REPUBLIC OF ALBANIA
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'RISKY BUSINESS': CAN PROVISIONAL MEASURES ISSUED BY THE ALBANIAN COURTS SAFEGUARD THE RIGHTS OF EU CREDITORS?

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1. Introduction

The timeless promise enshrined in the Magna Carta Libertatum, 'To no one will we sell, to no one will we deny or delay right or justice',[1] still holds. European states have undertaken the quest of guaranteeing its enforcement by sanctioning its modern counterpart – the right to a fair trial – in the most prominent international human rights acts in Europe: the European Convention on Human Rights ('ECHR')[2] and the Charter of Fundamental Rights of the European Union ('EU Charter'). However, this maxim continues to face challenges when it comes to the preservation of rights threatened by risks associated with judicial proceedings.

Preserving rights and preventing harm before the commencement of proceedings or the issuance of a final judgment is essential for both domestic and cross-border civil matters. However, considering the complexity of cross-border disputes, it becomes evident that the claimant's interest in obtaining interim relief in such disputes becomes more critical than in domestic ones. In the European Union ('EU'), the Brussels I System serves as the general law of European civil procedure[3] and provides for provisional and protective measures that claimants may request in cross-border civil and commercial matters before any European court.[4]

Since Albania is not yet a member of the EU, the *acquis* is not formally a part of its legal framework.[5] Therefore, despite being Albania's main trading partners, EU creditors cannot benefit from the Brussels I system before the Albanian courts. On the other hand, as a result of the approximation of legislation to the *acquis* (an obligation for EU membership),[6] several solutions of the Brussels Ibis Regulation have been incorporated into the Private International Law of Albania ('PILA'),[7] including provisional measures. In the interpretation of approximated laws, Albanian judges are encouraged to adopt a pro-European approach.

This paper will focus on interim relief measures requested before the Albanian courts in cross-border civil and commercial matters, the challenges they pose, and the possibilities of indirectly applying the Brussels Ibis Regulation through a pro-European interpretation of Albanian laws.

2. Procedural Guarantees under the Albanian Legislation

Article 42(2) of the Albanian Constitution[8] and Article 6(1) of the ECHR guarantee the right to a fair trial to every person under the jurisdiction of the Republic of Albania, be they natural or legal persons, national

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1 Magna Carta 1217, clauses 39, 40. The Magna Carta is available at https://www.parliament.uk.

2 Albania ratified the ECHR through Law no. 8137 of 31 July 1996, OJ 1996 L 20/724. It entered into force on 12 August 1996.

3 I. Pretelli, *Provisional and Protective Measures in the European Civil Procedure of the Brussels I System*', in V. Lazic and S. Stuij (eds.), *Brussels Ibis Regulation, Short Studies in Private International Law* (2017) 97, at 98.

4 Article 35 of the Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L 351/1.

5 Albania is a candidate state to the EU as of 19 July 2022. See to this regard: www.consilium.europa.eu/en/press/press-releases/2022/07/19/intergovernmental-conference-at-ministerial-level-on-the-accession-of-albania/.

6 Article 70 of Stabilization and Association Agreement, which Albania ratified by Law no. 9590 of 27 July 2007, OJ 2006 87/2955.

7 Article 81 of PILA, Law no. 10428 of 2 June 2011 'On private international law', OJ 2011 L 82/3319.

8 Every provision of the Albanian law, when referred to for the first time in this paper, shall be cited the footnotes, unless directly cited in the main text. Article 42(2) of the Albanian Constitution provides that 'Everyone, for the protection of their constitutional and legal rights, freedoms, and interests, or in the case of an accusation raised against them, has the right to a fair and public trial,

or foreign. According to the Albanian Code of Civil Procedure[9] ('ACCP') and Article 82 of the PILA,[10] everyone, irrespective of their nationality, has the right of access to a court to protect or reinstate their civil rights, by making use of all procedural means provided by the ACCP. In this respect, the ACCP sanctions four motions for provisional and protective measures, the aim of which is to mitigate the risks associated with judicial proceedings by: (i) securing the claim,[11] (ii) preserving evidence,[12] (iii) issuing an immediately enforceable judgment;[13] and (iv) suspending the enforcement of a final judgment.[14]

Due to their temporary character and underlying urgency, the court decisions granting either of the four motions are regarded as provisional measures. This paper shall focus on the former two measures, as the respective case law of Albanian courts has been inconsistent, especially when foreign persons have been party to them. The divergence in case law may be caused due to the vaguely worded provisions in force, which shall be addressed in detail in the continuity of this paper. Although the High Court of Albania ('HCA') has been reluctant to address this inconsistency, it has oriented lower courts to be guided by the ECHR and the *acquis*, as well as the relevant case law of both the European Court of Human Rights ('ECtHR')[15] and the Court of Justice of the EU ('CJEU')[16] when interpreting obscure provisions or where there exists a legal omission.

3. Provisional Measures for Securing the Claim

Articles 202[17] et seq. of the ACCP construe measures for securing the claim as provisional, protective measures issued by courts upon the application of a current or future claimant. Their purpose is to prevent the risk of final judgments becoming unenforceable. The claimant bears the burden of proving that there exists an actual, real, and specific possibility that the respondent may take definitive legal actions to transfer his property, over which a potential final judgment in favour of the claimant will be enforced. Typically, the claimant needs

within a reasonable time, by an independent and impartial court established by law.' Albania adopted its Constitution by law no. 8417 of 21 October 1998, OJ 1998 L 28/1416.

9 Law no. 8116 of 29 March 1996 'The Code of Civil Procedure of the Republic of Albania', as amended. OJ 1996 L 9, 10, 11.

10 Article 82 provides '1. The examination of judicial cases with foreign elements before the Albanian courts is conducted in accordance with the Albanian procedural law. 2. Foreign persons, as well as persons without nationality, enjoy the same procedural guarantees as Albanian persons in civil proceedings conducted before the Albanian courts.'

11 Regulated by articles 202 *et seq.* of the ACCP. Per articles 203 and 204 of the ACCP, this motion may be filed either before the commencement of the trial of the merits or during its course. This motion is exclusive to the claimant.

12 Regulated by articles 292 *et seq.* of the ACCP. Per art. 293 of the ACCP, this motion may be filed either before the commencement of the trial of the merits or during its course. Both parties may use this motion.

13 Regulated by articles 317 *et seq.* of the ACCP. As per art. 317 of the ACCP, this motion consists of a request ancillary to the main claim, which is tried jointly with the latter. If the motion is founded, the court orders the direct enforceability of the judgment, derogating from the rule set forth by art. 449 of the ACCP that only appellate judgments are enforceable.

14 This motion, regulated by art. 479 of the ACCP, is the only one exclusive to the respondent. The latter pleads to the HCA to suspend the enforcement of the appellate judgment until the HCA rules on the recourse, claiming irreparable damages.

15 High Court Administrative Section (Albania), *Merushe Shpata v. Institute of Social Security*, unifying judgment no. 1317 (113) of 22 July 2021, at para. 147.

16 High Court Civil Section (Albania), *A. S. v. M. S.*, judgment no. 00-2016-820 (94) of 23 March 2016, at para. 14.2-14.3.

17 Art. 202 of the ACCP, in its relevant part, provides that: 'Upon the request of the claimant, the court, within five days, allows for the provision of measures securing the lawsuit, when there is cause to believe that the enforcement of the decision [in favor] of the rights of the claimant shall become impossible or difficult …'.

to prove that the respondent has already started to put these 'plans' in motion. Whereas the claimant may propose any measure they deem appropriate, the seized court is not limited to the proposed measure.[18]

A. Nature of Claims that May Be Secured

Article 203 of the ACCP[19] provides that *all* types of claims may be secured, save for claims raised during enforcement procedures, which follow a different procedural regime. However, a restrictive interpretation adopted by the HCA has resulted in the de facto exclusion of several claims from the scope of this provision. Although ordinary judgments of the HCA are not formally binding on the lower courts, the latter are reluctant to depart from its consolidated case law unless there exists a legitimate reason for doing so, as such deviation constitutes a cause for appeal.[20]

1. Can Recognition Claims be Secured?

Article 32 of the ACCP provides that 'claims may be filed: a) to seek the reinstatement of a violated right or legal interest, b) to verify the existence or non-existence of a legal relationship or a particular right, or c) to ascertain the truth or falsity of a document, which bears legal consequences for the claimant.' The claims stipulated under letter 'b' above, are widely known as 'recognition claims'.

The ACCP does not distinguish between the different types of claims when determining if provisional measures ought to be applied. However, the HCA has ruled that recognition claims – including those for recognition of ownership – cannot be secured. [21] The reasoning behind this stance is that these claims lead to declarative judgments since they merely recognize rights that, albeit denied by third parties, already belong to the claimant. Judgments for the recognition of ownership are not enforceable per se, as the claimant will be recognized as an owner irrespective of which party alleges ownership over the property. Thus, the use of provisional measures becomes redundant as there exists no risk of non-enforcement.

According to the HCA, the existence of a judicial process concerning the recognition of ownership rights over the immovable property does not a priori legitimize seizing the property for the purpose of securing the claim. This aim is achieved by registering the claim with the State Cadastral Agency per Article 197(b) of the Albanian Civil Code,[22] which gives notice to interested parties that the ownership title of the property is subject

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[18] Art. 206 of the ACCP-provides 'The lawsuit may be secured: (a) through the seizure of movable and immovable assets, as well as credits of the debtor; b) via other appropriate measures issued by the court…'

[19] Article 203 of the ACCP provides 'The motion for securing the claim is allowed for all types of claims and in any stage of the proceedings, until the judgment becomes final. Security for the claim may also be granted by the court of appeals, when the claim is being examined by the latter. Security for the claim is not allowed for claims raised during the stage of execution of the judgment, for which the fourth part of this code is applicable'.

[20] Art. 472 of the ACCP provides '1. The judgments of the Court of Appeal and those of the Court of First Instance may be appealed through a recourse at the High Court in the cases provided in this Code: … b) when the appealed judgment is different from the case-law of the Civil Section or the unified case-law of the Joint Sections of the High Court.'

[21] High Court Civil Section (Albania), *Elsa Tanushi v. TDR Group SHPK*, no.00-2020-704 of 25 November 2020 and *Gjergji Ndini v. Vera Terihati and others*, no. 00-2020-725 of 26 November 2020.

[22] Art. 197 of the Albanian Civil Code stipulates: 'The following must also be registered [in the public registers]: … b) claims for the acquisition, recognition, transferal or cease of ownership rights or other real rights over immovable property.'

to dispute. Should they still decide to conclude contracts related to this property, they knowingly assume the associated risk. We believe that the aim of the motion for securing the claim is different than that of cadastral registration of the claim. Specifically, whereas registration intends to protect third parties, the motion aims to guarantee the claimant's own ownership rights by receiving an enforceable judgment over their claim.

In a conundrum of whether to strictly apply the ACCP or the interpretation adopted by the HCA, we may find resolve in the applicable EU standards, specifically, the Brussels Ibis Regulation and the pertaining case law. Article 1(1) of the Regulation includes in its scope civil and commercial matters. Recognition claims have not been – at least expressly – excluded from its application since they fall neither under the concept of claims related to *acta iure imperii* nor those listed under para. 2 of this Article. A comprehensive analysis of the case law of the CJEU shows that when the need for interpretation arose, the CJEU mainly employed a broad interpretation to give life to the provision.

According to the latter, although the nature of provisional measures usually corresponds to that of the case they are issued for, this is not always the case. In *Louise de Cavel*,[23] the CJEU held that a motion for provisional measures fell within the scope of the Regulation if '… its own subject-matter is one of the matters covered by that Convention even if it is ancillary to proceedings which, because of their subject matter, do not come within this Convention's sphere of application.' The CJEU has later interpreted this ruling to mean that since 'provisional or protective measures may serve to safeguard a variety of rights… their inclusion in the scope of the 1968 Brussels Convention is determined not by their own nature but by the nature of the rights which they serve to protect.'[24] For instance, although divorce proceedings are excluded from the scope of the Regulation, provisional measures ordering the husband to pay a monthly allowance until the termination of the divorce proceedings are considered as 'maintenance obligations' and, therefore, fall within its scope.[25]

By adopting this interpretation to the aforementioned case of the HCA, we could conclude that a measure securing the claim by seizing immovable assets aims to protect the ownership rights of the claimant. Therefore, although the main claim is classified as a recognition claim, the nature of the provisional measure is one of ownership, which is not excluded from the scope of claims that can be secured under the ACCP.

It appears that the stances adopted by the HCA and the CJEU differ widely. This may have been caused by the methods of interpretation employed by each of them. As a result, an EU citizen or company filing a motion to secure a recognition claim before the Albanian courts would not find the same level of protection as that granted by the courts of their state of origin or other EU Member States due to the application of the Brussels Ibis Regulation.

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[23] Case 120/79, *Louise de Cavel v Jacques de Cavel* (EU:C:1980:70), at para. 2.

[24] Case C-186/19, *Supreme Site Services GmbH, Supreme Fuels GmbH & Co KG, Supreme Fuels Trading Fze v SHAPE* (EU:C:2020:252), at para. 52.

[25] *Supra* note 23 at para. 10-11.

2. Is the Claimant Entitled to Seek, via Provisional Measures, the Performance of the Same Action Sought through the Main Claim?

Article 206(b) of the ACCP provides that the claim may be secured 'by any appropriate measures issued by the court.' However, courts should take into account the legitimate interests of the respondent so as not to jeopardize them. In the unifying judgment no. 10 of 24 March 2004, concerning the interpretation of the aforementioned article, the Joint Sections of the HCA held that provisional measures cannot be used to restore the legal situation that existed before the dispute. Otherwise, the main proceedings would lose their meaning, and the resolution of the case would be deemed prejudiced and predetermined.

This stance is similar to the one held by the CJEU in the 1992 case *Reichert/Köchler,* in which it precluded 'provisional, including protective measures' from securing definitive protection for the substantive rights of the creditors.[26] In this respect, EU creditors would find themselves in the same legal position as under the Brussels Ibis Regulation.

B. Jurisdiction over Motions for Securing the Claim

The international jurisdiction of the Albanian courts over provisional measures in civil and commercial matters is governed by Article 81 of the PILA, which states that '[t]he Albanian courts have jurisdiction with regard to measures for securing the claim if such measures are to be executed in the Republic of Albania or if the Albanian courts have international jurisdiction over the subject of the proceedings.' Two elements of this provision should be analysed: namely, the meaning of 'provisional, including protective measures' under Albanian law and the international jurisdiction of Albanian courts to issue such measures. In this regard, reference to Article 35 of the Brussels Ibis Regulation may help.[27]

Article 81 of the PILA uses the term 'measures for securing the claim' and not 'provisional measures' or 'protective measures', concepts which fall within the scope of Article 35 of the Brussels Ibis. There is a mutual understanding between scholars that Article 81 should be interpreted broadly to include all types of protective measures provided by the ACCP.[28] Although the PILA does not sanction 'characterization,' this principle remains essential for analysing the institutes regulated by private international law. For this reason, scholars argue that in order to define provisional measures, reference should be made to the types available under the ACCP.[29] However, Albanian courts exclusively apply Article 81 to measures securing the claim and not to other types of provisional measures.

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[26] Case C-261/90, *Reichert and Kockler v DRESDNER BANK* (EU:C:2020:252), at para. 35.

[27] Article 35 provides 'Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.'

[28] C. Jessel-Holst *et al. 'Komentar i ligjit "Për të drejtën ndërkombëtare private" nr. 10 428, dt. 02.06.2011'* [Eng.: 'Commentary of the law "On Private International Law" no. 10 428, date 02.06.2011'] (2018), at 508.

[29] A. Metzger, 'Characterization', in J. Basedow *et al.* (eds), *The Max Planck Encyclopedia of European Private Law,* vol. 1 (2012). Available at https://max-eup2012.mpipriv.de/index.php/Characterization.

A. International Jurisdiction of the Albanian Courts: The Triumph of the Place of Enforcement?

Article 81 of the PILA provides that Albanian courts have international jurisdiction to adopt measures aiming at securing the claim in two cases: (i) if that measure will be executed in the Republic of Albania or (ii) if Albanian courts enjoy international jurisdiction to examine the substance of the matter. While the second cause of action is self-explanatory[30], the first one has been subject to interpretation.

A prima facie reading of Article 81 of the PILA indicates that it provides for a 'double-track jurisdiction system' similar to the one established by Article 35 of the Brussels Ibis Regulation. This means that Albanian courts have the jurisdiction to issue provisional security measures when another court holds jurisdiction over the substance of the case, provided a 'double-condition test' is satisfied. Specifically, the effects of the measure must be reversible, and there must exist a genuine link between the measure and the jurisdiction of the court, which manifests when the measure is executed.[31]

The CJEU maintained this line of reasoning in the current so-called *TOTO* judgment[32]. Indeed, this judgment brings to our attention a similar situation that was raised before the Albanian courts. Prior to analysing the jurisprudence of Albanian courts, which give prevalence to the enforcement court (i.e., the Albanian courts over a foreign court, chosen by agreement), the main outcomes of the *TOTO* judgment need to be addressed in order to compare the stances adopted by the HCA and the CJEU.

In the *TOTO* case, the CJEU was asked whether Article 35 of the Brussels Ibis Regulation must be interpreted as meaning that a court of a Member State hearing an application for provisional measures under that provision is required to decline jurisdiction where the court of another Member State, which has jurisdiction as to the substance of the matter, has already given a judgment between the same parties in respect of an application with the same purpose and cause of action. In its judgments, the CJEU emphasized the lack of a formal hierarchy between Article 2(a)[33] and Article 35, i.e., between the courts with subject matter jurisdiction and those with jurisdiction as to provisional measures. It concluded that the courts competent as per Article 35 are not required to decline jurisdiction when a court with subject matter jurisdiction has been either seized or examined interim proceedings. AG Rantos proposed that this issue could have been settled by recourse to the *lis pendens* rule inherent in Article 29 of the Brussels Ibis. However, the CJEU rejected this argument.[34] The question of the possible applicability of *lis pendens* rules over provisional measures has not been discussed by the Albanian courts, as there exists a mutual understanding between courts and scholars

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30 Under Article 35 of the Brussels Ibis Regulation, the second cause of action is implied.

31 Case C-391/95, *Van Uden Maritime v Kommanditgesellschaft in Firma Deco-Line and Others* (EU:C:1998:543).

32 Case C-581/20, *Skarb Państwa Rzeczypospolitej Polskiej v TOTO SpA and Vianini Lavori SpA* (EU:C:2021:808).

33 Article 2 provides: '(a) … For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which such a court or tribunal orders without the respondent being summoned to appear unless the judgment containing the measure is served on the respondent prior to enforcement.'

34 C. S. Goris, 'C-581/20 TOTO: A Missed Opportunity to Cast Light on Article 35 of the Brussels I Bis Regulation?', *14 Cuadernos Derecho Transnacional* (*CDT*) (2022) 915, at 918.

alike that *lis pendens* may only exist between proceedings on the merits and does not apply to provisional measures, which aligns with the approach adopted by the CJEU.

When confronted with the question of whether a chosen court may be conferred exclusive jurisdiction to issue security measures, the CJEU was inclined to accept it as possible. In this respect, the CJEU first stressed that despite a choice-of-court clause conferring exclusive jurisdiction on the merits, this does not necessarily imply that the exclusive jurisdiction of the chosen court also extends to provisional measures. It might still be possible to obtain provisional measures under Article 35, and their availability would depend on the terms of the jurisdiction clause. In *TOTO,* The CJEU left it up to the Bulgarian court to examine whether the jurisdiction clause also applied to provisional measures. This reasoning seems to be guided by the principle of 'freedom of choice', which gives parties the possibility to choose between two different courts. This approach aligns with the one adopted by several domestic courts in EU member states.[35] The next logical step in our analysis is to examine if and how the triumph of the court of the place of enforcement affects the Albanian jurisprudence.

Albanian courts have been confronted twice with the question of whether they are competent to issue pre-trial provisional measures when parties, by virtue of a choice-of-court agreement, have conferred jurisdiction on another court to examine the merits of the dispute. In both cases, the Albanian courts have answered affirmatively and, therefore, granted the motions, reasoning that foreign natural or legal persons may address the Albanian courts with motions for securing the claim, in cases when the assets of the respondent (debtor) are located in the Republic of Albania, even when a foreign court or arbitration tribunal enjoys jurisdiction as to the substance of the matter.[36]

The first case[37] concerned a supply contract of natural gas concluded between an Albanian company, 'A&V Gas' SHA, an Albanian fuel-trading company (the debtor), and 'Profil' BSA, a Swiss company (the creditor). The parties had agreed on a non-exclusive jurisdiction clause in favour of the London High Court. Due to several unpaid invoices, the debtor had accumulated a significant amount of debt to the creditor, forcing the latter to seise the District Court of Durrës with a motion to secure the claim, arguing that the reduction of the assets of the debtor could hinder the execution of a final judgment in his favour. The seised court declined its jurisdiction, reasoning that the parties by virtue of a choice-of-court clause had conferred jurisdiction on a foreign court. The HCA reversed this decision, arguing that irrespective of the existence of such clause, the Albanian courts enjoyed jurisdiction to examine the motion due to the prevalence of the nature of provisional measures, the *sui generis* character of the proceedings, the territorial connection with the assets sought to be seized, and the expediency with which these motions must be examined. The HCA reinforced its stance by

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35 Ibid.

36 This stance was adopted even prior to the entry into force of the current PILA. To this respect, see: High Court Civil Section (Albania), *Colliers International SHPK v. City Park SHPK*, judgment no. 00-2010-425(92) of 2 March 2010.

37 High Court Civil Section (Albania), *"Profil" BSA v. "A&V Gas" SHA,* judgment no. 00-2011-47 (22) of 19 January 2011.

also referring to Article 31 of the Brussels I Regulation no. 444/2001 of 22 December 2000, which allowed the courts of member states of the EU to issue provisional measures even when the court of another member state has jurisdiction as to the merits of the case. Reference to Brussels Ibis was made to overcome the omission of Albanian law regarding the international jurisdiction of Albanian courts over measures to secure the claim[38].

In the second case,[39] an Italian company requested the Court of Durres to arrest a ship owned by a Maltese company, the beneficial owner of which was an Albanian company, to secure a future claim for specific performance against the latter. The liability of the respondent was alleged based on a debt assumption contract concluded between the Italian and the Albanian company. By means of Article 7 of the agreement, the parties had conferred jurisdiction on the Court of Genoa to resolve any potential dispute between them. The arrest was requested based on Article 202 of the ACCP and Article 8 of the International Convention on Arrest of Ships.[40]

The Court noted that '[a]lthough in the case under review, the parties by agreement have conferred jurisdiction on the Court of Genoa to resolve any potential conflict, … an Albanian court still has international jurisdiction to adopt security measures based on Article 81 of the PILA, as the arrest of the ship will have to be executed in the Republic of Albania, since the ship is located in the territory of Albania'.[41] In reaching this conclusion, the Court also referred to the stance held by the HCA, that a foreign natural or legal person may access Albanian courts with a motion for securing the claim, if the assets of the respondent are located in the Republic of Albania, irrespective of whether a foreign court or arbitration tribunal enjoys jurisdiction over the merits.[42] Based on Article 8(1) of the International Convention on Arrest of Ships,[43] the jurisdiction of Albanian courts extends to the ship regardless of its flag, as it was located in the Port of Durrës.

The main argument used by the Albanian courts in both cases was the place of execution of the measure, which they gave priority to. However, neither court analysed the content of the choice-of-court clause for the purpose of determining whether it also applied to the motion for securing the claim. Should the courts have followed the guidance of the CJEU to review the scope of the exclusive choice-of-court clause, what would the outcome have been? This, of course, would satisfy the freedom of choice principle but would complicate matters in practice. Suppose that the courts decided that the choice of court clause confers jurisdiction not only to examine the substance of the matter, but the related provisional measures as well. The logical outcome would be for them to decline jurisdiction in favour of the court chosen by the clause. As a result, the only option left

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38 The first comprehensive regulation of private international law was made by Law No. 3920 of 21 November 1964 'On the enjoyment of civil rights by foreigners and on the application of foreign law', OJ 1964 L 9/217. This law was silent in this respect.

39 District Court of Durrës (Albania), *'AFH' SPA v. 'Adriatica Traghetti' SHPK,* decision no. 22 of 4 October 2012.

40 International Convention on Arrest of Ships 1999, 2797 UNTS 3, available at https://treaties.un.org/doc/Publication/UNTS/Volume%202797/Part/volume-2797-I-49196.pdf. Albania ratified this Convention by law no. 10035 of 22 December 2008 "On the adherence of the Republic of Albania to the United Nations Convention 'On Arrest of Ships', 1999", OJ 2008 L 201/10893.

41 *Supra* note 39, at 6.

42 *Supra* note 37, at 6-7.

43 Article 8(1) provides that 'This Convention shall apply to any ship within the jurisdiction of any State Party, whether or not that ship is flying the flag of a State Party'.

to the creditors would be to seek security measures before the foreign court and, should their motion be granted, have them recognized and enforced in Albania, if recognition is possible under the Albanian legal framework.

B. Can an Albanian Court, with Jurisdiction over the Substance of the Matter, Secure the Claim by Ordering the Seizure of Assets Located in a Different State?

Article 206 of the ACCP does not provide an exhaustive list of the measures that may be taken to secure the claim.[44] It neither allows nor denies the so-called Mareva injunctions. Mareva injunctions are orders issued in ex parte proceedings, which freeze all of the respondent's property worldwide.[45] The only case in which an Albanian court has issued a Mareva-like injunction was the 2021 case of *Kuka v Hyseni*,[46] in which the claimant, jointly with the lawsuit, filed a motion to freeze all assets owned by the respondent, located in Albania and Kosovo, until the conclusion of the main proceedings. Kuka, an Albanian citizen, claimed specific performance from Hyseni, a Kosovar citizen, for the unpaid rent between 2012 and 2020 in accordance with the lease contract.

The District Court of Durrës, following ex parte proceedings, granted the motion. The Court reasoned that since the respondent is a Kosovar citizen, there exists a reasonable doubt that he may frustrate the enforcement of the final judgment by dissipating the assets he owns in Albania and leaving the country at any time. Should that be the case, the claimant would have to file a request to the courts of Kosovo to recognize the judgment, the proceedings for the examination of which can be considerably lengthy. Since the enforcement stage is included in the 'length of the proceedings', this could potentially lead to a violation of the claimant's right to have their case examined within a reasonable time, inherent to his right to a fair trial.[47]

The District Court of Durrës implicitly indicated that a freezing order for all the debtor's assets worldwide was also permissible. However, since the motion was confined to the assets located in Albania and Kosovo, the Court could not go beyond what the claimant requested. The Court stressed that for the decision to be enforced in Kosovo, it should undergo the process of recognition as per the *lex fori* of that state.

The respondent appealed this decision, alleging that Albanian courts did not have jurisdiction to issue freezing orders regarding assets located abroad. The Court of Appeals rejected this argument, upholding the appealed decision.[48]

Indeed, according to Article 72(a)[49] in conjunction with Article 81 of the PILA, Albanian courts enjoy jurisdiction to examine motions for securing claims, the subject matter of which are lease contracts, since the

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[44] The only criterion imposed is that the value of the issued measure should not be higher than that of the main claim.

[45] K. Alexander, 'The Mareva Injunction and Anton Piller Order: The Nuclear Weapons of English Commercial Litigation.', *11* (3) *FJIL* (1997), Article 8, at 2, available at https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1303&context=fjil.

[46] District Court of Durrës (Albania), *Myslim Kuka v. Xhevdet Hyseni*, decision no. 151 of 2 July 2021.

[47] ECtHR, *Martins Moreira v. Portugal*, Appl. no. 11371/85, Judgment of 26 October 1988, at para. 44. All ECtHR decisions are available at http://hudoc.echr.coe.int/.

[48] Court of Appeal of Durrës (Albania), *Myslim Kuka v. Xhevdet Hyseni*, decision no. 10-2021-1635 (320) of 28 September 2021.

[49] Article 72 provides 'Irrespective of the rules of this law, Albanian courts enjoy exclusive jurisdiction in every case over the examination of: a) matters the subject of which are ownership rights and other real rights over immovable assets, as well as lease

latter fall within the scope of claims over which Albanian courts exercise exclusive jurisdiction. Article 81 complies with Articles 2(a)[50] and 35 of the Brussels Ibis, to which it was partially approximated. Since there are no provisions specific to the Mareva injunctions, we shall address their permissibility under Albanian law by interpreting the general provisions set forth by the PILA with reference to the case law of the CJEU.

In *Van Uden*, the CJEU implicitly precluded the permissibility of Mareva injunctions under Article 35 of the Brussels Ibis, reasoning that provisional measures fall within its scope only if the assets they relate to 'are located within the confines of the territorial jurisdiction of the court to which application is made.'[51] *Van Uden* expands on the *Denialuer* judgment,[52] where the CJEU held that freezing orders for assets located abroad issued in adversarial proceedings by courts with jurisdiction over the merits may be enforced according to the simplified procedure set forth by the Brussels Ibis Regulation. In the case of ex parte proceedings, the freezing orders may move freely within the EU *only* if delivered to the respondent prior to their enforcement. This does not preclude their recognition according to the *lex fori* of the state in which the measure is sought to be enforced.

In the present case, the decision of the District Court of Durrës was delivered to the respondent, Hyseni, who also exercised his right to appeal. Therefore, should this decision have been issued by a court located in an EU member state for assets also located therein, it would constitute a 'judgment' as per Article 2(a) of the Brussels Ibis Convention and, therefore, be subject to simplified enforcement. Since that is not the case, the claimant must necessarily initiate recognition proceedings in Kosovo. This showcases the importance of the guarantees offered by the *acquis* to the natural and legal persons of the EU, who benefit from the legal security inherent in adopting a common legal framework.

As a result, EU companies operating in non-EU states would find it safer to seek provisional measures from the courts where the assets are located, irrespective of whether the latter are EU Member States or not, as there is a high risk that decisions issuing provisional measures in the absence of a territorial link will neither be recognized, nor enforced in the state where the assets of the respondent are located.

C. Recognition and Enforcement of Provisional Measures

Requests for recognition of foreign judgments are always examined in accordance with the *lex fori* of the requested court. Therefore, it is the latter that examines whether the decision sought to be recognized satisfies the necessary criteria for recognition. Chapter IX of the ACCP governs the procedure for the recognition and enforcement of foreign decisions in Albania. As a general rule, this procedure is based on the conditions laid

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and the rights emanating from the use of immovable assets in exchange for remuneration, when the latter are located in the Republic of Albania…'.

50 Article 2 provides '(a) … For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which such a court or tribunal orders without the respondent being summoned to appear unless the judgment containing the measure is served on the respondent prior to enforcement.'

51 *Supra* note 31 at para. 47.

52 Case C-125/79, *Bernard Denilauler v SNC Couchet Frères* (EU:C:1980:130).

down by the ACCP and separate laws.[53] However, when an international agreement exists on that matter, to which Albania is a party, the provisions of that agreement shall supersede those of the ACCP.[54]

The first issue addressed by the Albanian courts when seised by a motion for recognition is whether the decision sought to be recognized is prima facie eligible for recognition i.e., whether it constitutes a 'decision' as per Article 393(1) of the ACCP. Whereas the ACCP classifies decisions into interim, non-final, and final, neither of the provisions regulating recognition proceedings defines which types of 'decisions' may be eligible for recognition. As a result, courts used to attach different interpretations to this notion. To ensure its uniform interpretation, the Joint Panels of the HCA issued a binding unifying judgment by which they concluded that the notion of 'decision' must be construed as referring only to final judgments resolving the case in its merits.[55]

What this binding stance implies is that provisional measures of any kind cannot be recognized in Albania, unlike the EU. Thus, in cross-border disputes, the obtainment of a freezing order over assets located in Albania from the 'chosen court' enjoying jurisdiction over the substance, would not serve the purpose of the creditor (i.e., to secure the risk of non-enforcement), as this decision can be neither recognized, nor executed in Albania. The most financially valid scenario for the creditor would be to always submit their motion for provisional measures to the Albanian courts. Justice will be provided and guaranteed in this case.

D. The Applicable Law

Both the PILA and Article 35 of the Brussels Ibis Regulation provide that the applicable law for motions on provisional measures will be the *lex fori*. If the motion is filed before the commencement of the main proceedings, Article 204(2) of the ACCP applies, according to which the court granting the motion sets a term no longer than 15 days, within which the claimant ought to file the main lawsuit. Based on Article 211(1) of the ACCP, if the claimant does not abide by this term, the provisional measure is discontinued. Conversely, based on Article 212(1) of the ACCP, if the claimant abides by the term and his claim is successful, the court of first instance orders the continuity of the measure until the appellate court issues a final judgment.

Indeed, when a court other than that issuing the provisional measure enjoys jurisdiction as to the substance of the matter, it gives rise to a dichotomy of the applicable procedural rules. For the purpose of clarifying which set of rules applies, one may seek the answer in the international acts in force. It is worth noting that the Brussels Ibis Regulation does not help in this respect, as Recital 35 confines the effects of measures issued by a non-competent court to the territory of the state where the court is located.

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[53] Per Article 393(1) of the ACCP, 'The decisions issued by foreign courts shall be recognized and enforced in the Republic of Albania, subject to the conditions set forth in this Code or in other separate laws.'

[54] According to Article 393(2) of the ACCP, which provides that: 'When for this purpose a special agreement is in force between the Republic of Albania and the foreign state, the provisions of the agreement shall be applied.'

[55] High Court Joint Sections (Albania), *I.C.M.A. S.R.L and AGRI. BEN S.A.S v Ministry of Agriculture and Food*, unifying judgment no. 6, of 1 June 2011.

1. *If the Lex Fori of the Court that Secured the Claim and the Lex Fori of the Court with Jurisdiction over the Merits stipulate Different Terms for Filing the Claim, which Term should the Claimant Abide by?*

When determining the applicable deadline to file the main lawsuit, states may wish to grant precedence to their own procedural legislation if its inherent terms are more favourable to the claimant. On the other hand, should they be detrimental as opposed to the *lex fori* of the court issuing the provisional measure in respect of the term allowed for filing the main lawsuit, the Courts should consider it filed on time. This stems from the principles set forth by the ECtHR – also applicable to EU Member States by virtue of membership – according to which member states should guarantee the legitimate expectations of the persons under their jurisdiction.[56]

In this sense, the decisions granting provisional measures have created legitimate expectations on the claimants that the issued measure will remain in force should they file the lawsuit within the term set by the court. Refusing to recognize this decision only as a result of the national legislation of the required court being less favourable to the applicant would result in a violation of their right to a fair trial and an effective legal remedy, enshrined in articles 6 and 13 of the ECHR. Therefore, the requested courts should apply the term set in the decision ordering the provisional measure when verifying whether the measure is still in force and, therefore, recognizable.

2. *Which Court is Competent to Order the Continuity of the Provisional Measure if the Claim is Accepted in its Merits? Which is the Applicable Law?*

We believe that both courts are able to order the continuity of the effects of the provisional measure once the matter has been resolved in favour of the claimant at the first instance. However, if the claimant wishes for this verdict to be issued by the court that ordered the provisional measure in the first place, i.e., the Albanian court, they should first recognize the judgment on the merits in Albania, according to articles 393 et seq. of the ACCP. However, the court with jurisdiction on the merits may also order the continuity if the decision issuing provisional measures has been successfully recognized in that state.

4. Protective Measures for the Preservation of Evidence Pre-Trial

Articles 292 et seq. of the ACCP provide that courts may issue an order for the preservation of evidence upon the claimant's request when there is a high risk that the evidence may be lost or become difficult to obtain. The HCA has construed such measures as being of a 'protective nature' since they protect the evidence central to the case, without which the claimant may not be able to reinstate their subjective rights judicially.[57]

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[56] ECtHR, *Cañete de Goñi v. Spain,* Appl. No. 55782/00, judgment of 15 October 2002, at para. 36.

[57] High Court Administrative Section (Albania), *Arjana Nerguti v. the District Court of Kukës,* judgment no. 00-2021-1471 of 1 October 2021, at para. 13.

It is important to note that the motions for securing the claim and preserving evidence in Albania are very distinctive, both in terms of their purpose, inherent criteria, the source of the risk sought to be alleviated, and the related judicial proceedings. Specifically, while the purpose of securing the claim is to guarantee the enforceability of the judgment on the merits of the case, the preservation of evidence aims to guarantee the stability and integrity of evidence so as to allow the claimant to exercise his right of access to a court effectively.

Additionally, while the risk of non-enforcement inherent in the motion to secure the claim stems from the respondent's behaviour, the risk of evidence disappearance may stem from the properties inherent in the evidence itself. Finally, whereas proceedings for examining the motion to secure the claim ought to be finalized within five days, no such term applies to the proceedings for the preservation of evidence.

As measures for the preservation of evidence fall within the scope of Article 35 of the Brussels Ibis Regulation, it is crucial for EU creditors to understand whether they enjoy the same guarantees under the Albanian law as under that of the EU, so that they select the most viable option to preserve evidence in accordance with the most favourable legislation. This also helps to present the incompatibilities between the ACCP and the *acquis* to the Albanian lawmaker, which may choose to intervene in order to approximate the rules that are detrimental to EU creditors, therefore being a step closer to full legal approximation, which will be inevitably the result of Albania's pre-accession phase.

A. The Nature of the Main Claim

The nature of the main claim is one of the elements that determine the court enjoying jurisdiction to examine the case. However, the classification of proceedings differs amongst states. For instance, the meaning of 'civil disputes' according to Albanian legislation is much broader than that of the Brussels Ibis Regulation. The former also includes the disputes exempted from the scope of 'civil or commercial disputes' as per Article 1(2) of the Brussels Ibis. On the other hand, disputes which are typically classified as 'administrative' according to Article 17 of the Albanian law on administrative disputes,[58] may fall under the scope of 'civil disputes' per the interpretation of the CJEU. Therefore, this notion has an autonomous meaning which should be interpreted by referring '... first, to the objectives and scheme of that regulation and, second, to the general principles which stem from the corpus of the national legal systems.'[59]

As the CJEU held in *Movic*, the nature of provisional and protective measures is determined by the legal relationship between the parties to the main case.[60] Albania also adopts this stance.[61] However, the CJEU's definition of civil and administrative cases varies from that adopted by the HCA. The CJEU has implicitly embraced variations in interpretation by granting authority to the seized courts to determine the nature of the

[58] Law no. 49/2012 of 3 May 2012 'On administrative courts and the examination of administrative disputes', OJ 2012 L 53/2701.
[59] Case C-641/18, *LG and Others v Rina SpA and others,* (EU:C:2020:349) at para. 30.
[60] Case C-73/19, *Belgische Staat* and others*. v Movic BV, Events Belgium BV, Leisure Tickets & Activities International BV*, (EU:C:2020:568), at para. 37.
[61] *Supra* note 57, at para. 14.

dispute.[62] However, the various interpretation of the rules inherent in the Brussels Ibis Regulation should be foreseeable for reasonably well-informed respondents. Otherwise, legal certainty would be undermined.[63]

If the dispute arises out of a contractual relationship one of the parties to which is a public authority, the public purpose of the contract does not necessarily suffice to classify it as *acta iure imperii*. Instead, the court must examine whether, in entering the agreement, the public authority had exercised specific powers which '… fall outside the scope of the ordinary legal rules applicable to relationships between private individuals.'[64] For example, a specific performance claim and the related provisional measures may fall under the scope of Article 1(1) of the Regulation insofar as the public authority did not act in the course of the exercise of its public powers.[65] In the same logic, measures for the preservation of evidence ancillary to a dispute concerning penalties emanating from a public procurement contract fall within the scope of the Regulation, as penalties are purely contractual.[66]

The criteria distinguishing between 'civil and commercial disputes' and 'administrative' ones are quite sparse and vaguely worded, which leaves room for varying interpretations by national courts. Elaboration of more detailed and practical criteria would ensure a uniform judicial interpretation, which serves to guarantee legal certainty within the EU.[67]

B. The Nature of the Evidence Sought to Be Preserved

A strict interpretation of Article 293 of the ACCP would lead to the conclusion that only two types of evidence may be preserved: documentary evidence on the condition (state) of an object or person, and witness testimony. However, Albanian courts by means of an extended interpretation, have also allowed the preservation of expert evidence, reasoning that the latter shall only examine the actual state of the object or person and will not draft a proper expert report on the matter. It is worth noting that in Albania, expertise is a separate type of evidence, which takes a central role in the determination of facts in a civil case. This prominent position of expert evidence within the probatory process may derive from the fact that the expert report, albeit legally not obligatory for the court, has been consistently interpreted as binding unless the other evidence prima facie shows the opposite of what the expert has concluded.[68]

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62 *Supra* note 60, at para. 38.

63 Case C-440/97, *GIE Groupe Concorde and Others v The Master of the vessel "Suhadiwarno Panjan" and Others*, EU:C:1999:456, para.23-24; case C-256/00, *Besix SA*, (EU:C:2002:99), para.24-26 and case C-281/02, *Andrew Owusu v N. B. Jackson and Others* (EU:C:2005:120), para. 38-42.

64 Case C-551/15, *Pula Parking d.o.o. v Sven Klaus Tederahn* (EU:C:2017:193), at para. 35.

65 *Supra* note 24.

66 Case C-581/20, *supra* note 32, at para. 48. See also: case C-222/15, *Hőszig Kft. v Alstom Power Thermal Services,* (EU:C:2016:525), at para. 28.

67 Legal certainty is one of the main aims of the Brussels Ibis Regulation. To this effect, see the CJEU cases cited *supra* note 63.

68 High Court Administrative Section (Albania), *Tefta Daci v. the Council for the Regulation of Territory at the Bulqiza Municipality*, judgment no. 00-2017-2613 (829) of 31 October 2017, at para. 50.

1. Expert Evidence

In three recent cases,[69] the expert appointed to preserve the evidence, in addition to documenting the health condition of the claimant – which was the sole duty imposed by the court – also evaluated the nature of the damage incurred and the grade of incapacity to work caused by said damage. The respondents disputed that these expert conclusions should not be included in the decision for the preservation of evidence, as they constitute an expert report *par excellence*, thus falling outside the scope of Article 293 of the ACCP. The court dismissed this request, reasoning that the expert conclusions shall be subject to debate during the proceedings for the main dispute, where the respondent may present any objections they have as to the legality of the report.

We consider that the ACCP does not allow for such an extensive interpretation. While appointing an expert is permissible when Article 293 is read in conjunction with Article 286 of the ACCP, this may only occur when the nature of the evidence sought to be preserved imposes the expert's appointment to obtain it.[70] In these cases, the preserved evidence is not the 'expertise' but the 'examination' recorded by the expert.

In these motions, the expert may not compile a proper report, as expertise is regulated by strict procedural rules.[71] These rules create a complex 'process within a process', where parties have the right to propose tasks for the expert, require clarifications, and discuss the findings of the expert, among others. These rights cannot be guaranteed in the proceedings for preserving evidence due to their very nature. Alas, after the evidence is obtained, the proceedings end, and neither party may submit further requests or observations regarding the obtained evidence. Additionally, the state of 'urgency' ceases to exist after the evidence is preserved. If the latter needs to be examined or evaluated by an expert, the expertise must be performed during the main proceedings. Nevertheless, in the absence of a unifying judgment from the HCA, lower courts have not hesitated to secure expert evidence.

2. Witness Testimony

At first glance, it seems that Recital 25[72] has exempted the preservation of witness testimony from the scope of 'provisional, including protective measures'. On the other hand, the fact that CJEU excluded witness examination from the scope of 'protective measures' when the purpose of such measure was to evaluate the chances of the claimant to file a lawsuit does not appear to stem from an *ex lege* exemption of witness testimony. Rather, the cause of the exclusion was that the measure '… [did] not pursue the aim of the

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[69] District Court of Tirana (Albania), *Megis Molla v. 'Doctor's Hospital' SHPK,* judgment no. 46 of 23 November 2023; *D. M. Muça v. 'American Hospital' SHA*, judgment no. 25 of 18 May 2023; and *A. M., Tauland Memushaj and Fotika Dhimolea v. 'International Hospital' SHA,* judgment no. 78 of 9 May 2022.

[70] For example, a medical expert is the only person suitable to perform a health examination and record his findings accordingly due to the need for medical knowledge.

[71] Articles 224/a *et seq.* of the ACCP.

[72] 'The notion of provisional, including protective, measures should include, for example, protective orders aimed at obtaining information or preserving evidence as referred to in Articles 6 and 7 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. It should not include measures which are not protective, such as measures ordering the hearing of a witness …'.

jurisdiction laid down by way of derogation by Article 24 of the Convention, which is to avoid causing loss to the parties as a result of the long delays inherent in any international proceedings and to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case.'[73] By an a contrario interpretation of this stance, one could conclude that should the obtainment of testimony pre-trial satisfy one of the purposes of Recital 35 of the Brussels Ibis Regulation, it could fall within the meaning and scope of 'protective measures'.

A typical cause for which courts may allow the preservation of witness testimony would be the old age of the witness or their suffering from a terminal illness, both of which could result in their death before being able to obtain the testimony in the main proceedings. This could potentially cause the loss of the claimant's right to enforce his subjective rights through the operation of judicial authority. In a more extensive interpretation, a dismissal of the request for the preservation of evidence in these cases could violate Article 6 of the ECHR as a result of an indirect denial of access to the court. Specifically, the refusal of courts to preserve evidence instrumental to the main dispute due to a stringent interpretation of the law would make the right of access to a court illusory and theoretical, rather than practical and effective, which contradicts the very nature of the rights guaranteed by the ECHR.[74]

This affirmative interpretation would also be compatible with article 6(3) of the TEU, which provides that '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.' Additionally, Article 53 of the EU Charter sets the rights guaranteed by the ECHR as the minimum standard to be adopted by EU Member States. This invokes that the *acquis* may afford a higher level of protection than the ECHR.

In conclusion, we consider that the preservation of witness testimony may fall within the scope of 'protective measures' under the Brussels Ibis Regulation, as long as its purpose is to preserve the factual or legal situation instrumental to the main proceedings.

C. Jurisdiction over Motions for the Preservation of Evidence

Preservation of evidence is regulated in only four articles of the ACCP, neither of which contain any rules regarding the international jurisdiction of Albanian courts over motions for the preservation of evidence. The only Article of the PILA concerning jurisdiction on proceedings other than the main ones is Article 81. As stated above, whereas scholars argue that this article should also apply to the preservation of evidence as one of the forms of provisional protective measures, Albanian courts do not favour this interpretation and apply Article 81 only to motions for securing the claim.

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[73] Case C-104/03, *St. Paul Dairy Industries NV v Unibel Exser BVBA,* (EU:C:2005:255), at para. 17.
[74] ECtHR, *Airey v. Ireland,* Appl. no. 6289/73, Judgment of 9 October 1979, at para. 24.

On the other hand, Article 294(1) of the ACCP establishes territorial competence depending on whether the main claim has been instituted or, rather the evidence is being secured pre-trial. In the former situation, the only competent court is the one before which the main proceedings are instituted. Meanwhile, when the preservation of evidence is requested pre-trial, the court enjoying territorial competence shall be '… the court of the domicile of the person who shall be questioned or of the location of the object that shall be examined.'

At this point, it is important to stress that under the ACCP, territorial competence is a different institute from jurisdiction. Whereas the rules on jurisdiction determine the authority of Albanian courts to examine a case as opposed to public authorities, arbitration tribunals, or foreign courts, the rules on territorial competence ascertain which of the Albanian courts is competent depending on the location of certain elements of the matter.

In light of such a precise provision on territorial competence, it is curious why the Albanian legislator has refrained from sanctioning similar rules on international jurisdiction. Consequently, one may ask whether this legal omission implies that the general rules of the ACCP relating to jurisdiction shall apply in these cases, too, and if so, whether these provisions will be complementary to Article 294(1) when establishing territorial jurisdiction. The answer may be extrapolated from the stance adopted by the HCA on the applicability of general rules on subject-matter competence. In this respect, the HCA held that 'Article 293 of the Code of Civil Procedure does not have universal application and does not aim to disrupt the division between civil and administrative courts… If the evidence, the preservation of which is requested, serves civil proceedings, the civil court should obtain it (or not), whereas when this evidence serves administrative proceedings, it shall be obtained by the competent administrative court.'[75]

This stance is the diametric opposite of the one adopted by the HCA regarding proceedings on securing the claim, which cements the judicial interpretation that these motions are not subjected to the same procedural rules. Insofar as the conclusions of the HCA establishing the prevalence of 'urgency' over rules on subject-matter competence do not apply to the proceedings for the preservation of evidence, neither will its conclusions on jurisdiction be considered applicable. Therefore, the HCA does not help to overcome this legal omission either.

However, the HCA has encouraged Albanian courts to refer to the EU Regulations for guidance in cases of legal omissions or *praeter legem*.[76] In this respect, reference can be made to the Brussels Ibis Regulation, Recital 22 and Article 35 of which include preservation of evidence within the scope of 'provisional, including protective measures'. Since unlike the ACCP, the Regulation does not distinguish between provisional and protective measures, the conclusions of the CJEU on either of them shall be relevant in determining matters related to preservation of evidence. A conciliatory interpretation leads to the conclusion that Albanian courts

[75] *Supra* note 57, at para. 14.
[76] *Supra* note 16, at para. 14.2-14.3.

shall enjoy international jurisdiction to preserve evidence pre-trial when they enjoy jurisdiction over the main matter, or when there exists a territorial link between the court and the location of the evidence to be preserved.

In the event of future EU accession by Albania, which would make it part of the Brussels I system, the decision should be issued by a court with full jurisdiction over the subject of the matter in order for it to be considered a 'judgment' per Article 2(a) of the Regulation, entitling it to free movement within the EU.

D. The Adversariality of the Proceedings

Article 294(2) of the ACCP[77] provides that the respondent shall be notified of the motion for preservation of evidence, without explicitly sanctioning their right to be heard. However, its interpretation in conjunction with Articles 9 and 18 of the ACCP indicates that the aim of notification can only be to ensure the participation of the respondent in the proceedings and to guarantee their right to be heard. Consequently, in most cases, respondents are granted both the right to be heard and the right to be present when the evidence is obtained.

Nevertheless, the said article allows for derogation from the general rule, when (i) the interested party is unknown or (ii) the obtainment of evidence does not allow for delays. The first cause typically occurs when the main claim concerns damages due to the tortious liability of a third party that the claimant has yet to identify. The second might arise when the claimant seeks to challenge an administrative order for the demolition of a building and receive compensation for the incurred damages, for which they wish to record as evidence the condition of the building pre-demolition. If the date of demolition is set, the court may not be able to postpone the obtainment of the evidence to wait for the notification of the respondent.

While it is true that the rules governing these proceedings fall within the states' legislative power, for EU creditors to benefit from the Brussels Ibis system, the proceedings for the preservation of evidence and the decisions issued at their outset must meet the criteria stipulated Article 2(a) of the Regulation. Compliance is the only option that ensures their free circulation within the EU as a result of the simplified recognition procedure. That being said, for a decision to be deemed as a 'judgment' for the purpose of its free movement within the EU, the respondent must have been notified on his right to be heard or, alternatively, on the decision issued by the Court *prior* to its execution.

In Albania, the second scenario is impossible to occur. The examination of the motion for preservation of evidence is conducted in two distinct stages. In the first stage, the court issues an interim decision on the admissibility of the request. This decision is not reasoned separately. However, it is recorded in the minutes of the hearing. Since parties have no right to special appeal against this decision, neither the decision itself nor the minutes of the hearing are notified. In the second stage, the court proceeds with the enforcement of the admissibility decision by obtaining the evidence. The 'final' decision is issued after the evidence is obtained

[77] '… A copy of the motion shall be notified to the other party, save for the cases when the latter is unknown, or the obtainment of evidence does not allow for delays.'

and serves only to describe the preserved evidence and the method of obtainment. As a result, the respondent is notified of the decision granting the motion for the preservation of evidence only after it is executed.

To put perspective to what this would mean for EU creditors should Albania have already acceded to the EU, a decision for the preservation of evidence issued in ex parte proceedings cannot be construed as a 'judgment' for the purpose of Article 2(a) of the Regulation and does not benefit from free movement.

5. Concluding Remarks

In conclusion, we may infer that measures issued by courts to secure the main claim and to preserve evidence as per the ACCP fall within the concept of 'provisional, including protective measures' as per Article 35 of the Brussels Ibis Regulation. However, since Albania is not a member of the EU, the inherent rules set forth by the latter are neither applicable, nor do they afford protection to the parties to a cross-border matter when the provisional measures ancillary to it are examined in Albania.

In light of an increase in international commerce between Albanian companies and companies located in the EU, the Albanian legislator should take measures to accommodate the needs of the latter for equal guarantees under Albanian law. This may be achieved by adopting relevant amendments seeking to approximate PILA to the *acquis* of the EU in its entirety. Approximation is especially necessary with respect to establishing common rules on jurisdiction for provisional and protective measures, the scope of the measures, and the nature of the rights or evidence they seek to preserve and protect. Such legislative measures would also be compatible with the obligations assumed by Albania under Article 70 of the Stabilization and Association Agreement, as interpreted by the HCA.

However, the fastest way to ensure a de facto approximation would be through a Unifying Judgment of the Joint Panels of the HCA on the yet unresolved procedural matters presented herein concerning proceedings for securing claims and preserving evidence. The procedure followed by the HCA in such cases, while not subject to any specific time limits, is nevertheless bound to abide by the principle of 'reasonable length of the proceedings' inherent in Article 6 of the ECHR. Therefore, the process for unifying the case law of the lower courts would undoubtedly be far more expeditious than the legislative process for adopting new laws or amending the existing ones. Since unifying judgments are binding on the lower courts, EU creditors would be granted the much-desired legal certainty as to the applicable rules and the interpretation thereof in the examination of their civil and commercial cases by Albanian courts.

The undertaking of the steps mentioned above is also favourable for Albanian citizens and companies, as it smooths the legislative transition towards full adoption of the EU *acquis*, which is expected to occur at the aspired successful conclusion of Albania's accession procedure to the EU. It would also increase the credibility of Albanian companies in the EU market, thus creating higher opportunities for cross-border commerce.