Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 18 September 2019[1]

Case C-678/18

Procureur-Generaal bij de Hoge Raad der Nederlanden

(Request for a preliminary ruling
from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling — Admissibility — Article 267 TFEU — Concept of dispute — Appeal in cassation in the interests of the law — Immutability of the situation decided upon by the judgment under appeal — Designs — Provisional and protective measures — Jurisdiction of national courts of first instance to hear and determine proceedings for protective measures — Exclusive jurisdiction of the Community design courts)

1. Regulation (EC) No 6/2002[2] established that Member States were to designate in their respective territories one or more 'Community design courts' with exclusive jurisdiction to dispose of certain actions relating to the infringement and invalidity of Community designs (Article 81).

2. In the course of implementing that mandate, the Netherlands conferred that head of exclusive jurisdiction on the rechtbank Den Haag (District Court, The Hague, Netherlands), to one of whose judges it also assigned jurisdiction to grant protective and provisional measures.

3. However, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) is uncertain whether the latter provision (to the effect that the judge of the specialised Community design court based in The Hague has exclusive jurisdiction to adopt provisional and protective measures in disputes under Article 81 of Regulation No 6/2002) is consistent with other provisions in that regulation.

4. The referring court's uncertainty stems from the controversy which has arisen in the Netherlands, where a number of courts of first instance and courts of appeal which do not have the status of Community design courts have declared themselves to have jurisdiction to hear applications for protective and provisional measures in proceedings relating to actions for a declaration of infringement or invalidity of such designs.

I. Legal framework

A. EU law: Regulation No 6/2002

5. Title IX concerns 'Jurisdiction and procedure in legal actions relating to Community designs'.

1 Original language: Spanish.

2 Council Regulation of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

6. The second section of that title, which comprises Articles 80 to 92, deals with 'Disputes concerning the infringement and validity of Community designs'.

7. According to Article 80 ('Community design courts'):

'1. The Member States shall designate in their territories as limited a number as possible of national courts and tribunals of first and second instance ("Community design courts") which shall perform the functions assigned to them by this Regulation.

…'

8. Article 81 ('Jurisdiction over infringement and validity') provides:

'The Community design courts shall have exclusive jurisdiction:

(a) for infringement actions and — if they are permitted under national law — actions in respect of threatened infringement of Community designs;

(b) for actions for declaration of non-infringement of Community designs, if they are permitted under national law;

(c) for actions for a declaration of invalidity of an unregistered Community design;

(d) for counterclaims for a declaration of invalidity of a Community design raised in connection with actions under (a).'

9. Article 90 ('Provisional measures, including protective measures') provides:

'1. Application may be made to the courts of a Member State, including Community design courts, for such provisional measures, including protective measures, in respect of a Community design as may be available under the law of that State in respect of national design rights even if, under this Regulation, a Community design court of another Member State has jurisdiction as to the substance of the matter.

2. In proceedings relating to provisional measures, including protective measures, a plea otherwise than by way of counterclaim relating to the invalidity of a Community design submitted by the defendant shall be admissible. Article 85(2) shall, however, apply *mutatis mutandis*.

3. A Community design court whose jurisdiction is based on Article 82(1), (2), (3) or (4) shall have jurisdiction to grant provisional measures, including protective measures, which, subject to any necessary procedure for recognition and enforcement pursuant to Title III of the Convention on Jurisdiction and Enforcement, are applicable in the territory of any Member State. No other court shall have such jurisdiction.'

10. Section 3 of Title IX (Articles 93 and 94) is devoted to 'Other disputes concerning Community designs'.

11. Article 93 ('Supplementary provisions on the jurisdiction of national courts other than Community design courts') states:

'1. Within the Member State whose courts have jurisdiction under Article 79(1) or (4), those courts shall have jurisdiction for actions relating to Community designs other than those referred to in Article 81 which would have jurisdiction *ratione loci* and *ratione materiae* in the case of actions relating to a national design right in that State.

…’

B. National law

1. Wet op de rechterlijke organisatie (Law on the organisation of the judiciary)

12. In accordance with Article 78:

‘1. The Hoge Raad [(Supreme Court)] shall hear and determine an appeal in cassation brought against acts, judgments, orders and decisions of courts of appeal or courts of first instance, whether by a party or, “in the interests of the law”, by the Procureur-generaal [(“Procurator General”)] attached to the Hoge Raad.

…

7. An appeal in cassation “in the interests of the law” cannot be brought if an ordinary appeal is available to the parties and does not prejudice the rights acquired by the parties.’

13. Article 111(2), heading and point (c), confers on the Procurator General standing to bring an appeal in cassation in the interests of the law.

2. Law of 4 November 2004 implementing the Regulation of the Council of the European Union on Community designs and designating the court competent to hear and determine disputes relating to Community designs (Law implementing the EC Regulation on Community designs)[3]

14. Article 3 provides:

‘Exclusive jurisdiction to hear and determine at first instance all of the actions referred to in Article 81 of the Regulation shall lie with the rechtbank Den Haag [(District Court, The Hague)] and, in proceedings for protective measures, with the judge dealing with applications for provisional measures at that court.’

II. Facts of the dispute and reference for a preliminary ruling

15. Spin Master is a Canadian toy manufacturer. Under the brand name ‘Bunchems’, it markets a toy consisting of coloured balls that can be stuck together to build any kind of shape or figure. On 16 January 2015, it registered that toy in its own name as a Community design under number 002614669 0002.

16. Under the name ‘Linkees’, High5 markets a toy consisting of coloured balls that can be stuck together to design any kind of shape or figure.

17. Spin Master brought before the judge dealing with applications for provisional and protective measures at the rechtbank Amsterdam (District Court, Amsterdam, Netherlands) proceedings for the adoption of such measures on grounds of infringement of the Community design it had registered. In particular, it sought a ban on the marketing of High5 products in the territory of the Netherlands.

3 (Nederlandse) Wet van 4 november 2004 tot uitvoering van de verordening van de Raad van de Europese Unie betreffende Gemeenschapsmodellen houdende aanwijzing van de rechtbank voor het Gemeenschapsmodel (Uitvoeringswet EG-verordening betreffende Gemeenschapsmodellen) (Stb. 2004/573). ‘Law of 4 November 2004’.

18. In those proceedings, High5 argued *in limine litis* that the rechtbank Den Haag (District Court, The Hague) had exclusive jurisdiction to hear and determine the dispute and that the rechtbank Amsterdam (District Court, Amsterdam) therefore lacked jurisdiction.

19. On 12 January 2017, the court dealing with applications for provisional measures at the rechtbank Amsterdam (District Court, Amsterdam) dismissed the objection of lack of jurisdiction, on the basis of Article 90(1) of Regulation No 6/2002, and granted a series of provisional and protective measures.[4] In that same decision, it held that the time limit for bringing an action on the substance of the matter, as laid down in Article 1019i of the Netherlands Code of Civil Procedure, was 6 months from the date of that decision.

20. The Procurator General, after noting that there is disagreement among courts in the Netherlands as to whether judges dealing with applications for protective and provisional measures at rechtbanken (district courts) other than the rechtbank Den Haag (District Court, The Hague) have jurisdiction to adopt such measures in proceedings relating to Community designs, brought an appeal in cassation 'in the interests of the law' against the decision of the judge dealing with applications for provisional measures at the rechtbank Amsterdam (District Court, Amsterdam).

21. In the ground of the appeal in cassation, the Procurator General argued that:

– under Netherlands law, the only judge with jurisdiction to adopt provisional and protective measures in proceedings for infringement of Community designs is the judge sitting at the rechtbank Den Haag (District Court, The Hague);

– Article 90(2) of Regulation No 6/2002 is not applicable to the disputes provided for in Article 81 thereof, as can be inferred from the legislative history and 'scheme' of that regulation.

22. It was in those circumstances that the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred the following question to the Court of Justice for a preliminary ruling:

'Must Article 90(1) of Regulation No 6/2002 be interpreted as requiring the mandatory granting, to all courts and tribunals of a Member State referred to therein, of jurisdiction to grant provisional and protective measures, or does it leave the Member States — in full or in part — free to delegate jurisdiction to grant such measures exclusively to the courts and tribunals which, in accordance with Article 80(1) of Regulation No 6/2002, have been designated as courts (of first and second instance) for Community design[s]?'

III. Procedure before the Court of Justice

23. The request for a preliminary ruling was received at the Court of Justice on 5 November 2018.

24. Written observations have been lodged by the Procurator General, the Government of the Netherlands and the Commission. It was not considered necessary to hold a hearing.

4 Including a ban, on pain of coercive fines, prohibiting High5 from selling its toy balls and their accessories and an order requiring it to ask businesses to return the stock they had purchased in return for a refund of the purchase price and the costs of carriage. High5 was also instructed to provide Spin Master with a list of its suppliers and purchasers, together with details of the products supplied.

IV. Assessment

25. The question referred for a preliminary ruling boils down to whether or not the exclusive jurisdiction of the (specialised) Community design courts to hear and determine certain actions for a declaration of infringement and invalidity, as provided for in Articles 80 and 81 of Regulation No 6/2002, extends to the protective or provisional measures dealt with in Article 90 of that regulation.

26. The uncertainty stems from the fact that, in opposition to the aforementioned exclusivity, Article 90 appears to pave the way, in the context of Community designs, for applications for the adoption of protective and provisional measures to be made to other courts in the Member States (that is to say, not only the specialised courts).

27. Before we look at the answer to that point of uncertainty, we must clarify whether, as the national court intimates in its order for reference, the present dispute fulfils the requirements of Article 267 TFEU.

A. The admissibility of the reference for a preliminary ruling

28. The present reference for a preliminary ruling on interpretation was made in the course of an appeal in cassation 'in the interests of the law', which the Procurator General may bring against decisions of the courts of first instance and courts of appeal against which no further ordinary appeal lies.

29. This form of appeal in cassation is intended to ensure the uniform application of the law. It is available in circumstances where the point at issue arises in a large number of cases and, in the absence of a decision by the Hoge Raad (Supreme Court), the courts have resolved the matter in different ways.

30. It is a procedural mechanism that represents the supreme example of the nomophylactic function traditionally performed by the appeal in cassation (that is to say, to protect the law in an objective sense rather than to protect the subjective interests of the litigants). In addition to discharging that function, it also serves the purpose, 'in the interests of the law', of establishing a prospective rule of case-law the result of which, although being of no practical consequence for the underlying dispute, will henceforth be set in stone. In the event that the appeal is upheld, the judgment under appeal will have to be set aside, but this will not affect the legal position of the parties, this having been definitively fixed in the proceedings at first instance.

31. The Hoge Raad (Supreme Court) is of course a court against whose decisions there is no further remedy within the meaning of Article 267 TFEU. It therefore has an obligation, in the event of any uncertainty as to the interpretation of a provision of EU law, to make a reference for a preliminary ruling to the Court of Justice.

32. It might be thought that, although it is true that the referring court exercises a judicial function in a general sense, since the appeal in cassation in the interests of the law does not involve a dispute as such between the parties, the reference for a preliminary ruling should be declared inadmissible.

33. In my opinion, however, that objection is untenable. The Court of Justice ruled out long ago the requirement that a reference for a preliminary ruling should be made in the context of *inter partes* proceedings.[5] As Advocate General Ruiz-Jarabo Colomer stated, a question may be referred for a preliminary ruling 'even if there is no debate. The decisive factor … is that the body seeking the help of the Court of Justice is exercising the functions of a court or tribunal and considers that an interpretation of Community law is essential for it to reach a decision. The fact that the proceedings in which the question arises are or are not defended is irrelevant'.[6]

34. If, as in the present case, there has been a previous dispute between the parties and the decision at first instance has, via the route of an ordinary appeal or an appeal in cassation, come before a higher court, 'the appellate court must, in principle, be regarded as a court or tribunal within the meaning of Article [267 TFEU], with jurisdiction to refer a question to the Court for a preliminary ruling'.[7]

35. The foregoing is not precluded by the fact that the individual situation of the litigants remains unchanged regardless of the purport of the judgment given in the interests of the law. On the contrary, the *erga omnes* effect of judgments of this kind lends them a quality which, precisely because it extends beyond the individual case, amply justifies the jurisdiction of the Hoge Raad (Supreme Court) to seek from the Court of Justice an answer which, in providing an interpretation of EU law, will be more far-reaching and thus ensure that Regulation No 6/2002 is uniformly applied by all courts in the Netherlands.

36. In short, it is my view that there is no obstacle to the admissibility of the question referred for a preliminary ruling.

B. Substance

37. Regulation No 6/2002 opted for a model based on specialised courts: each Member State is to designate as limited a number as possible of national courts and tribunals (which are to be known as 'Community design courts') to adopt decisions on the invalidity and infringement of Community designs.

38. That rule, laid down in Articles 80 and 81 of that regulation, means that the *substantive* resolution of such disputes, even if they are not defended, falls exclusively to the aforementioned Community design courts in their capacity as experts in this field.

39. However, Article 90(1) of the aforementioned regulation appears to be informed by a different rationale, more attentive to the principle of effectiveness than to the principle of specialised courts, when it comes to protective and provisional measures.[8] 'Application may be made to the courts of a Member State, including Community design courts, for [such measures] in respect of a Community design'.

5 Judgments of 14 December 1971, *Politi* (43/71, EU:C:1971:122); of 21 February 1974, *Birra Dreher* (162/73, EU:C:1974:17); of 18 June 1998, *Corsica Ferries* (C-266/96, EU:C:1998:306); and of 25 June 2009, *Roda Golf & Beach Resort* (C-14/08, EU:C:2009:395, paragraph 33).

6 Opinion in *De Coster* (C-17/00, EU:C:2001:366, point 30).

7 Judgment of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraphs 57 to 59).

8 The classification of such measures is not harmonised in Regulation No 6/2002: each Member State is to apply the measures provided for in its legislation.

40. At first sight, then, the exclusivity provided for in Article 81 disappears in Article 90, thus allowing national courts and tribunals other than the specialised court alone to intervene, albeit only in order to grant provisional and protective measures. So far as these are concerned, the requirements of speed inherent in the principle of effectiveness and the enhanced territorial proximity of the various courts with jurisdiction would justify an approach that is decentralised rather than being focused on a single judicial body. [9]

41. The wording of Article 90(1) of Regulation No 6/2002 supports that interpretation: any court or tribunal of a Member State (in the sense of any one of the courts or tribunals in that State that dispose of disputes relating to design rights) may grant such measures. The fact that that court or tribunal does not have to be specialised is borne out by the expression 'including Community design courts': the latter, then, are on a par with other courts and tribunals when it comes to jurisdiction to grant protective and provisional measures. [10]

42. Both the Procurator General [11] and the Netherlands Government submit, however, that Article 90 of Regulation No 6/2002 does not alter the scope of Article 81 and does not constitute an exception to the provision it contains. In their view, Article 81 supports the proposition that the specialised Community design courts have jurisdiction at any stage in invalidity or infringement proceedings, including that involving applications for protective measures. In their contention, Article 90 applies to types of action other than those listed in Article 81.

43. The Commission advocates the opposite approach. Article 90(1) of Regulation No 6/2002 supports the view that jurisdiction to adopt protective measures in relation to Community designs lies with the courts of the Member States, 'including Community design courts'. In other words, it offers a choice between applying either to the (specialised) Community design courts or to other courts which are not specialised (but have general jurisdiction over disputes relating to design rights). In my opinion, that proposition comes closer to the correct interpretation of that provision.

44. In support of his position, the Procurator General cites the Protocol on the settlement of litigation concerning the infringement and validity of Community Patents. [12] In the view of the Procurator General, Article 90 of Regulation No 6/2002 follows the pattern of Article 36 of that Protocol, the purpose of which was to make it possible to adopt protective measures in relation to both national and Community patents. Article 36 sought to create an exception not to the Protocol's rules of domestic jurisdiction but to its rules relating to international jurisdiction. [13]

45. To my mind, that reference to the regime applicable to Community patent litigation (which did not go on to become the permanent mechanism) does not in any sense form a basis for interpreting Article 90 of Regulation No 6/2002 on designs. It is true that the Netherlands legislature applied to a different sphere the Protocol's aim of concentrating all jurisdiction relating to the protection of the Community patent within a single judicial body, on the ground that it was following the example of the provision contained in that Protocol, but such a decision does not dispel the uncertainty as to the scope of Article 90 in relation to Article 81 of Regulation No 6/2002.

9 As I have already said, Regulation No 6/2002 accepts that, in each Member State, there may be not one but a number ('as limited a number as possible') of specialised Community design courts. The Netherlands opted for a single court.

10 What effects those measures have depending on which court or tribunal adopts them, is a different matter. I shall deal with this distinction later.

11 His observations reproduce those set out in the appeal in cassation in the interests of the law brought before to the Hoge Raad (Supreme Court).

12 OJ 1989 L 401, p. 34.

13 The Protocol deals with international jurisdiction in Article 14 and with national jurisdiction in Article 15.

46. The argument based on the 'scheme' of Regulation No 6/2002, on which the Procurator General and the Netherlands Government rely, carries more weight. Those parties take the view that, in the context of protective and provisional measures, Article 90 constitutes the *general* rule that has to be supplemented depending on the type of litigation in which such measures are applied for:

– in the case of actions 'concerning the infringement and validity of Community designs' (Article 81), the specialised courts alone may adopt the relevant protective and provisional measures, since they have exclusive jurisdiction in respect of such proceedings;

– in the case of all actions other than those provided for in Article 81, the wording of Article 90(1), to the effect that any court of a Member State, including specialised courts, may grant protective and provisional measures, comes into play. This, it is argued, offers a better explanation of that 'problematic or enigmatic'[14] text.

47. I do not share that view, however. Militating against it is the structure of Title IX of Regulation No 6/2002, which is devoted to 'Jurisdiction and procedure in legal actions relating to Community designs' and comprises three sections:

– Section 1 sets out what might be described as the backdrop to the determination of the State court having jurisdiction to hear and determine a dispute. The provisions it invokes are those of the Brussels Convention,[15] which are to apply unless Regulation No 6/2002 specifies otherwise.

– Section 2 contains the exceptions to the application of the Brussels Ia Regulation. It lays down rules of international jurisdiction (Article 82) and defines which courts will have jurisdiction to resolve disputes relating to Community designs and which actions those courts will hear and determine (Articles 80 and 81).[16] Article 90 ('Provisional measures, including protective measures') appears in that section.

– Section 3, under the heading 'Other disputes relating to Community designs', refers to Article 79(1) and (4) for the purposes of determining the national court having jurisdiction[17] and assigns domestic jurisdiction over actions other than those mentioned in Article 81. More specifically, it assigns that head of jurisdiction to the courts with territorial and material jurisdiction over actions relating to a national design in the State in question (Article 93).

48. A schematic interpretation of Title IX of Regulation No 6/2002 confirms that the legislature wished to treat actions relating to infringements and the invalidity of Community designs, on the one hand, and other actions, on the other, differently. The former are regulated in section 2, in which Article 90 appears. It can hardly be the case, therefore, that Article 90 serves a purpose different from that of the body of rules (section 2) of which it forms part. In other words, Article 90 also applies to protective and provisional measures applied for in the course of proceedings relating to the infringement and invalidity of Community designs.

49. The Netherland Government submits by way of an additional argument that the position of Article 90 within section 2 is at some distance from that of Articles 80 and 81 of Regulation No 6/2002. In its contention, the interposition between them of Articles 82 and 89, relating to matters of a different nature, suggests some disconnection between the latter and the former.

14 Observations of the Procurator General, paragraph 3.23.

15 OJ 1998 C 27, p. 1, consolidated version in OJ 2009 L 147, p. 5. The reference to that Convention must nonetheless be understood as a reference to Regulation (EU) No 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 (OJ 2012 L 351, p. 1) ('Brussels Ia Regulation').

16 It also regulates certain specific aspects of the scope and effects of bringing actions for infringement or invalidity and contains, inter alia, provisions on applicable law, related actions and jurisdiction at second instance (Articles 82 to 89, 91 and 92).

17 In the absence of a court having jurisdiction under the rules of Article 79(1) and (4), it designates the courts of the country in which the Office for Harmonisation in the Internal Market (Trade Marks and Designs) has its headquarters.

50. That argument, in my opinion, cannot be accepted. The fact that the wording of Articles 82 to 89 of Regulation No 6/2002 is littered with references to the actions provided for in Article 81 shows that those articles are informed by a single rationale that justifies the inclusion of all of them in section 2 of Title IX. The same rationale explains why Article 90 is found in that section, and this reinforces the idea that the protective measures to which that article refers correspond to the proceedings provided for in Article 81 rather than to those under Article 93, which is situated in section 3.

51. The literal and schematic interpretations therefore support an approach different from that advocated by the Procurator General and the Netherlands Government. The same approach is suggested by the rationale behind the two-tier system of specialised and other competent courts within each Member State, when considered in conjunction with the different functions performed by provisional and protective measures, on the one hand, and the judicial decision that adjudicates on the substance of the dispute, on the other.

52. There is no doubt that the system of specialised Community design courts lends unity to case-law and helps secure the uniform application of the rules that govern *the substance of* actions for a declaration of infringement and invalidity. That view of the role of substantive litigation permeates the scheme of Regulation No 6/2002: thus, when Article 80 thereof concentrates jurisdiction over actions under Article 81 within a limited number of courts, it does so with a view to 'develop[ing a] uniform interpretation of the requirements governing the validity of Community designs' (recital 28).

53. Such a purpose has no place, however, in the context of protective and provisional measures, the granting of which is by definition limited in time and does not (should not) prejudice the final decision on the dispute.

54. Without denying the practical importance which the decision on an application for protective measures may have in certain cases, that decision is subject to the continuation of the main proceedings [18] and must not encroach upon matters that fall within the exclusive domain of those proceedings. Regulation No 6/2002 expressly reserves adjudication on the complex issues affecting the substance of the case (such as the infringement or invalidity of a design) for the specialised courts.

55. This can be seen, for example, in the counterclaim which, in accordance with Article 85(1), the defendant must bring in order to challenge the validity of a Community design owned by the applicant, in the case where the latter has brought an action under Article 81 of Regulation No 6/2002. At the procedural stage of protective or provisional measures, on the other hand, the defendant need only raise a simple *plea* of invalidity (Article 90(2) of Regulation No 6/2002). [19]

56. That binary treatment shows that, in the view of the EU legislature, the decision on an application for protective measures, precisely because it is provisional and given pending the decision on the substance of the matter, has limited effects. It is not that the judge hearing an application for protective or provisional measures cannot, when assessing the pleas of fact and law establishing a prima facie case for the measures sought (*fumus boni iuris*) or the other pleas adduced, address the defendant's submission (by way of a plea) in respect of the validity of the applicant's design, but, as those proceedings are not final, they do not require a counterclaim or the intervention of the specialised court that will ultimately have to decide on the matter.

57. It must also be taken into account that, while the Community design courts' knowledge of this field is undeniable, the other national courts are not without their own such knowledge.

18 That is why the judge dealing with applications for protective and provisional measures in Amsterdam, in his order of 12 January 2017, allowed time for the bringing of an action on the substance of the case.

19 The Spanish version of this paragraph wrongly uses the term '*demanda de nulidad*' (application for [a declaration of] invalidity), when, in actual fact, the measure in question is truly a *plea* rather than an application in a procedural sense. This is confirmed by the other language versions which I have consulted: *exception de nullité*, in French; *plea*, in English; *eccezioni di nullità*, in Italian; *excepção de nulidade*, in Portuguese; *Einwand der Nichtigkeit*, in German.

58. The design protection system is, after all, based on the coexistence of courts with a Community remit and those whose remit is confined to national territory. That coexistence is reflected in the conferment of heads of jurisdiction.

59. The protection of designs at national level falls to the national courts (not specialised within the meaning of Regulation No 6/2002) designated by the rules in each Member State, which fact alone lends them an indisputable proximity to the subject matter. In such disputes, they may adopt the same protective measures as will, if appropriate, be applicable to disputes relating to Community designs. [20]

60. Furthermore, those national (non-specialised) courts also have jurisdiction to dispose of certain disputes relating to Community designs, in accordance with Article 93 of Regulation No 6/2002. They may also grant protective and provisional measures in those disputes.

61. Consequently, the courts that are excluded from jurisdiction under Article 81 of Regulation No 6/2002 operate within a field that is familiar to them, notwithstanding that they are not entitled to rule on the substance of a dispute relating to the infringement or invalidity of a Community design.

62. To my mind, therefore, the argument based on the (greater) specialist knowledge of the Community design courts does not justify any restriction of the jurisdiction of the other national courts in relation to protective and provisional measures.

63. The Netherlands Government interprets Article 90(1) of Regulation No 6/2002 as meaning that it leaves Member States free to choose how to organise the procedure for applying for protective measures, subject to the limitation that the Community design court must necessarily have jurisdiction.

64. To that end, it argues that the procedural autonomy of the Member States is displaced only where there are express rules requiring that certain heads of jurisdiction be conferred on a particular judicial authority (as Articles 80 and 81 of Regulation No 6/2002 do). Consequently, there is nothing to prevent a Member State from deciding that exclusive jurisdiction over actions for a declaration of infringement or invalidity, including applications for protective measures, lies with the Community design courts.

65. That view is based on an understanding of Article 90(1) of Regulation No 6/2002 as a purely enabling provision: Member States 'may' exercise the option of conferring jurisdiction over applications for protective measures on one set of courts or another (subject to the aforementioned limitation that the Community design courts must always be included).

66. I am of the opinion, however, that the word 'may' as used in Article 90(1) has another meaning more in keeping with the purpose of that provision. The right to choose refers not to the Member States but to those bringing the proceedings. What is more, it is precisely for reasons connected with protecting the interests of those persons and the proximity of the judicial bodies called upon to deal with their cases urgently, [21] albeit on a purely provisional and protective basis, that they are authorised to apply either to the specialised courts or to the ordinary ones.

20 As I have already noted (footnote 8), Regulation No 6/2002 does not contain any specific provisions on the classification of those measures, the rules governing which are laid down in each Member State's legislation on national designs.

21 This is the interpretation adopted by the Commission when it states that the litigant must have access to a judicial body within close geographical proximity from which he can seek urgent protection, which suggests that specialist knowledge is secondary. It refers by way of examples to the need to preserve evidential material at risk of disappearance or the dissemination of counterfeit goods from a single distribution point such as a port or factory.

67. Consequently, that provision must be read from the point of view of the holders of Community design rights that seek to protect those rights before the courts. In short, what that provision is promoting is the opening up of a more *generous* process for securing interim protection in which effectiveness is the overriding consideration,[22] whereas, when it comes to matters of substance, specialist knowledge is paramount in the settlement of actions for a declaration of infringement or invalidity.

68. It might be thought that, if that were the case, the inclusion of Community design courts would be superfluous. That is not so, however. The key lies in Article 90(3), under which:

– if the person in question chooses to apply to the Community design court for the protective and provisional measure, any measures which that court adopts will be applicable in the territory of any Member State;

– if the person concerned chooses to make that application to national courts other than the specialised courts, the effects of any protective measure which those courts adopt will be confined to the Member State concerned.

69. Indeed, the final indent of Article 90(3) of Regulation No 6/2002 bears out everything that has been said so far. There would be no need to provide that 'no other court [that is to say, no court other than the Community design courts] shall have such jurisdiction [to extend the effects of its protective and provisional measures to the territory of any Member State]' if the other courts had no jurisdiction in their own right to adopt protective measures in the course of actions for a declaration of invalidity and infringement of Community designs.

70. In short, the adoption of a protective measure by the national courts (as defined above) provides access to the judicial protection inherent in such proceedings, in the form of their urgency, the fact, as I have pointed out, nonetheless remaining that an exhaustive examination of the substance of the dispute cannot be carried out at that stage of the procedure and falls exclusively to the Community design courts.

V. Conclusion

71. In the light of the foregoing, I suggest that the Court of Justice answer the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) as follows:

Article 90(1) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs must be interpreted as meaning that national courts with jurisdiction in matters relating to designs are entitled to adopt provisional and protective measures in proceedings concerning the infringement or validity of Community designs the decision on the substance of which is exclusively assigned to the courts designated in accordance with Article 80(1) of that regulation.

22 In the context of intellectual property, interim protection plays a fundamental role in ensuring that, due regard being had to the rights of defence of the other party, the holder of the right is proportionately protected prior to the delivery of a final decision (recital 22 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45; corrigendum in OJ 2004 L 195, p. 16)).