INTERIM MEASURES AT THE CROSSROADS OF INTERNATIONAL LITIGATION AND ARBITRATION

SOME REMARKS ON CONCURRENT JURISDICTION AND CROSS-BORDER ENFORCEMENT

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I. The Crucial Role of Interim Measures

As is the case in domestic litigation, interim measures are often a game changer in international disputes.

Conservative and protective measures (*Sicherungsmaßnahmen*) preserve and enhance the likelihood of future fruitful enforcement, pending a decision on the merits. Measures of provisional regulation (*Regelungsmaßnahmen*) ensure the continued safeguarding of rights during the proceedings, and anticipatory measures (*Leistungsmaßnahmen*) help to reduce the often too lengthy gap between timely performance and coercive enforcement of an executory decision. Evidence measures (*Beweismaßnahmen*) – albeit not always included in the category of interim measures *stricto sensu* – often prove crucial to securing one party's chances of success on the merits.

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While interim measures are key in all jurisdictions, their added value grows with the anticipated length of the proceedings. This is particularly true of certain kinds of measure, such as those of provisional regulation and anticipated performance. The longer proceedings are expected to last, the more important it is to provisionally safeguard the parties' rights pending a decision on the merits.

Interim relief is also often requested when the parties have opted for arbitral proceedings. While arbitration is generally expected to lead swiftly to an award on the merits, it is well known that in real life arbitral proceedings often last several months, sometimes years, thus increasing the need for interim protection. Also, if spontaneous compliance with arbitral awards remains more frequent than with court rulings, the practical importance of coercive enforcement is increasing: as practice shows, the end of the arbitral proceedings is often but the start of another long road, full of pitfalls, towards the actual fulfillment of the creditor's rights.

Provisional measures are important even where arbitral proceedings are particularly swift and enforcement is not an issue. Proceedings before the Court of Arbitration for Sport (CAS) are a good example: although CAS awards should be rendered within very short time limits,[1] and sometimes even overnight as in the case of the "ad hoc" CAS divisions,[2] both the "CAS Code" and the other CAS arbitration rules include a detailed regulation of interim relief,[3] which might prove crucial, *inter alia*, to ensuring the right of the athletes to take part in ongoing or upcoming competitions.

The reason for the centrality of interim measures is that they are often the practical tool for safeguarding a fundamental principle of civil procedure, *i.e.*, the right to effective access to justice. As widely recognized in the case law of the ECtHR, both a reasonable length of proceedings and the availability of effective remedies are core ingredients of the right to a fair trial.[4] Under specific circumstances, access to interim relief can be crucial to safeguarding those objectives.

With this in mind, a functional approach should guide the interpretation of several issues that are still unsettled in the law of interim measures, in particular in cross-border cases. Most of these questions arise in a similar way in state court litigation and arbitration; a comparison between these distinct but parallel fields can

[1] Under Article R59(5) of the Code of Sports-related Arbitration (2019 edition), "[t]he operative part of the award shall be communicated to the parties within three months after the transfer of the file to the Panel. Such time limit may be extended by the President of the Appeals Arbitration Division upon a reasoned request from the President of the Panel."

[2] Under Article 18 of the CAS Arbitration Rules for the Olympic Games (ad hoc) "[t]he Panel shall give a decision within 24 hours of the lodging of the application. In exceptional cases, this time limit may be extended by the President of the ad hoc Division if circumstances so require."

[3] See Article R37 of the Code of Sports-related Arbitration and Article 14 of the CAS Arbitration Rules for the Olympic Games.

[4] *Handbook of European law relating to access to justice* (jointly prepared by the European Union Agency for Fundamental Rights and the Council of Europe, together with the Registry of the European Court of Human Rights), Luxembourg 2016, at 91 *et seq*., 133 *et seq*.

help to a better understanding of the issues at stake and encourage cross-fertilization.

II. Jurisdiction to Order Interim Measures

A. The Principle of Concurrent Jurisdiction

While concurrent jurisdiction and parallel proceedings are often regarded, in both national and supranational systems, as negative situations, to be prevented through appropriate jurisdictional rules or rules on *lis pendens* and related actions, these phenomena are widely regarded as perfectly acceptable as far as interim measures are concerned.

Indeed, it is a widely accepted reality that – besides the courts or tribunals having jurisdiction on the merits of the case – the courts of one or several other countries – normally those of the place of enforcement – may also have concurrent jurisdiction to order interim relief.

This is first the case with respect to state court litigation. Under national systems of jurisdiction, it is common to allow local courts the power to issue interim measures, even though they do not have jurisdiction on the merits. This is the case, at the very least, when the object of the requested measure is situated within the territory of the forum state. Article 10 of the Swiss PIL Act is a good example of this approach, which is also followed in several other PIL systems:

> "Jurisdiction to order interim relief lies:
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> a. with either the Swiss courts or authorities having jurisdiction for the principal action; or
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> b. with the Swiss courts or authorities at the place where the interim measures are to be enforced."

More surprisingly, this is also recognized in the European judicial space. In the wake of the Brussels Convention, most EU regulations include a specific provision providing that

> "[a]pplication 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."[5]

[5] See Article 35 of the Brussels I *bis* Regulation. Similar provisions are included in the Maintenance Regulation (Art. 14), the Succession Regulation (Art. 19), the Matrimonial Property Regulation (Art. 19) and the Registered Partnership Regulation (Art. 19). The Brussels II *bis* and Brussels II *ter* Regulations include slightly different provisions (see *infra*, section II.C).

Despite some limits established in the case law of the CJEU[6] and partly codified in the Brussels I *bis* Regulation,[7] the reference made by this provision to the national law of the Member States is very broad. At the same time, it does not rule out – but rather implicitly confirms – that provisional measures can also be issued by the court having jurisdiction on the merits, as also recognized by the CJEU[8]; the consequence is a broad admission of concurrent jurisdiction.

This approach contrasts with the philosophy of most EU regulations, which tend – not only for civil and commercial matters, but also in succession matters and in some fields of family law – to limit concurrent jurisdiction and encourage concentration of the proceedings before one single court, or at least before the courts of one single Member State. The contradiction is even more striking if one considers that the strict *lis pendens* rules included in all EU regulations do not apply where requests for provisional measures are concerned.[9]

Concurrent jurisdiction is also accepted in most national arbitration laws. While in the past the authority of arbitral tribunals to issue interim measures was controversial, it is now widely recognized in the great majority of national arbitration laws, under the influence of the UNCITRAL Model Law.[10] Notwithstanding, a concurrent jurisdiction of state courts to order such measures is also admitted, with only rare exceptions.[11]

The jurisdiction of state courts to *order* interim measures should not be confused with their role, which is also recognized in several arbitration laws, of *assisting* the arbitral tribunal and/or the requesting party in implementing interim measures issued by the arbitral tribunal.[12] What we are referring to here is the authority of the court to issue its own provisional measures, notwithstanding the

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[6] CJEU, 17 November 1998, *Van Uden,* Case C-391/95, ECLI:EU:C:1998:543; CJEU, 21 May 1980, *Denilauler*, Case C-125/79, ECLI:EU:C:1980:130.

[7] Article 2(a), para. 2, and Recital 33 of the Brussels I *bis* Regulation. See *infra*, section II.C.

[8] CJEU, 17 November 1998, *Van Uden* (note 6), para. 19.

[9] J. KROPHOLLER/ J. VON HEIN, *Europäisches Zivilprozessrecht*, 9th ed., Frankfurt a.M. 2011, Article 27, para. 14.

[10] See Article 17 of the UNCITRAL Model Law. A great majority of national arbitration laws and virtually all arbitration rules expressly recognize the authority of the arbitral tribunal to order interim relief, with only a few exceptions (Chinese and Italian law, for instance).

[11] See Article 17 J of the UNCITRAL Model Law, as amended in 2006. Most national arbitration laws also admit that an arbitration agreement does not rule out the concurrent jurisdiction of state courts to order provisional measures: see the express wording of Art. 183 Swiss PIL Act. This is also recognized in several arbitration rules, although sometimes with some restrictions (see *infra*, note 30). On concurrent jurisdiction see G.B. BORN, *International Commercial Arbitration*, vol. II, Wolters Kluwer 2009, at 1972 *et seq*.; 2043 *et seq*. According to this author (at 2032), the U.S. decision in the case *Mc Creary Tire & Rubber Co. v. CEAT, SpA*, 501 F.2d at 1032 – often cited as an exception to the general trend – "is not inconsistent with a general principle of concurrent jurisdiction".

[12] We will address this possibility *infra*, in section III.C, because it represents one of the tools available at the stage of enforcement of arbitral measures.

existence of a valid arbitration agreement and the jurisdiction of the arbitral tribunal resulting therefrom. The admission of this authority results, here again, in concurrent jurisdiction.

The admission of a two-track jurisdiction system for ordering provisional measures in the context of arbitration might also be surprising, at first sight, if one considers that the main purpose of arbitration agreements is to deprive state courts of their jurisdiction to rule on the merits.[13] However, this negative effect does not extend to interim relief.

Based on national arbitration laws, this outcome is also compatible with EU regulations. While arbitration is expressly excluded from the scope of the EU instruments applicable in civil and commercial matters,[14] the CJEU has ruled, in the seminal *Van Uden* case, that a Member State's jurisdiction to issue interim measures is not precluded by the existence of a valid arbitration agreement.[15] Although the Court did not expressly say so, this ruling also sanctions concurrent jurisdiction of courts and arbitral tribunals.

B. The Rationale for Concurrent Jurisdiction

The rationale for concurrent jurisdiction obviously lies in the protection of the principle of effective access to justice.

It certainly makes sense that the court or the arbitral tribunal having jurisdiction on the merits is recognized as having the authority to order interim measures, when requested by one of the parties. The court or tribunal seized with the merits has an extensive knowledge of the case and is thus well placed to decide whether a request for interim relief is well founded. Under virtually all national laws, a first condition for ordering provisional measures is the likelihood of success on the merits:[16] the judge seized with merits is obviously best placed to evaluate this. That same judge is often also in a position to correctly assess the other usual conditions for interim relief, *i.e.*, the risk of irreparable harm, as well as the need to strike a fair balance between the parties' interests.

However, there are also strong reasons in favour of allowing a party to request provisional measures from courts not seized with the merits. Generally speaking, these reasons reflect the need to ensure effective access to justice.

A first ground is that provisional measures frequently need to be enforced on assets or against persons that are beyond the territorial reach of the court seized

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[13] See G.B. BORN (note 11), at 2049 ("an exception to the general objective of international arbitration agreements").

[14] See Article 1(2)(d) of the Brussels I *bis* Regulation, which reproduces similar provisions of the Brussels Convention and the Brussels I Regulation.

[15] CJEU, 17 November 1998, *Van Uden* (note 6), paras 23-25. Noteworthy is the fact that the Recast Proposal included specific language confirming that Article 35 applies even when jurisdiction on the merits is conferred on an arbitral tribunal.

[16] This also applies to arbitration: see Article 17 A(1)(b) of the UNCITRAL Model Law.

with the merit. This is often the case for conservative measures, but can also be true of other kinds of measure. In such situations, a court might lack the power, as a matter of national law, to issue extraterritorial orders; attachment of assets, for instance, is sometimes regarded as a purely territorial measure, which can only be issued on assets located within the territorial boundaries of the issuing court. When an extraterritorial order can be issued, cross-border enforcement might be needed but is not always available: as we will mention below, several state laws only allow for recognition and enforcement of final decisions on the merits, thus excluding interim measures.[17] Even when cross-border enforcement is in principle allowed, it is often subject to limitations, which might significantly affect the effectiveness of the provisional measure: thus, in the European justice space, the circulation of *ex parte* measures is only possible when the opposing party is given, before enforcement, the opportunity to be heard, which is unanimously regarded as a severe restriction of the surprise effect and thus of the efficacy of those measures.[18] Finally, cross-border enforcement of a foreign measure is often subject to intermediary "exequatur" proceedings, which might delay the implementation. For all these reasons, the principle of effectiveness is sometimes only (or better) protected by the possibility of filing a direct request with the court of the place of enforcement.

This argument is also very important with respect to arbitration. According to the prevailing view, provisional measures cannot benefit from enforcement under the New York Convention.[19] Although the 2006 revised version of the Model Law includes express provisions allowing the recognition and enforcement of foreign provisional measures, many national arbitration laws are still silent on this issue.[20] The concurrent jurisdiction of the state courts in the country of enforcement is therefore crucial to ensuring effective protection.

Additional arguments specifically support the principle of concurrent jurisdiction in the field of arbitration. First, provisional measures cannot be requested from the arbitral tribunal until it is constituted; although alternative mechanisms are provided for under a growing number of institutional rules (emergency arbitrator[21], president of the relevant CAS division[22]), they are not always available. Second, and more relevantly, the arbitral tribunal cannot address provisional orders to third parties, because these are not bound by the arbitration agreement.[23] Third, certain categories of interim measure cannot be, or are rarely, ordered by the

[17] See *infra*, section III.A.

[18] CJEU, 21 May 1980, *Denilauler* (note 6), and now Article 2(a), para. 2, of the Brussels I *bis* Regulation.

[19] See *infra*, section III.A.

[20] See *infra*, section III.A.

[21] See Appendix V of the ICC Rules, Article 43 of the Swiss Rules, Article 9b of LCIA Rules.

[22] See Article R37(3) of the Code of Sports-related Arbitration.

[23] See G.B. BORN (note 11), at 1965 *et seq*., 2049.

arbitral tribunal (*e.g.* attachments).[24] Although arbitrators are often vested, in theory, with the authority to issue *ex parte* orders as well as anticipatory measures, it is well known that they rarely make use of this power, in their efforts to observe meticulously the right to be heard and to avert all legitimate doubts as to their impartiality.[25] In all of these cases, only state courts can grant effective provisional remedies.

C. The Need for Coordination

Although justified, to a certain extent, by the need for effective remedies, concurrent jurisdiction inevitably creates some sort of duplicative litigation.

Admittedly, the resulting inconvenience cannot be compared to the downsides of parallel proceedings on the merits. Indeed, provisional measures, by their very nature, cannot jeopardize the litigation outcome on the substance of the dispute; concurrent jurisdiction in this field cannot therefore result in irreconcilable decisions. The increase in costs and resources is also more limited than in the case of parallel proceedings on the merits, provisional measures being generally obtained through expeditious and summary proceedings.

Nevertheless, interferences between interim relief and proceedings on the merits cannot be denied.[26] On the one hand, the possibility exists, although it does not often materialize, of contradictory decisions on parallel requests for the same or similar provisional measures: one court or tribunal might order them, while the other rejects the request.[27] Admittedly, an occurrence such as this does not often lead to open conflict: first, because of the territorially limited reach of many such measures, and second, because of the widespread position of refusing their cross-border enforcement.[28] However, even though contradictory decisions do not collide, the simple fact of their coexistence may weaken the credibility, and thus the very efficacy, of provisional relief.

On the other hand, while it is true that a decision on a request for provisional measures cannot prejudice the final decision on the merits, various significant connections exist between the two. To begin with, an important condition for ordering interim relief is – as mentioned above – the likelihood of success on the merits. Of course, this requirement is, and can only be, examined in a summary way, based on *prima facie* evidence, in order not to prejudge the substance of the case. Nonetheless, it is somewhat disturbing that the parties' chances of

[24] This is the case in Switzerland: see G. KAUFMANN-KOHLER/ A. RIGOZZI, *International Arbitration – Law and Practice in Switzerland*, Oxford 2015, para. 6.116.

[25] On *ex parte* measures, see the criticism by G.B. BORN (note 11), at 2016 *et seq*.

[26] See also G.B. BORN (note 11), at 2049.

[27] See CJEU, 6.6.2002, *Italian Leather*, C-80/00, ECLI:EU:C:2002:342, where the Court held that "a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought".

[28] See *infra*, section III.A.

success in pending or future litigation should be examined by a court without jurisdiction on the merits. The other usual conditions for interim relief – the risk of irreparable harm and the balance of inconveniences –, albeit not always directly connected with the decision on the merits, may also have a significant link with the substance of the case, and can be better analysed by the court or tribunal which is (or will be) seized with it.

The intensity of the connections between interim relief and the decision on the merits also depends on the kind of measure requested. While such connections can be relatively loose in the case of conservative (protective) measures, which generally do not have the same content as the final decision and only aim to facilitate the enforcement of the latter, they are normally extremely tight when it comes to regulatory measures and measures of anticipatory performance, which are intended as an anticipation of the decision on the merits.

Such interferences suggest that concurrent jurisdiction should be used with some restraint, only when it is necessary or, at least, reasonable.

This idea is often put forward in the field of arbitration. While the arbitration agreement does not rule out the concurrent jurisdiction of state courts for interim relief, it nonetheless clearly shows the parties' preference for private justice. Therefore, according to a widely held opinion, state courts should show particular restraint when asked for provisional measures and only exert their jurisdiction when this appears justified by the circumstances of the case, *i.e.*, when the arbitral tribunal is not in a position to order effective relief.[29]

This idea of subsidiarity of state courts is expressed in particularly clear terms in the English Arbitration Act of 1996. Pursuant to Section 44 of the Act:

> "[...] (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such order as it thinks necessary for the purpose of preserving evidence or assets.
>
> (4) If the case is not one of urgency, the court may, on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.
>
> (5) In any case the court shall act *only if and to the extent that the arbitral tribunal*, and any arbitral or other institution or person vested by the parties with the power in that regard, *has no power or is unable for the time being to act effectively*." (emphasis added)

Similar limitations are sometimes provided for in institutional arbitration rules.[30]

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[29] See G. KAUFMANN-KOHLER/ A. RIGOZZI, (note 24), para. 6.100 *et seq*.

[30] Under Article 28(2) of the ICC Rules, a party can address a request for interim relief to state courts after the file is transmitted to the arbitral tribunal, but only "in appropriate circumstances". Under Article 25(3) of the LCIA Rules, after the formation of the Arbitral Tribunal, such a request is only admissible "in exceptional cases and with the Arbitral Tribunal's authorization".

In other national arbitration systems, in the absence of equally clear legislative language, a similar approach is sometimes taken by the courts.[31] While this does not raise any particular question in countries where courts traditionally enjoy some discretion with respect to the exercise of jurisdiction (such as most common law systems), it is also acceptable in countries (such as those with civil law systems) where jurisdiction is interpreted as implying the duty of the courts to take a decision; indeed, even in such systems, the competent court is never obliged to order interim measures, but is expected to weigh the parties' interests in the light of all the circumstances of the case. In this framework, the possibility of obtaining effective relief from the arbitral tribunal can be regarded as one of the relevant circumstances.

Although the idea of subsidiarity of the courts without jurisdiction on the merits is less frequently spelled out with respect to litigation before state courts, it also occasionally surfaces in that context.

This is particularly true in family law cases. Thus, the drafting of Article 15 of the Brussels II *ter* Regulation – while confirming the system of concurrent jurisdiction provided for in other EU regulations[32] – is clearly intended to set up some limitations to interim relief granted by the court without jurisdiction on the merits. On one hand, Article 15(1) provides that

> "[i]n urgent cases, even if the court of another Member State has jurisdiction as to the substance of the matter, the courts of a Member State shall have jurisdiction to take provisional, including protective, measures which may be available under the law of that Member State in respect of:
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> (a) a child who is present in that Member State; or
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> (b) property belonging to a child which is located in that Member State."

The explicit reference to the condition of "urgency", together with the territorial limitations that were not mentioned in the Brussels II *bis* Regulation, indicate that the power of a court not having jurisdiction as to the substance should be used with parsimony. The subsidiary nature of such power results even more clearly from Article 15(3) of the Regulation:

> "The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate […]."

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[31] In the case *Mc Creary Tire & Rubber Co. v. CEAT, SpA*, 501 F.2d at 1032, the U.S. Court of Appeals for the 3d Circuit rejected a request for interim relief holding that, in the specific circumstances of the case, a court order would bypass the parties' agreement to arbitrate their dispute.

[32] See *supra*, note 5.

Noteworthy, under this provision, is the fact that the effect of the measures taken by the court without jurisdiction on the merits does not cease only when the decision on the merits is rendered (as is normally the case for interim measures), but already when the court seized with the merits takes appropriate measures. This confirms that the concurrent jurisdiction of a national court under Article 15 of the Brussels II *ter* Regulation is considered subsidiary to the jurisdiction of the ordinarily competent court.[33]

In family law disputes, some state courts have also clearly adopted an approach based on subsidiarity. An interesting example is provided by the case law of the Swiss Federal Tribunal on the possibility of obtaining, in Switzerland, provisional regulatory measures in divorce cases filed with a foreign court. According to the highest Swiss court, such measures are only available under specific circumstances, in particular when equivalent measures cannot be obtained – within reasonable time limits – from the foreign court seized with the merits, or when the measures ordered by that court cannot be enforced in Switzerland.[34]

It might be argued that this approach is particularly welcome in family law cases.[35] In this field, interim relief mostly consists of regulatory measures, which, as mentioned above, are particularly closely related to the substance of the dispute, and therefore should in principle be ordered by the court with jurisdiction on the merits. However, a similar argument may also apply in civil and commercial matters, at least when regulatory and anticipatory measures are requested.

In a wider perspective, good reasons speak for extending beyond arbitration and family law cases the self-restraint practised by some national courts when they do not have jurisdiction on the merits. While favouring the concentration of litigation and thus procedural economy, this approach also prevents interferences with the main proceedings and reflects an idea of comity. More importantly, by imposing on the court seized with a request for interim relief a previous analysis of the ability of the court seized with the merits to order appropriate measures, the idea of subsidiarity emphasizes that concurrent jurisdiction in this field is only justified by the need to provide effective remedies.

To be sure, nothing in the Brussels I *bis* Regulation suggests that the power of national courts under Article 35 is subsidiary to the power of courts having jurisdiction as to the substance. Also, the CJEU – while clearly worried by the excessive territorial reach of interim measures ordered on the basis of that provision – has never suggested that subsidiarity should (also) be a key factor. However,

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[33] I. PRETELLI, Provisional Measures in Family Law, this *Yearbook*, 2018/2019, p. 126.

[34] ATF 134 III 334; ATF 104 II 247. See also judgments of 5.3.1991, 5C.243/1990, 21.4.2008, 5A_677/2007, of 30.8.2010, 5A_461/2010, and of 12.11.2014, 5A_588/2014. On this case law, see A. BUCHER, in A. BUCHER (ed.), *Commentaire romand LDIP/CL*, Bâle 2011, Art. 62, n° 5.

[35] See also I. PRETELLI (note 33), at 125, who argues that provisional and protective measures in family matters also deserve different treatment because of "the object of the measure, which is not merely material (*e.g.* a sum of money, the property of an object, etc.), but consists in a substantial interference on the self-determination of one or more persons".

since Article 35 largely refers to national law, nothing prevents Member State courts from spontaneously including this standard in their analysis.

D. The Role of Party Autonomy

It is uncontested that party autonomy can play a positive role in the allocation of jurisdiction to order interim measures.

This is obvious in the field of arbitration: since the jurisdiction of the arbitral tribunal to rule on the substance of the dispute always depends on the existence of a valid arbitration agreement, this also applies to the tribunal's jurisdiction to grant interim relief. The same is also true of state courts: a valid choice-of-court agreement also grants the chosen court the power to issue provisional measures.[36] In both cases, the parties do not need to provide specifically for interim measures in their agreement: the authority to order them follows from the principle that courts and tribunals having jurisdiction on the merits also have the authority to grant interim relief.

Can the parties expressly grant the chosen court or tribunal such authority when this does not result from the applicable law? In arbitration, this possibility follows from the uncontested right of the parties to adapt the arbitral procedure to their needs: on this basis, most arbitration rules expressly provide for the authority of the tribunal to order provisional relief.[37] However, such rules as, more generally, the party agreement are subject to mandatory rules of the *lex arbitrii*, which reserve the power of issuing interim measures for state courts.[38] The mandatory nature of the procedural rules of the *lex fori* will also normally preclude a party agreement specifically conferring the power to issue interim measures on a state court which would otherwise lack such power.

Of course, whenever jurisdiction depends on a choice-of-court or an arbitration agreement, its scope is determined by the parties' will. As far as a dispute is not covered by the forum-selection agreement and therefore falls under the jurisdiction of a court having jurisdiction under the objective rules, this court will also retain its authority to order provisional measures in that respect. Similarly, in the rare cases where a choice-of-court agreement (or the arbitration agreement, which is even less frequent) is not exclusive, it will not deprive the courts having concurrent jurisdiction on the merits of their power to also rule on requests for provisional measures.

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[36] A. BUCHER (note 34), Article 23 CL, para. 47. See also the decision of the Swiss Federal Tribunal in the case *SodaStream* (ATF 125 III 451), which however deals in particular with the negative effects of a choice-of-court agreement.

[37] Article 28 ICC Rules, Article 26 Swiss Rules, Article 25 LCIA Rules. The authority of emergency arbitrators also rests on a specific allocation of jurisdiction to order interim relief *ante causam*.

[38] This is for instance the case in China: see Article 28 of the Chinese Arbitration Law.

A more difficult question is whether party autonomy can also play a negative role, in other words whether parties have the right to exclude the jurisdiction of a court or a tribunal to order interim relief. At first sight, this might sound like a rather theoretical question, devoid of practical interest. Why would the parties wish to restrict their right to apply for interim relief before concurrent courts or tribunals? While it is true that such agreements remain unusual, they might sometimes be appealing to the parties or to one of them. Indeed, concurrent jurisdiction – albeit often useful – is also a source of complexity, which the party may, for various reasons, wish to avoid.

First, the concentration of the dispute in the hands of a single court or tribunal might appear desirable for both parties.[39] While the idea of "one-stop" dispute resolution is often mentioned as one of the advantages of arbitration, a choice-of-court agreement may also be seen as pursuing a similar objective. By reducing complexity, concentration reduces the costs and inconveniences of parallel proceedings, and prevents contradictory decisions.

Secondly, it may happen that one of the parties – for whatever reason – particularly fears exposure to provisional measures, and thus wishes to limit their availability. This may be the case of the licensee of an IP right who might fear being the target of injunctions requested by the licensor, or of a debtor holding most of its assets within a "safe-haven" jurisdiction. If the bargaining power of that party is sufficiently strong, it may result in an attempt to exclude (or limit) concurrent jurisdiction for provisional measures.

Thirdly, there might be a particular wish to rule out the jurisdiction of state courts (as opposed to arbitral tribunals) in order to protect confidentiality,[40] or to preserve the autonomy of a specific field: sport-governing bodies are, for instance, generally interested in limiting interferences of state courts in order to take account of the peculiarities of sport-related disputes.[41]

Finally, one of the parties may wish to exclude interferences from the courts of a certain country because of lack of trust in their independence and impartiality, or due to concerns about their (too) extensive powers to grant extraterritorial measures.

In the field of arbitration, there seems to be no doubt that the parties can rule out the authority of the arbitral tribunal to order provisional measures. Although rarely used, this possibility is expressly recognized by several arbitration laws;[42] more generally it follows from the wide admission of party autonomy in

[39] With respect to arbitration, see G.B. BORN (note 11), at 1973 and 2052.

[40] *Ibid*.

[41] See *infra*, note 45, on Article R37 of the Article 37 of the Code for Sports-related Arbitration.

[42] Article 17 of the UNCITRAL Model Law ("Unless otherwise agreed by the parties […]"). See also Article 183(1) Swiss PIL Act and § 38(1) of the English 1996 Arbitration Act.

this field,[43] and in particular from the parties' right to mould the arbitration procedure.

By contrast, parties' autonomy to exclude court-ordered provisional measures is more controversial. While more liberal courts and commentators uphold such agreements,[44] a more restrictive opinion is that they should not deprive a party of its right to obtain effective remedy. It follows that state courts will retain their power to order interim relief, notwithstanding the party agreement to the contrary, whenever the arbitral tribunal is not in a position to grant an effective equivalent of the requested measure.[45] This can be the case, for instance, when the tribunal is not yet constituted, when a measure is to be addressed against a third party, or when its cross-border enforcement is not available.

It is submitted that a similar approach should also be followed in the field of state court litigation. As far as the parties are allowed to agree on the exclusive jurisdiction of a court to rule on the substance of the dispute, they should also be allowed, in principle, to enter into an exclusive choice-of-court agreement concerning interim measures, thus excluding the concurrent jurisdiction of other national courts.[46] However, such an agreement cannot affect their right to obtain effective remedies, and should therefore be disregarded when the chosen court is unable to grant appropriate relief.[47]

III. Cross-Border Enforcement of Interim Measures

A. Traditional Resistance and Increasing Openness

Provisional measures requested from the court at the place of enforcement can be directly executed, if necessary by coercion, within the territory where they were

[43] G.B. BORN (note 11), at 1973; G. KAUFMANN-KOHLER/ A. RIGOZZI (note 24), at 6.91.

[44] G.B. BORN (note 11), at 2051 *et seq*.; E. GAILLARD/ J. SAVAGE (eds), *Fouchard, Gaillard Goldman on International Commercial Arbitration*, Kluwer 1999, at 1319; S. BESSON, *Arbitrage international et mesures provisoires – Etudes de droit comparé*, Zurich 1998, paras 225 et 299. The validity of such agreements was recognized in principle, in an ICSID case, by the French Cour de Cassation in its decision of 21.4.1986, *Société Atlantic Triton v. République populaire révolutionnaire de Guinée e.a., Rev. arb*. 1987, at 315.

[45] G. KAUFMANN-KOHLER/ A. RIGOZZI (note 24), para. 6.108. The question is often discussed in the area of sports arbitration, because Article 37 of the Code for Sports-related Arbitration, while providing CAS panels with the jurisdiction to order provisional measures, rules out the concurrent jurisdiction of state courts.

[46] G.B. BORN (note 11), at 2057 *et seq.*

[47] With respect to the Lugano Convention, see the decision of the Swiss Federal Tribunal in the case *SodaStream* (ATF 125 III 451); A. BUCHER (note 34), Article 23 CL, para. 47.

ordered. The issue of cross-border enforcement thus only arises for such measures as are provided (or may be provided) with an extraterritorial effect.

Cross-border enforcement of provisional measures is accepted within the European judicial area. Indeed, such measures fall within the very broad definition of "decisions" provided for in EU regulations and thus benefit from their very open system of recognition and enforcement. However, important limitations have been set up by the case law of the CJEU and in the Brussels I *bis* Regulation.

A first, undisputed, restriction concerns *ex parte* measures: on the basis of the *Denilauler* decision,[48] these can only be enforced in another Member State once the defendant has been given a genuine opportunity to be heard.[49] This important practical limitation – now expressly codified in Article 2(a), para. 2, of the Brussels I *bis* Regulation[50] – deprives extraterritorial *ex parte* measures of their "surprise effect" and thus of some of their usefulness.

Other restrictions apply specifically to measures ordered by the court without jurisdiction on the merits. On the one hand, cross-border enforcement is clearly excluded with regard to anticipatory measures, such as an interim order of payment. By requiring in the *van Uden* decision that such measures "[relate] only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made",[51] the CJEU has clearly deprived them of any extraterritorial effect; their cross-border enforcement is therefore excluded, as also confirmed in the *Mietz* case.[52] On the other hand, the situation was (and still is) more controversial with respect to other kinds of provisional measure ordered by a Member State court without jurisdiction on the merits.

Before the recast, such measures could probably benefit from cross-border enforcement. In its v*an Uden* and *Mietz* decisions, the Court had only intended to curtail the extraterritorial effect (and the cross-border recognition) of anticipatory measures, because of the specific dangers connected with this category of measure; *a contrario*, other kinds of measures still benefitted from recognition and enforcement even when ordered by a court without jurisdiction on the merits.[53] The only

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[48] CJEU, 21 May 1980, *Denilauler* (note 6).

[49] Recognition and enforcement are possible provided that the defendant was served, and thus enabled to challenge the interim measure in the State of origin, before enforcement: CJEU, 13 July 1995, *Hengst*, C-474/93, ECLI:EU:C:1995:243 [1995] ECR I-2113, paras 14-15. See also the decision of the Swiss Federal Tribunal in the case *Motorola* (ATF 129 III 626, point 5.2.2).

[50] According to this provision the notion of "judgment" under the Regulation "[…] does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement". See also Recital 33 of the preamble to the Regulation.

[51] CJEU, 17 November 1998, *Van Uden* (note 6), para. 47.

[52] CJEU, 27.4.1999, *Mietz*, C-99/96, ECLI:EU:C:1999:202.

[53] In this sense, see also M. PERTEGÁS SENDER, in U. MAGNUS/P. MANKOWSKI (eds), Brussels I Regulation, Munich, 2007, Art. 30, para 27 *et seq*.; A. NUYTS, in A. DICKINSON/ E. LEIN (eds.), *The Brussels I Regulation Recast*, London 2015, Art. 2a, para 2.108 *et seq*.

question was whether the requirement of a "real connecting link" between the subject matter of the measures and the territorial jurisdiction of the issuing court, set up by the CJEU in *van Uden*,[54] could also be reviewed at the stage of recognition and enforcement.[55]

This question, still relevant under the Lugano Convention, has probably become moot under the Brussel I *bis* Regulation, which has simply excluded from the benefits of Chapter III *all* provisional measures ordered by a court without jurisdiction on the merits. According to a widely held (albeit not unanimous) opinion, this is the effect of Article 2(a), para. 1, of the Regulation, which includes in the definition of judgments only "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."[56]

While it can hardly be contested that this was the intention of the EU lawmaker, this restriction gives rise to some perplexity. Contrary to the reference, in the same provision, to *ex parte* measures, the restrictive definition adopted in Brussels I *bis* goes beyond a mere codification of the case law of the CJEU, and rules out from the benefits of Chapter III all categories of provisional measures ordered on the basis of Article 35. This may be regarded as overkill.[57]

Despite these limitations, the Brussels I *bis* Regulation and the Lugano Convention are still very recognition-friendly in comparative terms. Indeed, comparative analysis shows that, in many national systems recognition and

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See also CJEU, 6.6.2002, *Italian Leather* (note 27), where the Court held that, for the purpose of the applicability of the rules on recognition of the Brussels Convention, "it is unimportant whether the judgments at issue have been delivered in proceedings for interim measures or in proceedings on the substance", and, implicitly, the Swiss Federal Court in the *Motorola* case (ATF 129 III 626, point 5.3.1: "[i]m vorliegenden Verfahren steht keine Leistungsverfügung zur Beurteilung"). However, several commentators expressed an opposite view: see F. POCAR, Explanatory Report to the 2007 Lugano Convention, JO C 319, 23.12.200. point 127; H. GAUDEMET-TALLON/ M.-E. ANCEL, Compétence et exécution des jugements en Europe, 6 ed., Paris, 2018, p. 496 *et seq*.; I. PRETELLI, Provisional and Protective Measures in the European Civil Procedure of the Brussels I System, in V. LAZIC´/ S. STUIJ (eds.), Brussels Ibis Regulation, Short Studies in Private International Law, TMC Asser Instituut, 2017, p. 110 *et seq*.

[54] CJEU, 17 November 1998, *Van Uden* (note 6), para. 40.

[55] In the *Motorola* case (ATF 129 III 626, point 5.3), the Swiss Federal Tribunal seemed to accept this (although it finally refused to apply this ground for refusal to the benefit of a defendant domiciled in a third country). However, this approach is not completely consistent with the EU recognition system, in which review of indirect jurisdiction is normally excluded.

[56] See also Recital 33: "[…] Where provisional, including protecting, measures are ordered by the court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State."

[57] See also A. NUYTS (note 53), para. 2.110 ("a step backword in respect of the free circulation of judgments").

enforcement – if at all possible[58] – are reserved for "final decisions", which is often interpreted as only including final judgments on the merits.[59] International conventions on recognition and enforcement – other than the Brussels and Lugano Conventions – often also exclude interim measures from their scope[60] or remain silent on the issue.[61]

However, this restrictive view is not universally shared: a modern trend – probably influenced by the European legislation – is emerging in some jurisdictions, which are now open to cross-border enforcement of foreign interim measures. An interesting example is Brazil: since the recent reform of the Brazilian rules on recognition and enforcement of foreign judgments, the 2015 Code of Civil Procedure[62] now expressly provides for the enforcement of foreign interim measures.[63] As in the European system, foreign *ex parte* measures can only be enforced when the debtor has subsequently been given the right to challenge them.[64]

In Switzerland the question is still unsettled,[65] but an increasing number of scholars and court decisions interpret the "finality" requirement set up for recognition and enforcement of foreign decisions in Article 25(b) Swiss PIL Act as not precluding enforcement of foreign interim measures.[66]

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[58] In several countries, recognition and enforcement of foreign decisions is only possible on a treaty basis: this is the case, inter alia, in China, Russia and some Scandinavian countries.

[59] For the United States, see also AMERICAN LAW INSTITUTE, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* (May 2005), at 142. The same is true in Canada and Japan.

[60] This is the case of the 2005 Hague Choice of Court Convention (Art. 7) and of the recent 2019 Hague Judgments Convention (Article 3(1)(b), *in fine*: "An interim measure of protection is not a judgment"). See A. BONOMI/ C. MARIOTTINI, A Game Changer in International Litigation? Roadmap to the 2019 Hague Judgment Convention, in this *Yearbook* 2018-2019, p. 545. By contrast, the 1999 draft preliminary convention included interim measures ordered by the court having jurisdiction on the merits of a case (Article 13).

[61] Like most bilateral treaties on recognition and enforcement of decisions.

[62] Law No. 13.105/2015. See H. DALLA BERNARDINA DE PINHO/ F. PEREIRA HILL, Considerações sobre a homologação de sentença estrangeira no novo Código de Processo Civil, *Revista Eletrônica de Direito Processual*, 2016, pp. 112-134; L. SPITZ, Recognition and Enforcement of Foreign Judgments in Brazil, this *Yearbook* 2018/2019, pp. 221-241.

[63] Article 962 of the Code of Civil Procedure. See L. SPITZ (note 62) at 230.

[64] Article 962 § 2 of the Code of Civil Procedure.

[65] The Swiss Federal Court mentioned the issue, but left it unanswered: ATF 124 II 221, point 3bb; 5P.252/200, point 3.3.

[66] Appellationsgericht Basel, 22.9.2004, BJM 2006, p. 29; Appellationsgericht Basel, 29.12.1993, BJM 1994, p. 147; Kantonsgericht Sankt-Gallen, 19.12.1991, GVP 1992 No 40. D. TUNIK, L'exécution en Suisse de mesures provisionnelles étrangères : un état de lieux de la pratique, *Semaine Judiciaire* 2005 II 275, at 288; A. BUCHER (note 34), Article 25 paras 26-31; M. MÜLLER-CHEN, in M. MÜLLER-CHEN/ C. WIDMER LÜCHINGER, *Zürcher Kommentar zum IPRG*, 3d ed., Zurich 2018, Article 25, para. 66 *et seq*. *Contra*: Obergericht

A similar trend can be observed in the field of international arbitration. Under the interpretation prevailing in several Contracting States, provisional measures ordered by an arbitral tribunal do not benefit from the very recognition-friendly rules of the New York Convention.[67] This is not surprising when one considers that the authority of arbitral tribunals to order interim relief was still very controversial in 1958. Even the 1985 UNCITRAL Model Law, which expressly recognized such authority, did not include, in its original version, any specific language on the cross-border enforcement of provisional measures ordered by arbitrators. National arbitration laws are also often silent on this issue.[68]

However, the 2006 revision of the Model Law includes – among several detailed provisions on interim relief[69] – specific provisions on recognition and enforcement of foreign provisional measures. Under Article 17 H, a tribunal-ordered measure

> "[…] shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued […],"

subject to a limited number of grounds for refusal.[70]

B. Arguments for and against Cross-Border Enforcement

The discussion about the desirability of cross-border enforcement of foreign provisional measures very often revolves around technical issues of interpretation, such as the meaning of "finality" of foreign decisions or the nature of an order for interim relief.

In Switzerland, for example, the opponents of cross-border enforcement very often argue that provisional measures are not "final" because, by definition, they cease to apply when a decision is rendered on the merits and they can be modified at any time pending that decision. Conversely, the supporters of enforcement stress that – albeit temporary and subject to adjustment – an order issuing

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ZH 23.10.2001, ZR 2002 No 84; Obergericht ZH, 11.7.1989, ZR 1989 p. 126; I. CHABLOZ, La reconnaissance et l'exécution des mesures provisoires, in J. KREN KOSTKIEWICZ *et al.* (eds), *Vorsorglicher Rechtsschutz*, Bern 2011, at 101.

[67] See B. EHLE, Article I, in: R. WOLFF (ed.), New York Convention – Article-b-Article Commentary, 2d ed., Munich 2019, Article I para. 66 *et seq*. (with respect to "binding decisions that are interlocutory or temporary in nature") and para. 71a (with respect to orders issued by emergency arbitrators); G. KAUFMANN-KOHLER/ A. RIGOZZI (note 24), paras 6.135 and 8.244. However, a different view prevails in some countries, such as the U.S.: see references in G.B. BORN (note 11), at 2021 *et seq*.

[68] See for instance the U.S. Federal Arbitration Act and the French Code of Civil procedure.

[69] Articles 17 to 17 J of the 2006 UNCITRAL Model Law.

[70] These are listed in Article 17 I of the 2006 UNCITRAL Model Law and correspond to the grounds for refusal applicable to foreign awards under Article 36 of the Model Law and in Article 5 of the New York Convention.

interim relief is "final", because it disposes of a request for relief and is not subject to challenge.[71]

Similar arguments are put forward not only in other countries but also in the field of arbitration in favour of denying interim measures the benefits of the New York Convention.[72] The applicability of this treaty is sometimes also rejected on the grounds that provisional measures are not "foreign arbitral awards", but procedural orders.[73]

However, such technicalities are not very enlightening on the policy reasons that should be taken into consideration in order to decide whether to allow or rule out cross-border enforcement of provisional measures.

Trying to speculate on the real grounds for rejection, a first reason might be the "precarious" nature of interim measures: their lack of sufficient "stability" would oblige the enforcing court to continuously re-assess the situation in order to adjust the measures of enforcement, and in any event create a danger of prejudice for the addressee when the provision is ultimately revoked. On closer examination, such arguments are hardly convincing.

It is of course important to ensure that the effects of an interim measure abroad are reconsidered when the order is modified and, in any event, that they cease when a decision is rendered on the merits. It is also crucial that *restitutio in integrum* is granted to the addressee when it is clear that the measure was ill-founded. However, such objectives must be preserved not only in cross-border cases, but also in purely domestic situations. Some additional practical difficulties can certainly arise in transnational situations, but concrete solutions can be found, for instance by ensuring that the enforcing court is kept continuously informed[74] and by imposing a security upon the requesting party.[75] Rejecting cross-border enforcement altogether is overkill.

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[71] For reference, see the authors cited *supra*, at note 66.

[72] See *supra*, note 67.

[73] G. KAUFMANN-KOHLER/ A. RIGOZZI (note 24), paras 6.135, footnote 169, who stress that the Swiss Federal Tribunal characterised provisional measures as procedural orders, not subject, as such, to being challenged under Article 190 Swiss PIL Act (ATF 136 III 200).

[74] See Article 17 H(2) of the 2066 UNCITRAL Model Law: "[t]he party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure".

[75] See Article 17 H(3) of the 2006 UNCITRAL Model Law: "[t]he court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties". The case law of the CJEU concerning anticipatory measures confirms this: according to the Court, interim payment orders can only be considered as a provisional measure within the meaning of Article 24 of the Brussels Convention, when "repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim": CJEU, 17 November 1998, *Van Uden* (note 6), para. 47; CJEU, 27.4.1999, *Mietz* (note 52), para. 42.

Another reason for rejecting cross-border enforcement might be that provisional measures are regarded as the expression of a state's power (*imperium*), which is by definition territorial. Such reasoning might have been convincing in the past; indeed, the lack of *imperium* used to be the main argument for denying the arbitrator's authority to order such measures. The now almost universal recognition of the arbitral power to order interim relief, as well as the trend towards allowing coercive enforcement of measures ordered by both arbitral tribunals and foreign courts, greatly undermines the persuasiveness of this argument. Also, since foreign judgments and awards are routinely enforced across state boundaries it is difficult to argue that provisional measures should not be.

While the arguments against cross-border enforcement of interim measures are rather unconvincing, the right to effective remedies clearly supports it, at least when the measures are ordered by the court or the arbitral tribunal having jurisdiction on the substance of the proceedings. As mentioned above,[76] the jurisdiction of such a court or tribunal is, for several reasons, hardly contested, in particular because of its ability to concentrate litigation in a single forum and thus ensure procedural economy. Cross-border enforcement of such measures is often a necessary requirement for their efficacy.

Of course, some conditions need to be complied with. Besides the usual grounds for refusal, applicable to all foreign decisions (which also encompass European law restrictions concerning *ex parte* measures), specific safeguards should be put in place to ensure, when needed, re-adjustment of the enforcement measures and *restitutio in integrum* to the benefit of the debtor.

C. Court Assistance in the Enforcement of Interim Measures

While it is submitted that foreign and arbitral interim measures should be recognised and enforced under the same conditions as other foreign judgments, such an obligation might entail a significant change in the law and practice of some national legal systems. To facilitate the transition, an alternative, less constraining, solution might consist in providing the courts of the requested state with the authority to "assist" in the enforcement of the measure, without imposing a mechanical recognition.

A mechanism of this kind is well-known in arbitration, where several arbitration laws provide that the arbitral tribunal,[77] or one of the parties,[78] can request the assistance of state courts in enforcing provisional measures.

Under some arbitration laws, court assistance is limited to the implementation of provisional measures within the country of the seat of arbitration,[79] while in

[76] See *supra*, section II.A.

[77] Thus, Article 183(2) of the Swiss Pil Act provides that if a party does not voluntarily compy with a provisional measure ordered by the tribunal, "the arbitral tribunal may request the assistance of the competent court."

[78] See inter alia § 1041(2) of the German Code of Civil Procedure; § 42(1) of the English Arbitration Act.

other countries it is also available for measures ordered by a tribunal sitting abroad.[80]

In the latter case, the assistance of the local courts comes very close to plain cross-border enforcement of the tribunal-ordered measure,[81] but it should not be confused with it. First, the assisting court has the authority to order its own measures, and to adapt and complement those ordered by the tribunal,[82] and is therefore not subject to the strict prohibition of review on the merits. Such measures of enforcement are based on national law.[83] Second, the requested court seems to enjoy some discretion, both in its decision to assist and in the modalities.

However, this discretion is limited. The request for assistance should be distinguished from an (autonomous) request for interim relief directly addressed to the state courts of the place of enforcement. Thus, the court should not review whether the requirements for interim relief are met.[84] This is because the court is not requested, in this case, to order its own provisional measures, but only to assist (as "*juge d'appui*") in the implementation of the measures ordered by the arbitral tribunal.

Although originally designed for tribunal-ordered measures, nothing prevents a similar, intermediate mechanism to be also introduced in state litigation to the benefit of foreign court-ordered measures. An interesting proposal along these lines was included in the 2005 ALI Proposed Federal Statute on the Recognition and Enforcement of Foreign Judgments.[85] Under the title "Provisional Measures in Aid of Foreign Proceedings", § 12 of this draft provides that

> "[a] court in the United States may grant provisional relief in support of an order, whether or not it is final, issued by a foreign court
>
> (i) to secure enforcement of a judgment entitled to recognition and enforcement […]; or
>
> (ii) to provide security or disclosure of assets in connection with proceedings likely to result in a judgment entitled to recognition and enforcement […]".

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[79] This is true of Art. 183(2) Swiss PIL Act, at least according to some commentators: see A. BUCHER (note 34), Article 183, para. 20.

[80] See § 1041(2) and (3) of the German Code of Civil Procedure: see G. KAUFMANN-KOHLER/ A. RIGOZZI (note 24), para. 6.137, with further reference.

[81] In BORN's treatise such provisions are presented under the heading "Specialized National Arbitration Legislation Permittiong Enforcement of Provisional Measures": see G.B. BORN (note 11), at 2024.

[82] A. BUCHER (note 34), Article 183, para. 14; G. KAUFMANN-KOHLER/ A. RIGOZZI (note 24), para. 6.138.

[83] See Article 183(2) Swiss PIL Act; G. KAUFMANN-KOHLER/ A. RIGOZZI (note 24), para. 6.138.

[84] G. KAUFMANN-KOHLER/ A. RIGOZZI (note 24), para. 6.139.

[85] See AMERICAN LAW INSTITUTE (note 59), at 139.

As explained in the comment, the purpose of the proposed provision was to enable U.S. courts "to issue an ancillary order in support of the order of the foreign court".[86] This would be needed because interim orders "do not come within the definition of 'foreign judgment' in § 1 [of the Proposed Federal Statute] because they are interlocutory orders, not final judgments".[87] Contrary to plain cross-border enforcement, the decision whether to issue such an ancillary order would fall within the discretion of the U.S. courts and depend on their own assessment of the interests of justice.[88]

IV. Conclusion

Provisional measures are often crucial to the practical outcome of disputes, both in state court litigation and in arbitration cases. Several important questions relating to jurisdiction and cross-border enforcement of such measures arise in comparable terms in these two contexts, and sometimes call for similar answers.

The concurrent jurisdiction of the courts having jurisdiction on the merits and of those provided with the authority to issue interim relief, which is a characteristic feature of the EU regulations on judicial cooperation in civil matters, is also well established in arbitration under a large majority of national laws. Since, the rationale behind this "double track" system is comparable in both fields, analogous answers might be envisaged to improve the coordination between parallel proceedings, as well as to define the role and limits of party autonomy to that end.

Similar questions also arise with regard to cross-border enforcement of court-ordered and tribunal-ordered provisional measures. Here also congruent trends seem to be emerging and analogous technical solutions might be put forward.

[86] *Ibid*., at 142.

[87] *Ibid*.

[88] *Ibid*.