, particularly bank accounts. The court has discretion to tailor the order as appropriate, for instance to pay legal fees or payments in the regular course of business. It is important to note that third parties such as banks may be subject to contempt of court if they contribute or act in such a way as to breach the injunction where they are aware of its existence. In the exercise of the power by the courts to grant a *Mareva* injunction a number of key characteristics have emerged. In particular a plaintiff must show that he has a good arguable case,[47] and that there is a real risk that the defendant may remove or conceal his assets or deal with them so as to defeat the plaintiff's claim.[48] Generally, the courts are required to be satisfied that the balance of convenience is in favour of the grant of the injunction.[49]

The *Mareva* injunction was traditionally confined to assets within the jurisdiction but in recent years it has been extended in scope to assets located beyond the territorial jurisdiction of the English courts. This expansion may have important repercussions in an Article 24 context and it is instructive to consider how the discretion is exercised in relation to extraterritorial, often referred to as worldwide, *Mareva* injunctions.[50] The requirements for an extraterritorial *Mareva* injunction are differentiated

46. The name is derived from the relief granted in *Mareva Compania Naviera SA* v. *International Bulk Carriers SA* [1975] 2 Lloyd's Rep. 509. Its statutory basis is now founded in the Supreme Court Act 1981, s.37(3).

47. *Rasu Maritima SA* v. *Perusahaan Pertambangan Minivak Dan Gas Bumi Negara (The Pentamina)* [1978] Q.B. 644.

48. *Third Chandris Shipping Corp.* v. *Unimarine SA* [1979] 2 All E.R. 972. Furthermore, the plaintiff must give an undertaking in damages in case either he fails on the merits of the action or the injunction turns out to be unjustified (*ibid*).

49. *American Cyanamid Co.* v. *Ethicon Ltd* [1975] A.C. 396.

50. See L. Collins, "The Territorial Reach of Mareva Injunctions" (1989) 105 L.Q.R. 262; A. Zuckerman, "Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies" (1993) 109 L.Q.R. 432; D. Capper, "Worldwide Mareva Injunctions" (1991) 54 M.L.R. 329; P. Kaye, "Extraterritorial Mareva Orders and the Relevance of Enforceability" (1990) 9 Civil Justice Q. 12.

only by the absence of the requirement that the defendant has assets within the jurisdiction and by the specific limitations which may be imposed in an extraterritorial *Mareva*. There has been constant debate, particularly over the last ten years, regarding such "extraterritorial" *Mareva* injunctions. As it had been developed over the years, the *Mareva* injunction has been subjected to criticism that, because it operates *in personam*, it will be difficult in any case to enforce it abroad and this factor alone should militate against extraterritorial application.[51]

Nonetheless, four important Court of Appeal cases in the late 1980s helped to clarify the principles upon which the jurisdiction to grant *Mareva* and ancillary orders in respect of foreign assets would be exercised.[52] One factor which is apparent in this discussion is that the courts have not made a clear distinction in the criteria to be applied between situations where the English court has jurisdiction over the substance and those in which it does not. Of particular note is the judgment of Kerr LJ in *Babanaft International Co. SA* v. *Bassatne and another*.[53] That case neither involved the application of section 25 nor did it involve pre-trial interim relief, but instead a post-judgment *Mareva* injunction. In that context it was held that the court had jurisdiction to grant a *Mareva* injunction over foreign assets but the *Mareva* injunction would not be unqualified because of the exorbitant nature of the extraterritorial assertion of jurisdiction in relation to third parties outside the jurisdiction. The exercise of jurisdiction would be subject to the "*Babanaft* proviso", as it became known, by providing that it did not affect the rights of third parties.[54] In a discussion which was mainly obiter Kerr LJ considered that the grant of *Mareva* injunctions in respect of assets beyond the jurisdiction would depend on the existence of reciprocal enforcement arrangements with the legal system where the assets were located. This approach has been adopted in subsequent case law to the effect that extraterritorial *Mareva* injunctions will be granted subject to the discretion of the courts, this discretion being exercised in accordance with the principle of enforceability.[55] However, it was also

51. This point is discussed in the articles cited in the preceding footnote.

52. *Babanaft International Co. SA* v. *Bassatne* [1989] 1 All E.R. 433; *Duvalier*, *supra* n.43; *Derby & Co. Ltd* v. *Weldon (No.1)* [1989] 1 All E.R. 469 and *Derby & Co. Ltd* v. *Weldon (Nos.3 and 4)* [1990] 2 Ch. 65.

53. [1989] 1 All E.R. 433.

54. The same principles apply to the exercise of jurisdiction in relation to a pre-trial worldwide injunction, according to Kerr LJ at *idem*, pp.441 and 447. In addition Kerr LJ suggested that a *Mareva* injunction covering assets abroad should provide that it does not affect third parties except to the extent that the order is enforced by the courts of the State in which the defendant's assets are located; *idem*, pp.441–442 and 447.

55. These principles were applied in *Derby & Co. Ltd and Others* v. *Weldon and Others (No. 1)*, *supra* n.52. It should be noted that this principle of enforceability may allow a distinction to be drawn between s.25 cases which fall within Art.24 and s.25 cases which do not.

emphasised in early case law that extraterritorial *Mareva* injunctions would be granted only where the circumstances were exceptional.[56]

(b) Mareva *injunctions in section 25 cases.* The plaintiff will have to satisfy the same requirements under section 25 as noted above in order to obtain a *Mareva* injunction in aid of foreign proceedings. In this regard, the requirement that there must exist a good arguable case may raise difficulties in the context of an action which may be commenced in relation to the substance in a foreign court. It should be noted that Article 24 is not relevant in all section 25 cases, because the interim relief sought may not constitute a "provisional, including protective, measure" or because the relief is sought under the amendments introduced to Section 25 by the 1997 Order or the provisions of the Arbitration Act 1996. In any event, section 25(2) provides that the court shall have discretion in exercising its jurisdiction to grant interim relief under section 25(1). The question then arises whether there has been any difference in the approach of the English courts to cases in which the English court does not have jurisdiction over the substance, irrespective of whether Article 24 is involved. A brief answer is that not only has there been no distinction in approach between the different situations, but the distinction has not been accorded any particular significance.

In *Babanaft*, as noted above, Kerr LJ stressed that the grant of an extraterritorial *Mareva* injunction, sought post-judgment in an action in which the English court had jurisdiction in the main action, will normally depend on the existence of some form of reciprocal arrangements for the enforcement of such orders. In particular Kerr LJ pointed to the possibility of enforcing provisional measures under Article 24 through the mechanisms of Article 25 of the Convention, which treats such measures as enforceable judgments provided they are *inter partes* orders.[57] This interpretation is perhaps not what the European Court intended in *Denilauer*.[58] Accordingly, on the basis of *Babanaft* as applied in later cases, extraterritorial interim relief can be granted subject to the discretion of the courts, this discretion being exercised in accordance with the principle of enforceability, bearing in mind the enforcement provisions for extraterritorial *inter partes* measures under the Convention. As Kaye noted,[59] this does not appear to be the intention of the Convention drafters or of the European Court in *Denilauer* and indeed the proposed reforms to the Brussels Convention seek to limit the possibility of extraterritorial enforcement of provisional, including protective, measures.

56. See *Rosseel NV* v. *Oriental Commercial Shipping (UK) Limited* [1990] 3 All E.R. 545.

57. *Babanaft, supra* n.52, at pp.442–445.

58. *Supra* n.29.

59. See Kaye, *op. cit. supra* n.50, at pp.14–16.

The position of extraterritorial *Mareva* injunctions under section 25 of the Civil Jurisdiction and Judgments Act 1982 in the context of the applicability of Article 24 was first considered directly in *Republic of Haiti* v. *Duvalier*.[60] An extraterritorial *Mareva* injunction was granted subject to the *Babanaft* proviso, which was itself modified such that it applied only to assets and acts done outside England and Wales and not to individuals resident in England and Wales. Importantly, Staughton LJ discussed the court's discretion, which arises in two ways.[61] First, as in all cases, the court has to consider whether it is just and convenient to grant interim relief under section 37(1) of the Supreme Court Act 1981. Second, section 25(2) of the 1982 Act provides that the court may refuse to grant interim relief where it would be inexpedient to grant such relief. In exercising this discretion Staughton LJ focused on two factors. First, he found as determinative "the plain and admitted intention of the defendants to move their assets out of the reach of the courts of law, coupled with the resources they have obtained and the skill they have hitherto shown in doing that, and the vast amounts of money involved".[62] This may indicate a slightly higher threshold for the grant of extraterritorial relief in a section 25 situation. On the other hand this may simply be the application of the same requirement in non-section 25 cases that extraterritorial *Mareva* injunctions will be granted only in an exceptional case and indeed the reasoning on this point in *Duvalier* was relied upon in *Derby & Co.* v. *Weldon (No.1)*.[63] Second, and perhaps more significant in the consideration of the discretion under section 25(2), was the submission that the proper court to grant interim relief is the court having jurisdiction over the substance or the court(s) having jurisdiction where the assets are located. Supported by the European Court's judgment in *Denilauer*, Staughton LJ saw "considerable force" in this point and suggested that a time limit for an injunction over assets abroad may be appropriate in order to allow the plaintiff sufficient time to establish the whereabouts of the assets.[64] Again it is not clear that this suggestion would form part of the exercise of discretion only under section 25(2). As Collins has noted, the developments, principally in *Babanaft* and related cases, that *Mareva* injunctions could be granted abroad were an extension of the original principle that *Mareva* injunctions were designed to prevent the removal of assets from the jurisdiction and hence thought restricted to assets within the jurisdiction.[65] This concern ties in with the view that the

60. [1989] 1 All E.R. 456.
61. *Idem*, pp.466–467.
62. *Idem*, p.467.
63. [1990] 1 All E.R. 469, 473. See also *Rosseel*, *supra* n.56. Neither of these cases was brought under s.35.
64. *Duvalier*, *supra* n.60, at p.466.
65. Collins, *op. cit. supra* n.1, at pp.87–88.

purpose of Article 24 jurisdiction is to ensure subsequent court orders of the court dealing with the substance are not less effective in the jurisdiction of the court where the provisional, including protective, measures are granted.[66]

There has been recent case law in the English courts on extraterritorial *Mareva* injunctions under section 25. In *S & T Bautrading* v. *Nordling*[67] the Court of Appeal considered that under section 25 of the 1982 Act a court would not make an order which extended beyond its own territorial jurisdiction save in an exceptional case. In that case a post-judgment *Mareva* injunction was sought and Saville LJ considered that strong evidence of fraud and concealment of assets did not make the case exceptional. This followed earlier case law, notably *Rosseel NV* v. *Oriental Commercial Shipping (UK) Limited*.[68] However, this has recently been doubted by the Court of Appeal decision in *Crédit Suisse* v. *Cuoghi*.[69] Importantly, it was stressed that *Rosseel* was not a section 25 case, despite the reference in the decision to *Republic of Haiti* v. *Duvalier*, and merely referred to the wording of section 25(2) *en passant*. There are conflicting messages from the judgments in this recent case. The Court of Appeal dismissed an appeal against an earlier refusal to discharge a worldwide *Mareva* injunction. The *Mareva* and associated orders were granted in favour of the plaintiffs, under section 25 of the 1982 Act, in aid of a claim in civil proceedings brought in Switzerland alleging the defendant's complicity in the misappropriation of funds by one of its employees. The Lord Chief Justice pointed out that under section 25 the English court had to recognise that its role was to be supportive of and subordinate to the primary court, i.e. the court with jurisdiction over the substance of the matter. On the other hand, the leading judgment by Millett LJ rejected the exceptional circumstances requirement derived from *Rosseel*. This approach appears to make extraterritorial orders more accessible under section 25. Whilst confirming that direct orders against assets should be made by the courts of the States where they are located, *in personam* orders would be granted subject to two main considerations—the domicile of the defender and the likely reaction of the court seised of the substance. Millett LJ considered that an *in personam* order against a defendant resident in England was unlikely to be found objectionable. The structure of subsections (1) and (2), together with the fact that the scope of section 25 had been progressively widened, indicated an intention for the English courts to be willing to aid foreign courts where the substance of the action lay. It was noted that no

66. See *Denilauer* v. *Couchet Frères* [1980] E.C.R. 1553.
67. [1977] 3 All E.R. 718.
68. [1990] 3 All E.R. 545.
69. [1997] 3 All E.R. 724.

reference was made in *Bautrading* to section 25(2) and that the requirement for the existence of exceptional circumstances was a regrettable gloss on the term "inexpedient". As Lenon notes, this extension is likely to mean that *Mareva* injunctions are sought extraterritorially with greater frequency under section 25.[70]

There are several areas of concern about the application of Article 24 by the courts in England and Wales in relation to extraterritorial interim relief. First, with the notable exception of Staughton LJ in *Duvalier*, is the apparent misinterpretation of the European Court's view of the validity of extraterritorial provisional, including protective, measures put forward in *Denilauer*. Second, and possibly most important, is the lack of clarity in distinguishing between different types of case and the applicable principles in the exercise of the discretion to grant extraterritorial interim relief in those different situations. Article 24 cases are being unconsciously confused with non-Article 24 cases and, similarly, section 25 situations with non-section 25 situations. Although the principles in determining whether interim relief should be granted may be the same, this should be clarified and justified by the courts. For instance, *Babanaft* was not a section 25 case but a case in which the English court also had jurisdiction over the substance. Perhaps even more important, section 25 itself may be further subdivided into cases falling within Article 24 and cases falling outside the scope of the Brussels Convention altogether. The third difficulty is the fact that the European Court has not addressed, except tangentially in *Denilauer*, the issue of recognition and enforcement of Article 24 provisional measures. This may be partly due to the dicta in *Denilauer*, stating that provisional measures are normally taken in the place where they are most likely to be effective, i.e. where the assets are. Nonetheless, Collins suggests[71] that there is English authority, such as in *Babanaft*, recently followed in *Crédit Suisse*, that worldwide *Mareva* injunctions may be entitled to recognition if granted under the Convention and granted *inter partes*.

The recent case of *Coin Controls Ltd* v. *Suzo International (UK) Ltd*[72] has also considered the application of Article 24. In that case, the court declined jurisdiction in respect of foreign patents due to the combined effect of Articles 16(4) and 19 of the Convention. This aspect of the judgment is perfectly understandable. However, it would have been expected in the context of proceedings for interlocutory relief that Article 24 would have been mentioned directly. The court noted that under the *kort geding* procedure in Holland interlocutory injunctions effective abroad have been granted in patent matters. Laddie J stated vaguely that

70. Lenon, *op. cit. supra* n.39, at p.1236.
71. Collins, *op. cit. supra* n.1, at p.98.
72. [1997] 3 All E.R. 45.

"such powers may arise out of art 24 of the Convention which is of very wide scope and apparently is not limited by the provisions of art 16".[73] Strangely, this led him to the conclusion that "it therefore has no direct bearing on the issues I have to raise".[74] If Article 24 is not limited by Article 16 then one assumes that Article 24 jurisdiction may be available. Laddie J, however, declined to consider the matter further, "in view of the fact that I have decided in any event not to grant interlocutory relief",[75] possibly in ignorance of the fact that the grant of interlocutory relief depends upon a proper analysis of Article 24 and its implementing provision in section 25. Accordingly, the issues related to extraterritorial application of interim relief did not arise for consideration.

The connection between Article 24 and exclusive jurisdiction under the Convention has also been considered, albeit indirectly, in the recent case of *Fort Dodge Animal Health Ltd* v. *AKZO Nobel NV*.[76] This case took place against the background of the recent practice by Dutch courts of granting cross-border injunctions in respect of patent infringements. The Dutch courts apparently did not agree with English authority[77] which was to the effect that where both the validity and infringement of a patent were in issue then the former was the principal issue to be determined under Article 16(4) in the court where the patent had been registered. *Ex parte* infringement proceedings had been commenced in the Dutch courts seeking interlocutory relief in respect of breaches of its Dutch patent in Holland and UK patent in the United Kingdom. It was accepted that the Dutch court would not grant final relief until the validity had been determined in the United Kingdom but the Dutch court apparently considered itself to have the power to grant interlocutory relief. The petitioners sought an injunction to restrain the respondents from bringing or maintaining legal proceedings in the Netherlands.[78] The petitioners' claim that this was a blatant attempt at forum-shopping was rejected by Laddie J on the basis that a party could not be restrained from continuing foreign proceedings because the foreign court could not be trusted to apply the Convention properly or to act fairly.

The Court of Appeal rejected the appellants' appeal, expressed certain views on the application of Articles 16(4) and 24, but ultimately made a reference to the European Court. In relation to Article 16(4), the effect of which was considered to be crucial to the provisional measures issue, the court considered that Article differentiated between patent infringement

73. *Idem*, p.62.
74. *Ibid.*
75. *Ibid.*
76. [1998] F.S.R. 222.
77. E.g. *Coin Controls*, *supra* n.72.
78. See *Société Nationale Industrielle Aérospatiale* v. *Lee Kui Jak and Another* [1987] 1 A.C. 871.

and validity proceedings, although the distinction could not always be made, dependent upon the parties' pleadings. In the present case the defences raised the question of validity and therefore the claim fell within the exclusive jurisdiction of the UK courts. In relation to Article 24 the court's analysis is somewhat strange. First, the court considered that provisional, including protective, measures had to be in aid of, or as an adjunct to, some final determination then in contemplation. The court noted that although provisional relief would not be available in the United Kingdom, due to the delay by the respondents in taking any action, it was for the Dutch courts to determine if provisional relief was available. Nonetheless, the court appears (the judgment is rather awkward here) to consider that, if the UK courts have exclusive jurisdiction, there is no justification for the respondents seeking interim relief before the Dutch courts, and that it was vexatious to seek such relief. Although not articulated at this point, this was presumably because, as the judgment had earlier noted, the respondents had not initiated any proceedings in the United Kingdom and had no intention of doing so, a requirement not apparent in the terms of Article 24 or prior jurisprudence of the European Court. The court considered that, as the views adopted in relation to Articles 16(4) and 24 were not *acte claire*, an injunction would not be granted and a reference would be made to the European Court—which will hopefully clarify further the requirements for Article 24 jurisdiction, particularly in relation to the provisions on exclusive jurisdiction.

B. Scotland

1. Mode of implementation of Article 24

The specific provisions on provisional and protective measures for Scots law are to be found in sections 27 and 28 of the Civil Jurisdiction and Judgments Act 1982. Guidance on these provisions can be obtained from a report of an advisory body which examined the effect of implementation of the Brussels Convention on Scots law.[79] The Maxwell Committee noted that Article 24 could be read narrowly as simply declaring that courts in a contracting State continued to have jurisdiction over provisional or protective measures under their existing law, despite the rules on jurisdiction in the Brussels Convention itself. Alternatively, Article 24 could be read as requiring a contracting State to make available provisional and protective measures for the benefit of litigants under the

79. Report of the Scottish Committee on Jurisdiction and Enforcement (Chairman Lord Maxwell: HMSO, Edinburgh, 1980). A similar body examined the impact of the Convention on English law but its report was never made public.

Convention in all other contracting States, even if such measures were not available under the existing law of that contracting State. The Committee noted that this point was of some significance because in Scots law at that time certain provisional remedies could be obtained only in respect of actions in the Scottish courts. While noting that ultimately the interpretation of Article 24 was a matter for the European Court, the Committee inclined towards the narrower reading of Article 24 as the correct one but nonetheless concluded that the spirit of the Convention required providing litigants throughout the Convention countries with the same provisional remedies as awarded to litigants in Scotland.[80]

2. *Provisional and protective measures in Scotland under Article 24*

Sections 27 and 28 of the 1982 Act allow the Court of Session to grant types of provisional and protective remedies in the absence of substantive proceedings in Scotland. It may be noted that unlike the position in England the Scottish provisions specify and presumably therefore limit the provisional and protective measures which are used to give effect to Article 24.

The measures provided by section 27 are arrestment, inhibition and interim interdict. Arrestment is a measure which prevents a third party who is holding money or other types of moveable property of a defender from handing over the property to him. By itself it does not give the pursuer any right directly to the arrested property (this requires further procedures based on success in the litigation) but does confer preferences over other claimants against the defender. There are circumstances in which an arrestment has extraterritorial effect, e.g. an arrestment served on a bank in Scotland can attach funds held in a branch of the bank in England or elsewhere, but the scope of this extraterritorial effect is not clear.[81] However, an order granted under section 27 is restricted in its operation to assets situated in Scotland.[82]

Inhibition is a form of prohibition against the defender alienating his heritable property.[83] The measure works by way of a personal prohibition on the defender, though its chief effect is achieved by recording the inhibition in one of the public registers. Again, while inhibition, as with arrestment, does not give the pursuer any direct right to the defender's property, it does confer preferences in any competition with other

80. *Idem*, paras.5.234–5.236.

81. G. Maher and D. J. Cusine, *The Law and Practice of Diligence* (1990), pp.116–117; Scottish Law Commission Report: Diligence on the Dependence and Admiralty Arrestments (Scot. Law Com. No.164 (1998)), pp.196–197.

82. 1982 Act, s.27(1)(a).

83. In internal Scots law the distinction between forms of property is between moveable and heritable property, which broadly corresponds to but is not identical to the conflicts distinction between moveable and immoveable property.

claimants. Inhibition is a remedy which can operate only against heritable property situated in Scotland and this is confirmed by the terms of section 27 itself.[84]

The final remedy referred to in section 27 is interim interdict. Interdict is a remedy with broad similarities to remedies in other legal systems, including the injunction known to English law. Interdict can have extraterritorial effect in the sense that a party subject to the jurisdiction of the Scottish courts may be interdicted from carrying out acts outside Scotland. However, unlike the *Mareva* injunction, an interdict has effect only against the party named in it and not against any third party who has knowledge of its terms.

The preconditions for granting these measures under section 27 are that, as regards arrestment and inhibition, the principal proceedings have been commenced but not concluded in another legal system, including one elsewhere in the United Kingdom. As regards interim interdict, an alternative situation is that the substantive proceedings are yet to be commenced.[85] It may also be noted that as far as arrestment and inhibition are concerned it must have been competent to have granted these measures in equivalent proceedings in a Scottish action but that no similar limitation exists as regards interim interdict.

Some comment may be made on the way in which section 27 seeks to give effect to Article 24 for these Scottish provisional and protective measures. The reason the Scottish courts may grant interim interdict under the section in circumstances where they could not do so in equivalent Scottish proceedings is somewhat prosaic. The Maxwell Committee noted that in Scottish practice it was not possible to seek an interim interdict without also seeking a perpetual or permanent interdict. The Committee recognised that this requirement would be inappropriate in a situation where no substantive proceedings were to be raised in Scotland, and recommended that it should be possible for Article 24 purposes in Scotland to seek interim interdict only. It was presumably to give effect to this recommendation that section 27 of the 1982 Act makes

84. 1982 Act, s.27(1)(b). A crucial and remarkable feature of the provisional remedies of arrestment and inhibition is that they are granted to pursuers who raise an action seeking payment of money as now due, as of right and without any judicial scrutiny or supervision. For critical consideration of the present Scots law see G. Maher, "Diligence on the Dependence: Principles for Reform" (1996) Juridical Rev. 188. The Scottish Law Commission has recently recommended changes to this part of the law (see *op. cit. supra* n.81).

85. As originally enacted s.27 remedies could be granted only where the principal action had been or, in the case of interim interdict, was about to be raised in another contracting State or elsewhere in the UK and the subject of the action fell within the scope of the Convention. However, these limitations were removed by S.I. 1997/2780. For discussion of some of the problems arising from these changes, see G. Maher, "Provisional and Protective Measures in Respect of Foreign Proceedings" 1998 S.L.T. (News) 225.

the provisions noted above but, as will be seen, the courts have given a wider reading to this rule that the grant of interim interdict under the section need not have been competent in equivalent Scottish proceedings.

A further issue arises from the preconditions for the application of section 27. A warrant for arrestment or inhibition may be granted under section 27 only if the substantive proceedings have been commenced but not yet concluded. It is not obvious why the Court of Session's power should be so restricted. Article 24 itself has no requirement that a substantive action has been commenced but, rather, that a court in another contracting State has jurisdiction as to substance. The position is different as to interim interdict: here the Court has power to grant the measure even if the substantive proceedings are still to be commenced. Indeed on a literal reading of section 27 this is the only time during which this provisional remedy can be granted under section 27. However, the courts and commentators read the statute as empowering the Court to grant interim interdict not only before the main action has been started but also once it has been commenced but not concluded. What is clear, however, is that none of these provisional remedies can be granted in Scotland once the main action is concluded. There is no obvious reason why this restriction applies to Scots law. It is not required by Article 24 and no similar restriction exists in English law.

A further provision of the 1982 Act which gives effect to Article 24 in Scots law is section 28. This provides for the Court of Session to use its powers under section 1 of the Administration of Justice (Scotland) Act 1972 (as amended) in respect of actions which either have been or are likely to be brought elsewhere.[86] Section 1 of the 1972 Act is an important provision in relation to evidence. It confers on the court a wide range of powers in connection not only with the preservation of evidence and property in dispute but also with the recovery (the Scottish term for discovery) of such evidence and property. The Maxwell Committee recognised that while some of the section 1 powers were clearly provisional or protective in nature, and thus within the scope of Article 24, other provisions (especially those relating to recovery) were not.[87] Nonetheless, the Committee took the view that it would be difficult to split the power on this basis for purposes of giving effect to Article 24. Instead it suggested that any difficulty which would arise here might be resolved by leaving matters to the discretion of the Court. This approach was followed in the 1982 Act, which states that the Court can use its extended power under section 1 of the 1972 Act as if the foreign

86. In its original form s.28 extended only to actions within the scope of the Convention brought in another contracting State or elsewhere in the UK. These restrictions were removed by S.I. 1997/2780.

87. Maxwell Report, *supra* n.79, at paras.5.248–5.252.

proceedings had been or were likely to be brought before it. In internal Scots law the power of the Court to make an order under section 1 is discretionary though there is a considerable body of case law which guides the Court on the exercise of this discretion. A key question of course is whether this guidance applies also to the Court's extended power under section 28 of the 1982 Act.

The Maxwell Committee also gave some consideration to the general nature of provisional, including protective, measures which fell within the scope of Article 24 and which would be covered by the legislation to give effect to that Article in Scots law. It noted that, in addition to arrestment, inhibition, interim interdict, and orders for the preservation of evidence, Scots law possessed other remedies which were of a provisional or protective nature. Examples were interim appointments of a judicial factor or a curator bonis but the Committee took the view that these remedies normally involved topics such as bankruptcy or the status of natural persons and as such were outside the scope of the Convention. The Committee also concluded that other types of interim remedy, such as interim awards of damages, were in effect orders for execution and not protective measures and that recovery of documents and examination of witnesses were also not provisional or protective measures for the purposes of Article 24.

One further measure in Scots law which the Committee considered was an order by which the Court of Session may require a litigant to undo an illegal act already done by him.[88] The committee took the view that it was doubtful if such a measure, which can be seen as a positive version of interdict, could be classified as provisional, including protective, in nature mainly because it involves a decision on the substance of the action. However, since the time of the Maxwell Report, it has become clear that these orders may be made on an interim basis.[89]

Furthermore, section 47(2) of the Court of Session Act 1988 allows the Court, while the action is still before it, to make an order regarding the interim possession of any property to which the action relates.[90] These types of order share the essentially provisional nature of orders covered by Article 24, and there seems no good reason to exclude them from the provisions of sections 27 and 28 of the 1982 Act. One difficulty which arises from the Scottish approach of defining the protective measures in the statute itself is that the European Court may in future itself give firmer

88. Court of Session Act 1988, s.46 deriving from Court of Session Act 1868, s.89.

89. See *Maersk & Co. Ltd* v. *National Union of Seamen* 1988 S.L.T. 828; *Stirling Shipping Co. Ltd* v. *National Union of Seamen* 1988 S.L.T. 832; *Five Oaks Properties Ltd* v. *Granite House Ltd* 1994 S.C.L.R. 740.

90. See e.g. *Church Commissioners for England* v. *Abbey National plc* 1994 S.L.T. 959; *Retail Park Investments Ltd* v. *Royal Bank of Scotland plc* 1995 S.L.T. 1156; *Millar & Bryce Ltd* v. *Keeper of the Registers of Scotland* 1997 S.L.T. 1000.

guidance on what for Article 24 purposes is a provisional, including protective, measure. Scots law might then find itself in a position that some of its provisional remedies fall within the scope of Article 24 but are not included in the provisions of the 1982 Act which seek to give effect to that Article of the Convention.

3. Judicial approaches to protective measures in the absence of substantive proceedings

Since the 1982 Act came into force in 1987 there have been a number of reported decisions on the use of sections 27 and 28. These cases do throw some light on how the Scottish courts approach their powers under these provisions though it cannot yet be said that the Scottish courts have developed consistent principles of interpretation on all aspects of this part of the law.

Two cases have involved the grant of warrant for arrestment and inhibition under section 27. In *Stancroft Securities* v. *McDowall*[91] the Inner House of the Court of Session held that the Lord Ordinary had taken the wrong approach to section 27 when he had refused to grant warrants for arrestment and inhibition in respect of an action proceeding in England. The Lord Ordinary held that as there were no exact equivalents to these measures known to English law it would not be appropriate to grant them in the circumstances of the present case where application under section 27 had been made *ex parte* and where the petitioner could have initiated proceedings in Scotland to obtain these provisional remedies. The Inner House held that none of these reasons was correct. The whole purpose of section 27 was to prevent actions on substantive issues being raised in every legal system where provisional remedies were sought. The Inner House also pointed out that the present concern was with the provisional remedies of Scots law, and it did not matter whether those remedies had equivalents in the legal system of the substantive action.

This decision is important since it was made by the Inner House and thus has authority as a precedent. At first glance it appears to suggest that the Scottish courts should approach applications under section 27 in exactly the same way as if warrant for arrestment or inhibition were being sought in a Scottish action. The difficulty with this interpretation is that the Inner House also mentioned that the Lord Ordinary had a discretion as to whether or not to make an order under section 27. In Scottish cases, however, pursuers can seek the provisional remedies of arrestment and inhibition as of right and, far from having a discretion whether to grant them, judges are not involved in decisions on granting these remedies. It is true that there may be an exception to this general rule of Scottish

91. 1990 S.L.T. 746.

practice where application is made during the action, by way of motion, rather than at its start. It is not entirely clear if this exception is soundly established but, even if it is, there still arises the question whether an application under section 27 is more analogous to an application in a Scottish action at the start or during that action. In *Stancroft* itself the Inner House[92] rejected the Lord Ordinary's views about not granting remedies on an *ex parte* application by noting that this was frequently how warrants for arrestment and inhibition were obtained in Scottish practice. Accordingly, it seems that a section 27 petition is to be treated more as an initial application for arrestment or inhibition than as one made during an action.

The confusion as to whether Scottish courts have a discretion to grant arrestment or inhibition under section 27 which they undoubtedly lack in Scottish actions is added to by the decision of *Clipper Shipping Co.* v. *San Vincent Partners*.[93] In this case the substantive action was proceeding in Denmark. The applicant sought and obtained authority under section 27 to arrest a ship in Scotland belonging to the defenders in the main action. Warrant was granted on an *ex parte* application and the shipowners sought recall of the arrestment. The Lord Ordinary dealing with the recall noted that in Scots law there existed limitations on the arrestment of a ship on the dependence of an action by virtue of section 47 of the Administration of Justice Act 1956, which gives effect in Scots law to the 1952 Brussels Convention on the Arrestment of Seagoing Ships. However, on this point the Lord Ordinary held that while it may have been originally assumed that the 1956 Act applied only to actions raised in Scotland, section 27 has the effect of widening the scope of the court's power to allow arrestment of a ship to actions raised elsewhere. Of more concern to the present issue is the other matter dealt with in this case. The Lord Ordinary also held that the warrant for arrestment had properly been granted because there was a sufficient basis for asserting that the applicants had a colourable case in the main action. The basis for this was evidence that, by Danish law (which was the applicable law of the substantive dispute), the plaintiff in that action had an intelligible and discernible cause of action. It is important to see this part of the decision in its proper context. Generally speaking in internal law warrant for arrestment and inhibition do not require that the pursuer is likely to be successful in the action or even that he has any case in law. However, there may be an exception to this general rule where the arrested subject is a ship, though this point is far from certain.[94] In any case even if there is

92. *Idem*, p.748J.

93. 1989 S.L.T. 204.

94. The requirement that a pursuer has a "colourable" case to justify the use of arrestment in the dependence of an action was first stated in *West Cumberland Farmers Ltd* v. *Ellon Hinengo Ltd* 1988 S.L.T. 294, a decision relied on and followed in *Clipper Shipping*, *ibid.* However, in *West Cumberland Farmers* no reference was made to authorities for the general principle in Scots law that there is no requirement as to the substance of a case before warrant for arrestment or inhibition may be granted.

such a test it is one which exists both as respects Scottish actions and applications under section 27 of the 1982 Act.

There have been three cases involving the grant of interim interdict under section 27. The first two concerned the grant of this remedy in terms which would not have been competent in a Scottish action governed by Scots law. Somewhat surprisingly, in neither case was there any direct discussion of the provision in section 27 that there is no necessity for granting interim interdict under the section that it would have been competent to do so in equivalent Scottish proceedings. In *Lord Advocate* v. *Campbell*[95] an injunction had been granted that same day in England to prevent the publication of information relating to the UK intelligence services. The form of the injunction extended this prohibition not only to the respondent who was expressly named in it but also to any other person having notice of it. It was at the very least doubtful that an interdict could be granted under Scots law in these wide terms. Nonetheless, the Lord Ordinary granted interim interdict in these terms but indicated that he did so as the balance of convenience favoured granting the remedy purely as a temporary and protective matter.

G v. *Caledonian Newspapers Ltd*[96] involved a similar situation: here an injunction had been obtained in English proceedings in a form which would not have been available under Scots law. The Lord Ordinary granted interim interdict in terms similar to those of the English injunction but his reasons for doing so are not entirely clear. He did not refer to section 27 as allowing him to do so in express terms. Instead his Lordship appeared to be saying that the issue was one of the correct applicable law to the dispute. He found nothing in the terms of Article 24 to prevent him holding that he should apply the same substantive law in the ancillary proceedings before him as that applicable in the principal proceedings in England.

It is not easy to reconcile these decisions with the general principle that Article 24 remedies are governed by the law of the courts which grant them. The two judgments make no express reference to the way in which section 27 itself departs from this principle in respect of interim interdict but in neither case was the judge referred to the apparent, technical reason for this feature of the 1982 Act in the recommendation of the Maxwell Report. Furthermore, though the judges granted interim interdict in a form not known to Scots law, they appeared to have had in mind the substantive preconditions for the remedy according to Scots law. This is indicated by the reference to the balance of convenience in the *Campbell* decision, and even more so in the *Caledonian Newspapers* case, where the Lord Ordinary mentioned the test in Scots law that a *prima*

95. Outer House 17 Mar. 1988, noted in 1988 G.W.D. 9–370.
96. 1995 S.L.T. 559.

facie case for the remedy had to be made out. In the circumstances of that case he found that this test was to be met in accordance with English law and held that the order of the English court itself was sufficient indication that the Scottish criterion of a *prima facie* case had been made out according to English law in English proceedings.

Another decision involved the grant of interim interdict in relation to a potential action in Northern Ireland but the Court of Session failed to articulate that it was using its section 27 power. In *WAC Ltd* v. *Whillock*[97] a contract contained a clause providing that all disputes in relation to it were to be subject to the exclusive jurisdiction of the courts of Northern Ireland. One of the parties sought an interim interdict from the Court of Session to prevent breach by the other party of a restrictive covenant in the contract. This situation appeared to provide the Court with an ideal opportunity to consider the interrelationship between section 27 (and hence Article 24) and provisions on exclusive jurisdiction. In the event the defenders conceded that the Court of Session had jurisdiction but the basis of this concession is not clear. It was noted earlier that it can be argued that Article 24 is compatible with provisions which confer exclusive jurisdiction on courts of other legal systems, including those concerning prorogation by the parties, but it is simply not possible to discern any such basis for the Court assuming jurisdiction in this case.[98]

To date there have been two reported decisions on the use of section 28 of the 1982 Act. In *Iomega Corporation* v. *Myrica (UK) Ltd*[99] the Court held that where documents or other evidence had already been recovered under section 1 of the 1972 Act in respect of an ongoing or prospective Scottish action then the Court had a discretion to allow the evidence to be used in other litigation outside Scotland. It was expressly noted that this result would also apply where the evidence had been recovered under section 28 of the 1982 Act. Beyond that comment little insight can be gained about the approach taken to section 28. Of more interest is the decision in *Union Carbide Corpn* v. *BP Chemicals Ltd*,[100] where the petitioners had raised an action in England against the respondents in respect of breach of patent rights. Under the rules of procedure of the English courts, the plaintiffs in the English action were required to specify various details of their claim. In order to satisfy this requirement the plaintiffs petitioned the Court of Session seeking recovery of documents and other property in the hands of the defendants in Scotland. The Lord

97. 1990 S.L.T. 213.

98. Indeed the Court appears to have based its jurisdiction on jurisdiction rules which treated the application for interdict as an independent, substantive action: see *idem*, pp.215C, 219D. It does not appear from the report that the action was raised by way of a s.27 petition.

99. 1998 S.C.L.R. 475.

100. 1995 S.L.T. 972.

Ordinary granted the appropriate order. In refusing a reclaiming motion against this decision, the Inner House made a number of comments on the use to be made by the Scottish courts of their powers under section 28. Lord President Hope noted that section 28 gave effect to Article 24 of the Brussels Convention but in respect of orders for production and recovery of documents it extended beyond measures which were purely provisional or protective in nature. Moreover, the court made it clear that, in using its discretion whether to make an order under section 28, a Scottish court should not treat the issue entirely as if it were deciding a purely Scottish case. Instead the Scottish court had to take some account of the other (non-Scottish) proceedings. Where, as in the present case, a Scottish order was required in order to allow a litigant to comply with the procedural rules of another legal system, for the Scottish court to be satisfied that the order was justified it would have to consider the rules and practices of that other system. Lord Hope in this context drew a distinction between cases where the party in Scotland who held the documents or property now being sought under section 28 was or was not the other party in the main litigation elsewhere.

Where that person was not a party to the other proceedings (or where those other proceedings had not yet been brought) there was a stronger basis for the Scottish courts to use its section 28 power than where the person was directly involved in the foreign proceedings. This is because the court of the main proceedings is less likely to have effective control over someone in Scotland not subject to its jurisdiction. However, where the person is a party to the main proceedings, the Scottish court should be careful about granting a section 28 order. In this situation the Scottish court, which is not familiar with the law and practices of the other court, might find itself granting a discretionary remedy which the other court would not itself grant. A further point made in *Union Carbide* was that, whereas in that case the purpose of a section 28 order was to enable a party to comply with procedural requirements of the main action, the Scottish court had to consider the rules and practices of that court and not those of the Scottish courts in deciding whether to exercise its discretion to grant the order.

V. CONCLUSION

PROVISIONAL, including protective, measures remain a problematic part of the Brussels Convention. To date many of the issues and difficulties identified by commentators have not received a clear or definitive answer from the European Court. Furthermore, the situation in respect of the approach to Article 24 within the legal systems in Great Britain reflects this uncertainty. There is a diversity of approach between English and Scots law not just in terms of judicial response but even in respect of legislative implementation. The Civil Jurisdiction and Judgments Act

1982 gives effect to Article 24 in English law by leaving open the range of measures which may fall within its scope (with only two types of measure being expressly excluded from its ambit). Additionally, English law allows for Article 24 remedies to be granted in a wide range of circumstances, whilst Scots law limits the appropriate provisional and protective remedies to four specific types and allows for the grant of these measures in a much narrower set of circumstances than those under English law. As regards judicial response to the legislative measures, it must be said that in neither system have the courts made clear pronouncements of the relevant underlying principles but it is obvious that the courts in the two systems are adopting differing approaches. The English courts on the whole take the view that all section 25 cases are dealt with on much the same basis as remedies granted where the main proceedings are themselves English. By contrast, the Scottish courts do not treat the grant of protective and provisional orders under the Act in the same way as they deal with the same measures in Scottish actions. No doubt provisional and protective remedies reflect aspects of particular legal cultures and backgrounds, and the experience of dealing with Article 24 in the English and Scottish legal systems illustrates this point. Nevertheless, if a moral is to be drawn then it may be that for an effective system of provisional remedies there is need for a common European protective remedy, an option currently under consideration as part of the reform of the Brussels Convention.