

# CJEU Rules on Immunity and Application of Brussels Ibis Regulation to International Organisations



On 3 September 2020, the Court of Justice of the European Union (**CJEU**) delivered [a judgment](#) in a case which raised very interesting issues relating to the interaction and application of Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the **Brussels Ibis Regulation**) in summary proceedings involving international organisations, in particular when such international organisations invoke their immunity. The judgment follows the Opinion of Advocate General (**AG**) Henrik Saugmandsgaard Øe handed down [earlier this year](#).

## Background of the case

The case concerns a dispute between (i) three companies belonging to the Supreme group (**Supreme**), and (ii) Supreme Headquarters Allied Powers Europe (**SHAPE**) together with an entity under SHAPE's command, Allied Joint Force Command Headquarters Brunssum (**JFCB**). The latter two entities are both international organisations under NATO's umbrella.

Due to SHAPE and JFCB not fulfilling their payment obligations to Supreme for the supply of fuel used in NATO's military missions in Afghanistan, a Dutch District Court (JFCB being located in the Netherlands) granted Supreme a garnishee order on SHAPE's Belgian escrow account in 2015. On appeal (in summary proceedings), SHAPE invoked its immunity from execution and requested a lift of the interim garnishee order and a prohibition against Supreme to levy a similar order on the same grounds. SHAPE's appeal was upheld.

Supreme, in turn, unsuccessfully appealed this latter ruling before the Court of Appeal, who reasoned that SHAPE's interest in immunity from execution prevailed over Supreme's interest in the recovery of its claim. Supreme then challenged this decision before the Dutch Supreme Court in 2017.

However, in those latter proceedings, the Dutch Supreme Court raised, on its own initiative, the question of whether the jurisdiction to hear this case did not belong to the Belgian courts (instead of the Dutch courts) since the bank account at stake was located in Belgium. The Dutch Supreme Court's reasoning was based on Article 24(5) of the Brussels *Ibis* Regulation which provides that "*in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced*" shall exercise jurisdiction. In addition, the Dutch Supreme Court also questioned whether the fact that SHAPE and JFCB enjoyed immunity from execution and jurisdiction had any influence on the application of the Brussels *Ibis* Regulation.

The proceedings of the Dutch Supreme Court were stayed in order to seek a preliminary ruling from the CJEU on those issues.

### **The first question**

In its first question, the Dutch Supreme Court asked – given that the Brussels *Ibis* Regulation only applies in "*civil and*

*commercial matters*” – whether an action for interim relief brought before a court of a Member State and aimed at obtaining the lift of an interim garnishee order should be considered as “*civil and commercial matters*”.

The reasoning of the CJEU was divided into three parts.

Firstly, the CJEU examined whether an action for interim relief fell within the scope of “*civil and commercial matters*”. On this question, the CJEU confirmed that it was not the nature of the provisional and protective measures, but the nature of the substantive rights the measures seek to protect, that was determinative (para. 54).

Secondly, the CJEU examined the criteria that need to be considered in order to find that an interim relief falls within the scope of “*civil and commercial matters*”. On that point, the CJEU found that the exercise of public powers by one of the parties in an action excludes such an action from “*civil and commercial matters*” “*because [this party] exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals*” (para. 57).

Thirdly, the CJEU then questioned whether reliance in an action by an international organisation on the privilege derived from immunity from execution automatically excluded that action from the scope of the Brussels Ibis Regulation. While the CJEU noted that, as regards immunity of States from jurisdiction, it “*is generally recognised where the dispute concerns sovereign acts performed iure imperii*”, it sided with AG Saugmandsgaard Øe in stating that the immunity of bodies governed by private law does not automatically preclude the application of the Brussels Ibis Regulation by national courts (para. 62).

In light of those three elements, the CJEU ruled that even though SHAPE used the supply of fuel for the purposes of a

peace-keeping and security operation, the interim garnishee order at issue was ultimately to ensure the protection of the claims arising from a private contractual relationship, and that it was this latter relationship which was the basis of the summary proceedings. It thus concluded that the legal relationship between the parties to the proceedings could not be regarded as showing the exercise of public powers (subject to the verification of the Dutch Supreme Court). Consequently, the CJEU found that the present proceedings were covered by the concept of “*civil and commercial matters*” within the meaning of Article 1(1) of the Brussels *Ibis* Regulation (para. 68).

### **The second question**

In its second question, the CJEU examined whether the courts of the Member State in which the interim garnishee order was executed has exclusive jurisdiction pursuant to Article 24(5) of the Brussels *Ibis* Regulation.

In answering that question the CJEU noted two points.

- Following from the terms of Article 24(5) of the Brussels *Ibis* Regulation, in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced are to have exclusive jurisdiction, regardless of the domicile of the parties (para. 71);
- In accordance with the case-law of the CJEU (particularly, *Reitbauer and Others*, C-722/17, para. 52), only proceedings that concern recourse to force, constraint or distraint on movable or immovable property in order to ensure effective implementation of judgments and authentic instruments fall within the scope of Article 24(5) of the Brussels *Ibis*

The CJEU thus reasoned that as the action for interim relief did not concern the enforcement of judgments within the

meaning of Article 24(5) of the Brussels *Ibis* Regulation, it was not covered by the scope of that provision and did not therefore fall within the exclusive jurisdiction of the courts of the Member State in which the interim garnishee order was executed (para. 73). The CJEU further opined, in accordance with AG Saugmandsgaard Øe, that relying on immunity from execution did not preclude examination by the court of its international jurisdiction under the Brussels *Ibis* Regulation, but that it may come into play at a later stage, after the international jurisdiction of the court has been determined (para. 74).

### **Conclusions**

The CJEU's judgment makes two important points with respect to international organisations' immunity from execution and the scope of exclusive jurisdiction under Article 24(5) of the Brussels *Ibis* Regulation.

First, the CJEU delineates an interesting distinction between immunity enjoyed by States and that enjoyed by international organisations. While the immunity belonging to States is automatic as it is based on the general principle of customary law, *par in parem non habet imperium*, international organisations are only conferred immunity by the treaties establishing those organisations. Indeed, it is ultimately this distinction which prompted the CJEU to conclude that SHAPE could not rely on immunity in the summary proceedings, as the legal relationship between the parties of those proceedings did not involve the exercise of public powers.

Second, the CJEU applied a consistent approach to the application of the scope of Article 24(5) of the Brussels *Ibis* Regulation, by confirming its narrow interpretation as established in *Reitbauer and Others*. That is, proceedings which do not relate to recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic

instruments will not be covered by that Article.

*This article was kindly drafted by Elyse Kneller (intern at Van Bael & Bellis).*

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