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Provisional and protective measures in commercial conflict of laws: a jurisdictional study of international litigation and international arbitration

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Abstract

This thesis proposes to examine the law of jurisdiction to render provisional and protective measures in transnational commercial disputes in order to identify the main problems that arise in each dispute resolution system. Legal scholarship in this area is extensive, albeit fragmented and chaotic. Academic commentators have immersed themselves in the undertaking to examine the authority of courts and arbitral bodies to render interim measures without proper insight or analysis of basic concepts of the law of jurisdiction such as adjudicatory jurisdiction, competence, and procedural powers. Furthermore, the traditional divide between litigation and arbitration appears to have prevented a comprehensive analysis of jurisdicitional aspects in the specialist area of interlocutory relief. This chaotic scenario has also reached national courts and arbitral bodies which, in practice, have not properly categorised these jurisdicitional issues.

Against this background, the thesis: i) conducts a comprehensive analysis of the two adjudicatory methods of dispute resolution – litigation and arbitration –, ii) is based on a detailed examination of the relevant concepts of the law of jurisdiction that come into contact in the law and practice of interim measures, and iii) conducts a practice-focused analysis with reference to published decisions in order to discern how courts and arbitral bodies address, in practice, the issue of their jurisdiction and competence to render interim relief. Once the relevant legal sources are gathered and the law of jurisdiction is comprehensively analysed, the thesis identifies the main problems that arise in each dispute resolution system. The analysis of these problems leads to two significant conclusions.

First, the distinction between jurisdiction and competence is important since these concepts have different legal implications in the practice of provisional measures. Secondly, a closer dialogue is needed between international commercial arbitration and private international law. International arbitration did not reinvent jurisdicational concepts; however, the notion of jurisdiction as understood in private international law has not been always applied in the arbitration setting. Indeed, in some instances, the jurisdicitional decisions of arbitral tribunals and emergency arbitrators in the area of provisional measures have not rested on proper juridical concepts and legal principles. The adoption, in arbitration, of the vertical paradigm of jurisdiction as applied in private international law would have prevented unfortunate arbitral decisions. Furthermore, from a doctrinal point of view, the application of this jurisdicitional paradigm can be based on the fact that international arbitration predominantly operates within private international law.
Based on the above-mentioned conclusions, this thesis proposes different recommendations to the actors involved in each dispute resolution system, that is, litigation and arbitration users, law and policymakers, and the adjudicatory bodies involved. The purpose of these recommendations is to facilitate the future work of courts and arbitral bodies and to offer some degree of predictability to litigants and arbitration users. In particular, the thesis recommends the following.

As regards international litigation, the thesis concludes that one of the main developments in the area, Article 35 of the Brussels I Recast, is founded on the principle of open jurisdiction. Jurisdictional norms based on the notion of open jurisdiction create more problems than they solve, particularly, if their purpose is legal harmonisation or unification. Accordingly, a clear rule of jurisdiction based on proper connecting factors should be adopted instead. Furthermore, the thesis recommends that national courts should avoid adopting a differential treatment between arbitration and litigation when it comes to judicial support since the connecting factors adopted by each dispute resolution system are fundamentally the same.

As regards international arbitration, the thesis identifies an important problem in the context of the assessment of prima facie jurisdiction conducted by arbitral tribunals. The thesis then demonstrates that the concept of prima facie jurisdiction should include the issue of whether the parties have consented to arbitrate. Lastly, the relatively recent institution of emergency arbitration is examined. After concluding that there are no legal impediments that would advise against the implementation of the jurisdictional role of emergency arbitrators, the thesis recommends lawmakers to embrace the development first adopted in Singapore which equates the powers of tribunals and emergency arbitrators albeit, of course, restricted to the pre-arbitral stage.
Lay Summary

In a globalised world, small businesses and corporations are frequently involved in commercial transactions that take place beyond their national borders. In some cases, these transactions end up in complex disputes that cannot be settled amicably between the parties. In order to solve their disputes then, businesses have two options, either resorting to litigation or arbitration. Litigation is the process whereby a national court renders a judgment that determines a given dispute. Arbitration is a dispute resolution system alternative to litigation where a neutral third party – a sole arbitrator or an arbitral tribunal – renders a binding decision – an arbitral award – that has similar effects to those of an ordinary judgment rendered by a court of law. Arbitration, unlike litigation, cannot be imposed on the parties and can only be triggered if the parties voluntarily agree to resolve their disputes through this alternative dispute resolution system.

International commercial disputes frequently take a very long time to resolve. Usually, there are long delays between the commencement of the dispute and its resolution in both litigation and arbitration. Provisional and protective measures are then designed to maintain the status quo and avoid injustice to the parties while they wait for the final resolution of their dispute. Where, for example, two companies entered into a contract for the delivery of coffee beans and a dispute as to the quality of the coffee beans arises, a provisional measure might be rendered in order to preserve these beans. In this case, the coffee beans might be used as important evidence at a later stage of the litigation or arbitration proceedings. If the coffee beans are not preserved, as perishable goods, they may not be available by the time the court or tribunal examines the relevant evidence. Similarly, while the resolution of the dispute is pending, a party may be ready to transfer or move the money held in his bank accounts to a third country. By doing so, this party would avoid having to pay to the counterparty if required by the final judgment or arbitral award. A provisional remedy would, in this context, freeze the bank accounts of the party attempting to move his assets in order to ensure compliance with the final judgment or award.

In international commercial disputes, the parties have different alternatives in terms of where to seek provisional and protective measures. Indeed, the parties may obtain provisional and protective measures from courts of different countries. In addition, in arbitration, there are even more possibilities since the parties can obtain these remedies from courts and arbitrators. The law of jurisdiction widely considered seeks to provide guidance to the parties in identifying the proper
This thesis then proposes to examine the jurisdiction and authority to render provisional and protective measures in the context of international commercial transactions. After a comprehensive analysis, the thesis identifies several problems that arise in litigation and arbitration regarding the jurisdiction and authority of courts and arbitrators to render provisional and protective measures. As a result, several recommendations are proposed to the actors involved in international commercial disputes, that is, businesses, lawmakers, and courts and arbitral tribunals. The purpose of these recommendations is to facilitate the future work of courts and arbitrators and to offer some degree of predictability to businesses when they are faced with the question of where to seek provisional and protective measures.
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# Table of Contents

CHAPTER 1. Introduction 1

1. Concept and terminology 3
   1.1. Concept of provisional and protective measures 3
   1.2. Provisional or protective measures? The conceptual and terminological issue 4
       1.2.1. ‘Provisional’ versus ‘protective’ 5
       1.2.2. ‘Provisional’ versus ‘interim’ 8

2. Characteristics of provisional and protective measures 10
   2.1. Provisional nature or *periculum in mora* 10
   2.2. Protective nature or *fumus boni iuris* 11
   2.3. Measures ancillary to the proceedings on the merits? 13
   2.4. Relief available before the final resolution of the dispute? 14

3. Different types of provisional and protective measures 16
   3.1. Categorisation according to the functions and purposes of interim relief 17
       3.1.1. Provisional measures that maintain the *status quo* 17
       3.1.2. Provisional measures that ensure the enforcement of the ultimate judgment or award 19
       3.1.3. Provisional measures that ensure the preservation of evidence 20
       3.1.4. Provisional measures with respect to parallel proceedings 22
       3.1.5. Provisional measures that anticipate final relief 23
       3.1.6. Provisional measures requiring security 25
   3.2. Categorisation according to the object 26
       3.2.1. Provisional measures operating *in rem* and *in personam* 26
       3.2.2. Provisional measures securing moveable and immoveable property 27
   3.3. Categorisation according to the authority granting interim relief 29
   3.4. Other forms of categorisation 30

4. The importance of research in the specialist areas of provisional and protective measures and international jurisdiction 31

5. Purpose and aims of the thesis 33

6. Research methodology 34

CHAPTER 2. Jurisdiction and competence: an essential distinction to the law of interim protection of rights 36

1. Concept and types of jurisdiction in private international law 37
   1.1. International jurisdiction: jurisdiction to adjudicate and competence 38
1.2. Competence as a limitation on the jurisdiction to adjudicate of courts and tribunals

1.2.1. Competency restrictions detached from jurisdictional norms

1.2.2. Higher law constraints

2. The law of jurisdiction in transnational commercial disputes: differences between arbitral and judicial jurisdiction

2.1. The different focus of the law of international jurisdiction as a legal discipline in litigation and arbitration

2.2. The different paradigms or meanings of adjudicatory jurisdiction in arbitration and litigation

2.2.1. International litigation

2.2.2. International arbitration

2.3. Practical differences between arbitration and litigation regarding adjudicatory jurisdiction

2.3.1. Adjudicatory jurisdiction in general: differences between arbitration and litigation regarding the legal consequences in cases of absence of adjudicatory jurisdiction

2.3.2. Personal jurisdiction: differences between arbitration and litigation regarding the legal consequences in cases of absence of personal jurisdiction

3. Categorising the power to render interim measures of protection: the competence of courts and tribunals as distinct from jurisdiction

3.1. The power to render interim measures of protection vis-à-vis jurisdiction

3.2. The power to render interim measures of protection as a component of the notion of competence

CHAPTER 3. Jurisdiction and competence of national courts to render provisional and protective measures in international commercial litigation

1. Powers of courts with substantive jurisdiction to render provisional and protective measures

1.1. The legal nature of the power of courts with substantive jurisdiction to render provisional and protective measures

1.2. The power of national courts with jurisdiction on the merits to render provisional measures in the European Jurisdictional Area

1.2.1. Provisional and protective measures generally

1.2.2. The European Account Preservation Order

1.3. The power of European courts with substantive jurisdiction to render provisional measures in cases where the Brussels-Lugano and EAPO frameworks do not apply

1.4. The power to render provisional measures by courts with substantive jurisdiction outside the European Area
1.5. Conclusions

2. Powers of courts without substantive jurisdiction to render provisional and protective measures

2.1. Sources

2.1.1. Soft-law sources

2.1.2. Multilateral and regional sources

2.1.3. European sources: the Brussels I Recast Regulation and the Lugano Convention

2.1.3.1. The official interpretative reports and the case law of the European Court of Justice on Article 35 of the Brussels I Recast

2.1.3.2. Different alternatives on the jurisdictional nature of Article 35

2.1.4. Local sources

2.2. Jurisdictional bases conferring ancillary jurisdiction to render interim relief

2.2.1. Open jurisdiction

2.2.2. Limited ancillary jurisdiction in common law systems

2.2.3. Judicial discretion in common law systems

2.2.4. Rules of jurisdiction incorporating connecting factors

2.3. Conclusions and recommendations

2.3.1. Recommendations to law and policymakers

2.3.2. Recommendations to courts of common law systems

2.3.3. Recommendations to litigants

CHAPTER 4. Jurisdiction and competence of national courts to render provisional and protective measures in support of international commercial arbitration

1. Introduction

1.1. Theories of arbitration and their impact on judicial jurisdiction

1.1.1. Theories of international commercial arbitration: an overview

1.1.2. Acknowledgement of the jurisdictional role of the seat by arbitral institutions that have supported and promoted delocalisation

2. The seat of arbitration as the main arbitral connecting factor

2.1. Introduction: concept, terminological inconsistencies and legal significance of the seat

2.2. The arbitration’s legal domicile as the main connecting factor for court supervision and support

2.2.1 Introduction
2.2.2. Superseding the plurality of connecting factors with a unified and stable head of jurisdiction

2.2.3. Defining characteristics of the seat as a connecting factor

2.3. Conclusions

3. The *forum rei sitae* and the domicile of the defendant as the connecting factors of non-seat courts

3.1. Introduction: the distinction between supervisory and supportive jurisdiction

3.2. The *forum rei sitae* and the domicile of the defendant as the connecting factors of non-seat courts

3.2.1. Introduction: the competency issue

3.2.2. Implementing the connecting factors of *forum rei sitae* and domicile of the defendant

3.3. Potential conflicts of jurisdiction and extraterritorial remedies

4. Other heads of jurisdiction?

5. Illegitimate or quasi-legitimate connecting factors

6. Conclusions

6.1. Conclusions on the jurisdictional frameworks of the supporting courts

6.2. Conclusions on the main connecting factors to render interim relief in support of arbitration proceedings

6.3. Recommendations to arbitration users and lawmakers

6.3.1. Arbitration users

6.3.2. Lawmakers

CHAPTER 5. Jurisdiction and competence of arbitral tribunals to render provisional and protective measures

1. Introduction

2. The approaches of commentators

2.1. Inherent and implied powers of arbitrators

2.2. International standards and general principles of international arbitration law

2.3. The arbitration agreement

2.4. The law of the seat

2.5. The seat and the arbitration agreement as concurrent sources to render interim relief

2.5.1. Arbitral authority restricted or prohibited by the law of the seat

2.5.2. Arbitral authority excluded by the arbitration agreement

2.5.3. Arbitral authority actively conferred by the arbitration agreement

2.5.4. Arbitral authority actively conferred by the law of the seat

xii
2.6. The law of the seat as a restriction to the assertion of powers by arbitral tribunals

3. Assessment of arbitral awards and procedural orders on the authority to render interim measures of protection

3.1. Methodology

3.2. Relevant findings

Finding 1. Arbitration users do not select, as arbitral seats, states or law districts that impose general prohibitions on arbitral interim relief

Finding 2. A majority of tribunals apply the agreement to arbitrate and the lex arbitri as concurrent sources of their authority to render interim relief

A. Sources of arbitral authority to render injunctive relief: the results

B. Conclusions on the sources of arbitral authority to render interim relief: less “delocalised theory” and more facts, please

C. Exceptional and concurrent application of other laws

Finding 3. Potential lacunae: what is the source to render a given remedy if the arbitration agreement, the institutional rules and the lex arbitri are silent?

Finding 4. Arbitral technique: what comes first, the assessment of arbitral authority or the assessment of the substantive requirements to grant a particular remedy?

Finding 5. Limits and boundaries to the authority of arbitrators to render interim measures

A. Main or primary limits to the procedural powers of arbitrators: arbitral jurisdiction and admissibility

1. Arbitral jurisdiction: personal jurisdiction and competence

   1.1. Personal jurisdiction

      1.1.1. Prima facie assessment of jurisdiction

      1.1.2. Final and binding assessment of jurisdiction

   1.2. The subject-matter dimension of the concept of competence

2. Admissibility

B. Secondary limits to the authority of arbitrators to render interim relief

Finding 6. Terminology used by arbitral tribunals is clearly inconsistent. Absence of proper conceptual categorisation

Finding 7. National procedural laws designed for litigation proceedings are not applicable to the powers of arbitrators to render interim relief

4. Conclusions

4.1. Recommendations to arbitrators

4.2. Recommendations to arbitration users
4.3. Recommendations to lawmakers

CHAPTER 6. Jurisdiction and competence of emergency arbitrators to render pre-arbitral interim relief

1. Introduction
2. The emergency arbitrator procedure: an overview
3. The legal status and powers of emergency arbitrators to render pre-arbitral relief
   3.1. Framing the scope of the discussion
   3.2. The scholarly debate on the contractual or jurisdictional nature of the emergency arbitrator procedure
      3.2.1. Arguments in support of classifying emergency arbitrators as arbitrators
         3.2.1.1. The seat of the emergency arbitration procedure
         3.2.1.2. The principle of kompetenz-kompetenz
         3.2.1.3. The emergency proceedings and the arbitral proceedings on the merits as part of a single arbitration
         3.2.1.4. The intention of the parties
      3.2.2. Arguments in support of classifying emergency arbitrators as contractual decision-makers
         3.2.2.1. There cannot be two different arbitrators for the same matter
         3.2.2.2. No right to appoint the emergency arbitrator
         3.2.2.3. The mandate of an arbitrator cannot be limited to provisional measures
         3.2.2.4. Lack of “finality” of the emergency decision
         3.2.2.5. Emergency decisions limited to procedural orders
         3.2.2.6. The undertaking to be bound by the emergency decision: breach of contract as a consequence of non-compliance?
      3.2.3. Conclusions on the scholarly debate
3.3. National arbitration legislation on the legal status and powers of emergency arbitrators
   3.3.1. An Emergency Arbitrator is an arbitrator
   3.3.2. An Emergency Arbitrator is an arbitral body, different from arbitrators, who possesses adjudicatory powers
   3.3.3. An Emergency Arbitrator may or may not be an arbitrator: uncertainty in a great majority of legal systems
   3.3.4. An Emergency Arbitrator is not an arbitrator
3.4. Institutional rules on the legal status and powers of emergency arbitrators
4. Assessment of emergency awards and orders on the authority to render pre-arbitral interim relief 257
   4.1. Methodology 257
   4.2. Relevant findings 258

Finding 1. A majority of emergency arbitrators consider themselves jurisdictional decision-makers 258
Finding 2. Arbitration users do not select, as seats in emergency proceedings, states or law districts that impose general prohibitions on arbitrator-rendered relief 260
Finding 3. Sources of jurisdiction and sources of authority of emergency arbitrators 261
   A. Jurisdiction of the emergency arbitrator over the parties 261
      1. Prima facie jurisdiction of the emergency arbitrator 262
         1.1. Concept and main findings 262
         1.2. Sources of the jurisdiction in personam of the emergency arbitrator 264
         1.3. Prima facie jurisdiction: emergency arbitrators and arbitral tribunals compared 265

      2. Jurisdiction and the “applicability test” conducted by emergency arbitrators 266

      3. Jurisdiction and admissibility of the request for emergency relief 269
         3.1. Specific admissibility requirement in emergency arbitration 269
         3.2. Admissibility in general 271

   B. Authority of the emergency arbitrator to render pre-arbitral relief 272

Finding 4. Emergency arbitrators distinguish between jurisdiction/authority and the substantive requirements applicable to the request for emergency relief 273
Finding 5. Terminology used by emergency arbitrators is clearly inconsistent. Absence of proper conceptual categorisation 274
Finding 6. National procedural laws designed for litigation proceedings are not applicable to the powers of emergency arbitrators 275

5. Conclusions 276
   5.1. Recommendations to emergency arbitrators 276
   5.2. Recommendations to arbitration users 278
   5.3. Recommendations to lawmakers 279
   5.4. Recommendations to arbitral institutions 280
CHAPTER 7. Conclusions

1. Jurisdiction and competence to render provisional and protective measures in transnational commercial disputes: main doctrinal conclusions 281

2. The future of the law of jurisdiction in the specialist area of interim protection of rights 283

SCHEDULE I: Analysis of 52 awards and procedural orders on the authority of arbitrators to render interim relief 287

SCHEDULE II: Interim Relief Order or Award Toolkit for Arbitrators 322

SCHEDULE III: Analysis of 13 awards and orders on the authority of emergency arbitrators to render pre-arbitral relief 328

SCHEDULE IV: Correlation Table of Research Findings of Chapter 5 (Arbitral Tribunals) and Chapter 6 (Emergency Arbitrators) 338

SCHEDULE V: Main legal concepts used throughout this thesis 339

Bibliography 341
## Table of Cases

### INTERNATIONAL COURTS

#### European Court of Justice

- Allianz SpA v West Tankers Inc (C-185/07) EU:C:2009:69, [2009] ECR I-663
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<table>
<thead>
<tr>
<th>Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968 (Brussels Convention) [1982] OJ L388/1.</th>
<th>Ch1, 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art 3............................................................................</td>
<td>Ch3, 2.1.3.2</td>
</tr>
<tr>
<td>Art 24...........................................................................</td>
<td>See Art 35 Brussels I Recast</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Art 4(1)........................................................................</th>
<th>Ch3, 1.3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art 31..........................................................................</td>
<td>Ch3, 2.1.3</td>
</tr>
</tbody>
</table>


| Art V(1)(e)..................................................................... | Ch4, 2.1; Ch4, 3.1 |

Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019, Hague Conference on Private International Law

| Art 3(1)........................................................................ | Ch3, 2.1.2 |

Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966

|.................................................................................. | Ch4, 1.1.1 |

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

| Art 6........................................................................... | Ch2,1.2.1 |

Inter-American Convention on Execution of Preventive Measures 1979 OAS Treaty Series 52

| Art 10.......................................................................... | Ch3, 2.1.2 |


| Art 3............................................................................ | Ch4, 2.2.2 |


| Art 6............................................................................ | Ch3, 2.1.2 |

MERCOSUR Protocol on Preventive Measures, Ouro Preto, 16 December 1994

| Arts 4,11,14.................................................................. | Ch3, 2.1.2 |

Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission, and Report for the attention of the Nineteenth Session of June 2001 (Hague Conference, not adopted)

| Art 13.......................................................................... | Ch2, 2.2.1 |

Treaty between Central American States providing for the Arbitration of Differences of 20 January 1902

|.................................................................................. | Ch1 |
Treaty establishing a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Asunción, 26 March 1991 (Asunción Treaty) 2140 UNTS 257………………………Ch3, 2.1.2

Bilateral sources

Convention between Mexico and Spain on recognition and enforcement of judgments and arbitral awards in civil and commercial matters 1989
Art 21………………………………………………………………………………….Ch3, 1.3
Convention between Spain and Brazil on civil judicial cooperation 1989
Art 26………………………………………………………………………………….Ch3, 1.3
Convention between Spain and El Salvador on jurisdiction and recognition and enforcement of judgments in civil and commercial matters 2000
Art 8………………………………………………………………………………….Ch3, 1.3
Convention between Spain and Uruguay on judicial cooperation 1987
Art 14………………………………………………………………………………….Ch3, 1.3

EUROPEAN LEGISLATION

Regulations

Art 3………………………………………………………………………………….Ch3, 2.1.3.2
Art 22(5)………………………………………………………………………………….Ch1, 2.4
Art 31………………………………………………………………………………….Ch1, 2.4
Art 29(1)………………………………………………………………………………….Ch3, 1.3
Art 29(3)………………………………………………………………………………….Ch3, 1.2.1
Art 35………………………………………………………………………………….Ch3, 1.3
Art 40………………………………………………………………………………….Ch3, 1.2.1
Art 79………………………………………………………………………………….Ch3, 2.3.1
Recital 33………………………………………………………………………………….Ch3, 1.2.1; Ch3 1.2.2; Ch4, 6.3.2
Art 2(a)………………………………………………………………………………….Ch3, 1.2.1; Ch4, 6.3.2
Arts 4, 7-26………………………………………………………………………………….Ch3, 1.2.2; Ch3, 2.1.3.2
Art 24(5)………………………………………………………………………………….Ch3, 1.2.1
Art 29(1)………………………………………………………………………………….Ch3, 1.2.1
Art 29(3)………………………………………………………………………………….Ch3, 1.2.1
Art 35………………………………………………………………………………….Ch3, 1.3; Ch3, 2.1.3; Ch3, 2.1.3.1; Ch3, 2.1.3.2; Ch4, 3.2.2
Art 40………………………………………………………………………………….Ch1, 2.4; Ch3, 1.2.1
Art 79………………………………………………………………………………….Ch3, 2.3.1

Arts 3, 4, 6, 11, 22, 34………………………………………………………………………………….Ch3, 1.2.2
Official interpretative reports

Report by DI Evrigenis and KD Keramaeus on the Accession of the Hellenic Republic to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1986] OJ C298/19. .........................................................Ch3, 2.2.3.1; Ch3, 2.1.3.2

Report by Mr de Almeida Cruz, Mr Desantes Real and Mr Jenard on the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1990] OJ C189/35 ..........................................................Ch3, 2.1.3.1

Report by Mr P Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1979] OJ C59/1..................................................Ch3, 1.2.1; Ch3, 2.1.3.1

Report by Mr P. Jenard and Mr G. Moller on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano Convention) [1990] OJ C189/57..........................................................Ch3, 2.1.3.1

Report by Professor Dr Peter Schlosser on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation [1979] OJ C59/71..........................................................Ch3, 2.1.3.1

Other instruments


Art 6........................................................................................................Ch3, 1.2.2

Notice from Member States, 2015/C 4/02, List 1.................................Ch3, 2.1.3.2

STATUTES

Argentina

Código Civil y Comercial de la Nación, ley 26.994 (Civil and Commercial Code)

Art 1655..........................................................Ch5, 2.5.1
Art 2603..........................................................Ch3, 1.4; Ch3, 2.2.4

Código Procesal Civil y Comercial de la Nación, ley 17.454 (Civil and Commercial Procedural Code)

Art 753..........................................................Ch5, 2.5.1

Austria

Code of Civil Procedure

s 577..........................................................Ch4, 2.2.2
s 581..........................................................Ch6, 3.2.2.3
s 593(4)..........................................................Ch5, 2.5
Belgium
Judicial Code
Art 1717(4) repealed………………………………………………………Ch4, 1.1.1

Bolivia
Conciliation and Arbitration Act 2015
Art 67……………………………………………………………………………….Ch6, 3.3.2

Brazil
Lei 9.307, de 23 de setembro de 1996, as amended by Lei 13.129 de 26 de maio de 2015
(Arbitration Act)…………………………………………………………………………….Ch4, 3.2.2

British Virgin Islands
Eastern Caribbean Supreme Court (Virgin Islands) Act 1969
s 24………………………………………………………………………………….Ch3, 2.2.3

China
Civil Procedure Law of the People’s Republic of China
Art 272………………………………………………………………………………..Ch5, 2.3

Cyprus
International Commercial Arbitration Act 1987
Art 17………………………………………………………………………………….Ch5, 2.3

Czech Republic
Act No 216/1994 on arbitration proceedings and on enforcement of arbitration awards
s 22……………………………………………………………………………………Ch5, 2.3

Fiji
International Arbitration Act 2017
s 2………………………………………………………………………………......Ch6, 3.3.1

France
Civil Code
Arts 14 and 15………………………………………………………………….Ch4, 3.2.2

Code of Civil Execution Procedures
Arts L521-1 to L523-2……………………………………………………Ch1, 3.1.2

Code of Civil Procedure
Art 1468……………………………………………………………………………Ch6, 3.1

Germany
Code of Civil Procedure, ZPO
s 12………………………………………………………………………………...Ch4, 3.2.2
s 23…………………………………………………………………………………Ch4, 3.2.2
s 1025……………………………………………………………………………Ch4, 2.2.2; Ch4, 3.2.2
Hong Kong
Arbitration Ordinance, Cap 609
s 22B ................................................................. Ch6, 3.3.2
High Court Ordinance
s 5(2) .................................................................. Ch4, 3.2.2
s 21M(4) .......................................................... Ch3, 2.2.3

India
Arbitration and Conciliation Act 1996
s 2(2) .................................................................. Ch4, 3.2.1
s 9 ........................................................................ Ch4, 3.2.1

Italy
Codice di procedura civile, Regio decreto 28 ottobre 1940, n 1443 (Code of civil procedure)
Art 818 ................................................................. Ch5, 2.3
Art 10 ................................................................. Ch3, 1.3

Japan
Civil Provisional Remedies Act 1989
Art 11 ................................................................. Ch3, 1.4; Ch3 2.2.4

Malaysia
The Arbitration (Amendment) (No 2) Act 2018
s 2 ................................................................. Ch6, 3.3.1

Mexico
Commercial Code
Art 1462(d) .......................................................... Ch4, 1.1.1

Netherlands, The
Dutch Code of Civil Procedure
Art 254 ................................................................. Ch1, 3.1.5
Art 1043 ............................................................. Ch6, 3.3.1

New Zealand
Arbitration Act 1996
s 2(1) ................................................................. Ch5, 2.5; Ch6, 3.3.1
Singapore

Civil Law Act (Chapter 43)
  s 4(10).............................................................................................Ch3, 2.2.2

International Arbitration Act (Cap 143)
  s 2(1).............................................................................................Ch6, 3.3.1
  s 3.................................................................................................Ch4, 2.2.2
  s 12A.........................................................................................Ch3, 2.2.2; Ch4, 3.2.1

Supreme Court of Judicature Act
  s 16(1).............................................................................................Ch3, 2.2.2

Spain

Arbitration Act 2003
  Art 1.............................................................................................Ch4, 2.2.2
  Art 23(2)........................................................................................Ch5, 2.5.1
  Art 46.............................................................................................Ch4, 1.1.1

Code of Civil Procedure
  Art 723(2).....................................................................................Ch3, 1.3
  Art 727............................................................................................Ch1, 3.1.2
  Art 731(1).....................................................................................Ch3, 1.3

Constitution of the Kingdom of Spain 1978
  Art 24.............................................................................................Ch2, 1.2.1

Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil (Law 29/2015, of 30 July, on international judicial cooperation in civil matters)
  Art 54(2)........................................................................................Ch3, 1.3

Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (Law 6/11985, of 1 July, on the Organisation of the Judiciary)
  Art 22 sexies..................................................................................Ch3, 1.3

Sweden

Arbitration Act 1999, revised in 2019
  s 34(7).............................................................................................Ch5, 3.2

Switzerland

Private International Law Act of December 18, 1987
  Art 10............................................................................................Ch3, 1.1; Ch3, 2.2.4
  Art 176............................................................................................Ch4, 2.1; Ch4, 2.2.2
  Art 183.............................................................................................Ch5, 2.2
  Art 192.............................................................................................Ch4, 2.1

Thailand

Arbitration Act BCE 2545
  s 16.............................................................................................Ch5, 2.5.1
Tonga

International Arbitration Act 2020
s 2(1)................................................................................Ch6, 3.3.1

United Kingdom

Arbitration Act 1996
s 2(1)................................................................................Ch4, 2.2.2
s 2(3)................................................................................Ch4, 3.2.1; Ch4, 3.2.2
s 3..................................................................................Ch4, 2.1
s 38........................................................................Ch5, 2.3; Ch5, 3.2
s 39...............................................................................Ch5, 2.3
s 41...............................................................................Ch6, 3.1
s 42...............................................................................Ch6, 3.1
s 44................................................................................Ch4, 3.2.2; Ch5, 4.3; Ch6, 2
s 57................................................................................Ch2, 2.2.2
s 69................................................................................Ch5, 2.3
s 103(2).........................................................................Ch5, 2.3

Arbitration (Scotland) Act 2010 asp 1
s 3................................................................................Ch4, 2.1
s 10(3)...........................................................................Ch4, 3.2.1
s 20(3)(d)......................................................................Ch4, 1.1.1

Schedule I, Scottish Arbitration Rules........................................................................Ch4, 3.2.1
Rule 46........................................................................Ch4, 2.1; Ch4, 3.2.1; Ch5, 4.3
Rule 53........................................................................Ch1, 1.2.2; Ch5, 2.3
Rule 69............................................................................Ch5, 2.3

Civil Jurisdiction and Judgments Act 1982
s 25..............................................................................Ch1, 4; Ch3, 2.1.3.2; Ch3, 2.2.3
s 27-28..........................................................................Ch3, 2.2.3

Magna Carta 1297
cl 40........................................................................Ch1

Senior Courts Act 1981
s 37...............................................................................Ch4, 3.2.2

State Immunity Act 1978
s 13................................................................................Ch2, 1.2.2

United States

Restatement of the US Law of International Commercial and Investor-State Arbitration 2019
s 1.1(a)...........................................................................Ch5, 2.5.1

STATUTORY INSTRUMENTS

United Kingdom

Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302). ........................................Ch3, 2.2.3
Civil Jurisdiction and Judgments Act 1982 (Provisional and Protective Measures) (Scotland) Order 1997 (SI 1997/2780). ................................................................. Ch3, 2.2.3

Civil Procedure Rules 1998 and Practice Directions
rule 62.5(1)(b)................................................................. Ch4, 3.2.2
PD 6B, para 3.1................................................................. Ch3, 2.1.3.2

ARBITRATION RULES

Beijing Arbitration Commission

Beijing Arbitration Commission Arbitration Rules 2015
Art 63(1)........................................................................ Ch6, 3.3.4

Czech Arbitration Court

Rules of the Arbitration Court attached to the Economic Chamber of the Czech Republic 2002
s 25(3)........................................................................ Ch5, 2.5.1

Hong Kong International Arbitration Centre

2013 Administered Arbitration Rules of the Hong Kong International Arbitration Centre
Art 23........................................................................ Ch6, 2
Schedule IV....................................................................... Ch6, 2

2018 Administered Arbitration Rules of the Hong Kong International Arbitration Centre
Art 2(8)........................................................................ Ch6, 3.4
Art 13(10)................................................................. Ch5, 2.1
Art 14........................................................................ Ch4, 2.1
Art 23........................................................................ Ch5, 3.2
Art 45........................................................................ Ch6, 2
Schedule 4
Art 8........................................................................ Ch6, 3.2.2.4
Art 9........................................................................ Ch6, 4.2
Art 12........................................................................ Ch6, 3.2.2.5
Art 13........................................................................ Ch6, 3.4

International Centre for Dispute Resolution

International Dispute Resolution Procedures, Rules 2021
Art 7(4)........................................................................ Ch6, 3.2.2.5
Art 7(5)........................................................................ Ch6, 3.4

International Chamber of Commerce

Rules of Arbitration of the International Chamber of Commerce 1988
Art 8(5)........................................................................ Ch5, 2.2

Art 6........................................................................ Ch5, 3.2
Art 23........................................................................ Ch5, 3.2
Rules of Arbitration of the International Chamber of Commerce 2012
Art 6(4)(i) ................................................................. Ch5, 3.2
Art 29 ........................................................................ Ch6, 2
Appendix V .................................................................. Ch6, 2

Rules of Arbitration of the International Chamber of Commerce 2021
Art 6(4)(i) ................................................................. Ch5, 3.2
Art 15(4) .................................................................. Ch6, 3.2.2.4
Art 18 .......................................................................... Ch4, 2.1
Art 22(5) ................................................................. Ch6, 3.2.2.6
Art 28 .......................................................................... Ch5, 2.3; Ch5, 3.2; Ch6, 3.4
Art 29(1) .................................................................. Ch6, 3.4; Ch6, 4.2; Ch6, 5.1
Art 29(2) .................................................................... Ch6, 3.2.2.6
Art 29(5) .................................................................. Ch6, 5.1
Art 29(6) .................................................................... Ch6, 4.2; Ch6, 5.1
Art 34 .......................................................................... Ch6, 3.2.2.5
Art 35(6) .................................................................. Ch6, 3.2.2.6
Art 42 .......................................................................... Ch5, 2.1

Appendix V
Art 1(5) ....................................................................... Ch6, 4.2
Art 1(6) ...................................................................... Ch6, 2; Ch6, 3.2.2.4
Art 2(2) ....................................................................... Ch6, 2; Ch6, 3.2.1.3; Ch6, 3.4
Art 2(6) ........................................................................ Ch6, 2
Art 6 ........................................................................ Ch6, 2; Ch6, 3.2.2.4; Ch6, 4.2

Rules of Conciliation and Arbitration of the International Chamber of Commerce 1922
Art XVIII ................................................................. Ch 1, 4

**London Court of International Arbitration**

Arbitration Rules of the London Court of International Arbitration 2014
Art 9B ....................................................................... Ch6, 2

Arbitration Rules of the London Court of International Arbitration 2020
Art 9B ....................................................................... Ch6, 3.2.1.3
Art 9(8) ..................................................................... Ch6, 2; Ch6, 3.2.2.5; Ch6, 3.4
Art 9(13) ..................................................................... Ch6, 5.2
Art 9(14) ..................................................................... Ch6, 3.2.1.2
Art 16 .......................................................................... Ch4, 1.1.1; Ch4, 2.1
Art 23 .......................................................................... Ch6, 4.2
Art 25 .......................................................................... Ch5, 3.2; Ch5, 3.2
Art 32(2) ..................................................................... Ch5, 2.1

**Milan Chamber of Arbitration**

Arbitration Rules of the Milan Chamber of Arbitration 2020
Art 26(1) ..................................................................... Ch5, 2.5.1

**Netherlands Arbitration Institute**

Netherlands Arbitration Institute Arbitration Rules 2015
Art 36(4) ..................................................................... Ch6, 3.2.2.2
Art 36(9)........................................................................................................Ch6, 3.2.2.4

**Singapore International Arbitration Centre**

Arbitration Rules of the Singapore International Arbitration Centre 2010
Schedule 1........................................................................................................Ch6, 2

Arbitration Rules of the Singapore International Arbitration Centre 2016
Rule 21................................................................................................................Ch4, 2.1
Rule 39(1)..........................................................................................................Ch6, 2
Rule 41(1)..........................................................................................................Ch5, 2.1

Schedule 1
Rule 4...............................................................................................................Ch6, 3.2.1.3; Ch 6, 4.2
Rule 8...............................................................................................................Ch6, 3.2.2.5; Ch 6, 3.4
Rule 10..............................................................................................................Ch6, 3.2.1.3; Ch 6, 3.2.2.4; Ch 6, 3.4

**Stockholm Chamber of Commerce**

Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 2010
Appendix II........................................................................................................Ch6, 2

Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 2017
Art 37(3).............................................................................................................Ch6, 3.2.2.5

Appendix II
Art 1(2).............................................................................................................Ch6, 2; Ch6, 3.2.2.5; Ch 6, 3.4
Art 4(4)..............................................................................................................Ch6, 2

**Swiss Arbitration Centre, previously known as SCAI**

Swiss Rules of International Arbitration, Swiss Arbitration Centre, 2021
Art 29(3).............................................................................................................Ch6, 2
Art 43(1)............................................................................................................Ch6, 2
Art 43(5)............................................................................................................Ch6, 4.2

**UNCITRAL**

UNCITRAL Arbitration Rules 2013
Art 18..............................................................................................................Ch4, 1.1.1

**NON-ARBITRAL RULES**

FIDIC Conditions of Contract for Construction, Annex, DAAB Procedural Rules (2nd edn, 2017)........................................................................................................Ch6, 3.2.1.2; Ch6, 4.2

**“SOFT-LAW” INSTRUMENTS**

ALI-UNIDROIT Principles of Transnational Civil Procedure 2004 and Accompanying Commentary
Principle 2.3........................................................................................................Ch3, 2.1.1
Arbitration Guidelines 2016 of the Chartered Institute of Arbitrators…………………Ch1, 3.1.5

Rule 202(3)………………………………………………………………………...Ch3, 2.1.1

Guidelines on Applications for Interim Measures of the Chartered Institute of Arbitrators 2015…………………………………………………………………...........................Ch5, 3.2

ILA Principles on Provisional and Protective Measures in International Litigation 1998 (The Helsinki Principles)
Principles 10, 11 and 17…………………………………………………………………...Ch3, 2.1.1

Art 1(3)………………………………………………………………………………Ch2, 1
Art 17B……………………………………………………………………………Ch5, 2.5; Ch5, 3.2
Art 17C……………………………………………………………………………Ch5, 2.5
Art 17I……………………………………………………………………………Ch5, 2.5.1
Art 17J……………………………………………………………………………Ch4, 3.2.1
Art 17(2)……………………………………………………………………………Ch5, 3.2
Art 20…………………………………………………………………………………Ch4, 2.1

OTHER INSTRUMENTS

International instruments


Plan between the Chambers of Commerce of Buenos Aires and the United States 1915………………………………………………………………………………………Ch 1

Travaux préparatoires of the New York Convention 1958, ‘Enforcement of international arbitral awards: statement submitted by the International Chamber of Commerce, a non-governmental organization having consultative status in category A’, E/C.2/373………………………………………………………………………………Ch4, 1.1.2

National instruments

United Kingdom

Arbitration Bill [HL] (Bill 100) HMSO April 1996
cl 2………………………………………………………………………………Ch4, 2.2.2

Departmental Advisory Committee on Arbitration Law, 1996 Report on the Arbitration Bill (1997) 13 Arb Int 275………………………………………………………………………………Ch4, 2.2.2

Report of the Scottish Committee on Jurisdiction and Enforcement, Maxwell Committee (Edinburgh Her Majesty's Stationery Office 1980)…………………………………Ch3, 2.1.3.2
Other legal systems

246th Report of the Indian Law Commission...........................................Ch6, 3.3.1

International Commercial Arbitration Bill 2018 (The Bahamas)
  s 2(1)........................................................................................................Ch6, 3.3.1
List of abbreviations

§ Section/subsection of this thesis
AAA/ICDR American Arbitration Association/International Centre for Dispute Resolution
ALI American Law Institute
BAC/BIAC Beijing Arbitration Commission/Beijing International Arbitration Center
BAC Rules Beijing Arbitration Commission Arbitration Rules 2019
CPR Civil Procedure Rules 1998
CPR PD Civil Procedure Rules 1998, Practice Direction
DAAB Dispute Avoidance and Adjudication Board
EA Emergency Arbitrator
EAPO European Account Preservation Order
English Arbitration Act Arbitration Act 1996
FIDIC Fédération Internationale Des Ingénieurs-Conseils, International Federation of Consulting Engineers
HCCH or Hague Conference Hague Conference on Private International Law
HKIAC Hong Kong International Arbitration Centre
HKIAC Rules 2018 Administered Arbitration Rules of the Hong Kong International Arbitration Centre
ICC International Chamber of Commerce
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICC Rules</td>
<td>Rules of Arbitration of the International Chamber of Commerce 2021</td>
</tr>
<tr>
<td>ICC Task Force or Task Force</td>
<td>ICC Commission on Arbitration and ADR Task Force on Emergency Arbitrator Proceedings</td>
</tr>
<tr>
<td>ICDR Rules</td>
<td>International Arbitration Rules of the International Centre for Dispute Resolution 2021</td>
</tr>
<tr>
<td>LCIA</td>
<td>London Court of International Arbitration</td>
</tr>
<tr>
<td>LCIA Rules</td>
<td>Arbitration Rules of the London Court of International Arbitration 2020</td>
</tr>
<tr>
<td>Maxwell Report</td>
<td>Report of the Scottish Committee on Jurisdiction and Enforcement, Chairman: the Hon Lord Maxwell (Edinburgh, Her Majesty’s Stationery Office 1980)</td>
</tr>
<tr>
<td>NAI</td>
<td>Netherlands Arbitration Institute</td>
</tr>
<tr>
<td>NAI Rules</td>
<td>Arbitration Rules of the Netherlands Arbitration Institute 2015</td>
</tr>
<tr>
<td>SAC-SCAI</td>
<td>Swiss Arbitration Centre, renamed in 2021, previously known as Swiss Chambers' Arbitration Institution</td>
</tr>
<tr>
<td>SAC-SCAI Rules</td>
<td>Swiss Rules of International Arbitration, Swiss Arbitration Centre, 2021</td>
</tr>
<tr>
<td>SAR</td>
<td>Scottish Arbitration Rules, Schedule 1 to the Arbitration (Scotland) Act 2010</td>
</tr>
<tr>
<td>SCC</td>
<td>Stockholm Chamber of Commerce</td>
</tr>
<tr>
<td>SCC Rules</td>
<td>Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 2017</td>
</tr>
<tr>
<td>sch</td>
<td>Schedule</td>
</tr>
<tr>
<td>Scottish Arbitration Act</td>
<td>Arbitration (Scotland) Act 2010 asp 1</td>
</tr>
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<td>Singapore International Arbitration Centre</td>
</tr>
<tr>
<td>SIAC Rules</td>
<td>Arbitration Rules of the Singapore International Arbitration Centre 2016</td>
</tr>
<tr>
<td>Swiss PILA or PILA</td>
<td>Federal Act on Private International Law of Switzerland of 18 December 1987</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>UNCITRAL Rules</td>
<td>UNCITRAL Arbitration Rules 2013</td>
</tr>
<tr>
<td>ZPO</td>
<td>Zivilprozessordnung, Code of Civil Procedure (Germany)</td>
</tr>
</tbody>
</table>
List of figures

Chapter 1
Figure 1.1 Distinction between provisional measures, protective measures, and “provisional and protective measures”
Figure 1.2 Provisional, including protective, measures

Chapter 2
Figure 2.1 Types of jurisdiction in cross-border private disputes
Figure 2.2 Focus of the law of jurisdiction in private international law as an international litigation undertaking
Figure 2.3 Focus of the law of jurisdiction in international arbitration

Chapter 4
Figure 4.1 Evolution of arbitral connecting factors in general
Figure 4.2 Evolution of arbitral connecting factors in the context of interim relief

Chapter 6
Figure 6.1 Implementing the emergency arbitrator procedure
Table 6.2 Findings as to the assessment of jurisdiction in personam by emergency arbitrators

Schedule I
Figure I.1 “Provisional” relief in summary proceedings

Schedule V
Figure V.1 Main legal concepts used throughout this thesis
CHAPTER 1
Introduction

Interim protection of rights is important. In any legal system, it is inevitable the existence of delays between the commencement of a dispute and the enforcement of the ultimate decision on the merits rendered by a court of law or an arbitral tribunal.¹ Since ancient times, legal systems have developed instruments to protect the rights of the parties while the final decision on the merits is pending. Romans, for example, were already aware of the importance of interim protection of rights in cases where disputes were pending before the praetor. It is true, however, that interim measures of protection did not exist as such, but Romans developed a rich body of actions and interdicts the purpose of which was not different from that of current provisional measures.² In Medieval Europe, concerns as to delays of justice and their potential effects on the parties were once again revived. The 1215 Magna Carta, for example, provided: “to no one will we sell, to no one deny or delay right or justice”,³ and possessory assizes were frequently rendered in England in order to protect men who were in possession of a title from being disturbed while the trial was pending.⁴ Yet it is in modern times when provisional and protective measures emerge in their current form in the cross-border commercial sphere.⁵ During the first

² The cautio damni infecti, for example, was a guarantee to cover potential damage to the property of the pursuer before that damage actually occurred. By way of further example, interim interdicts aimed at the protection of the rights of the parties to justice while the dispute was pending by prohibiting the exercise of violence. See Jerome B Elkind, Interim Protection: A Functional Approach (Martinus Nijhoff 1981) 31.
³ Magna Carta 1215, clause 40.
⁴ Elkind (n2) 31.
⁵ According to Elkind, the emergence of modern provisional measures can be traced back to the Treaty between Central American States providing for the Arbitration of Differences of 20 January 1902. See Elkind (n2) 38. Yesilirmak argues that the origin of modern interim relief in the transnational commercial arena dates back to 1915 with the Plan between the Chambers of Commerce of Buenos Aires and the United States. See Ali Yesilirmak, ‘Provisional Measures’ in Loukas A Mistelis and Julian DM Lew (eds), Pervasive Problems in International Arbitration (Kluwer 2006) 186.
decades, the frameworks of interim relief in transnational commercial disputes were, in a majority of legal systems, chaotic and difficult to predict. In recent years, however, the legal regime of provisional measures has been clarified by a majority of legal systems which have turned legal chaos\(^6\) into a tidy framework of interim relief. One of the most remarkable changes in this process has taken place in the areas of international jurisdiction and competence. In fact, a majority of legal systems have extended the jurisdiction and competence of their local courts to render provisional measures in both arbitration and litigation. And this is not the end of the matter. The procedural powers of arbitrators and therefore, the availability of arbitral interim remedies have also been recently expanded.

The purpose of this thesis is to examine the law, theory and practice of international jurisdiction and the competence of national courts and arbitral bodies in the specialist area of interim protection of rights. The scope of the thesis is not restricted to a particular geographical area, but rather, it attempts to analyse different normative systems of the civilian and common law traditions as well as arbitration rules of the most important arbitration institutions. Having said that, the approach or perspective adopted throughout this work is predominantly European. Following this introductory part, Chapter 1 defines the main characteristics of provisional and protective measures and determines the aims of this thesis. Chapter 2 provides an overview of the law of jurisdiction in litigation and arbitration and sets out the differences between important concepts such as jurisdiction and competence. The main body of the thesis, that is, chapters 3 to 6, allocates one chapter to each decision-maker involved in litigation and arbitration. Specifically, each of these chapters analyses the following aspects. Chapter 3 examines the jurisdiction and competence of national courts to render injunctive relief in international commercial litigation. Chapter 4 analyses the jurisdiction and competence of courts supporting arbitration proceedings by way of interim relief. Chapter 5 studies the competence or procedural powers of arbitral tribunals to render provisional measures. Chapter 6

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\(^6\) In the US, for example, some courts have held that the New York Convention prohibits court-ordered relief in aid of arbitration. See *McCreary v CEAT*, 501 F2d 1032 (3rd Cir 1974). Other US courts, however, have refused to follow the said approach. See *Carolina Power v Uranex*, 451 FSupp 1040 (ND Cal 1977).
discusses issues relating to the jurisdiction and competence of emergency arbitrators. Finally, Chapter 7 concludes.

The first introductory chapter may be divided into two main parts. The first part comprises sections 1 to 3 and its purpose is to provide a transnational concept of “provisional and protective measures” and to determine the scope of this thesis as to its subject-matter. Having explained in these sections, the concept, characteristics and types of interim relief, the second part of the chapter – sections 4 to 6 – sets up the methodology adopted and the aims that this thesis intends to pursue.

1. Concept and terminology

1.1. Concept of provisional and protective measures

Interim measures of protection include a wide range of remedies that differ widely from one country to another. Indeed, there are as many concepts of ‘provisional and protective measures’ as there are legal systems. This conceptual divergence is not limited to domestic cases or local law. In fact, even if interim protection of rights is a critical part of transnational commercial disputes, there is no international instrument that defines the types, substantive requirements and effects of the aforementioned remedies. In international litigation, the legal regime of provisional measures is largely determined by national law. In international arbitration, there has not been, until the reform of the Model Law in 2006, any serious attempt to provide any such concept which, therefore, has been dependent on the authority – either an arbitral body or a local court – ruling on the applications for interim relief. Unsurprisingly then, what is considered as an interim measure in one forum, may be regarded as a final or fast-track decision on the merits in other legal systems. Likewise, a remedy deemed as protective in one legal system may not be considered as such by the

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7 An exception is Art 35 of the Brussels-Lugano framework and the interpretation regarding these provisions made by the European Court of Justice in Van Uden.
9 Thalia Kruger, Civil Jurisdiction Rules of the EU and Their Impact on Third States (OUP 2008) 334.
laws of other countries. As it can be seen, the absence of harmonisation and the different legal approaches make difficult the construction of an acceptable concept of interim relief. That said, it is possible to adopt a transnational and wide approach that encompasses a majority of remedies deemed as provisional and protective in most legal systems. Based on that approach, interim measures of protection can be defined as orders issued by courts or arbitral bodies without res judicata effect\(^{10}\) which have the purpose of either i) preserving a factual or legal situation pending the final resolution of the dispute or ii) ensuring that justice can be done in cases where a party tries to thwart the rights of the counterparty or the enforcement of the judicial or arbitral decision on the merits. The Court of Justice of the European Union, for example, has given a similar concept to the one presented above. In *Mario Reichert v Dresdner Bank*,\(^{11}\) it was held that provisional measures are remedies that aim to preserve the status quo or relationship between the parties and safeguard their rights.\(^{12}\)

### 1.2. Provisional or protective measures? The conceptual and terminological issue

Terminologically, as with the definition of interim relief, there is no common agreement among scholars, practitioners and legal instruments. Provisional measures are frequently named as, for example, interim relief, interim measures of protection, injunctive relief, precautionary measures, pre-emptive remedies, conservatory measures or urgent relief. In this context, a further question arises: are these terms employed to refer to the same remedies, or do they draw a distinction between different concepts? On the one hand, ‘protective’ and ‘conservatory’ seem to be references to the purpose or aim of these remedies, namely, the protection of the rights of the parties and the preservation of their relationship or status quo.\(^{13}\) On

\(^{10}\) See § 2.1.

\(^{11}\) Case C-261/90 *Mario Reichert v Dresdner Bank AG* (No 2) [1992] ECR I-2149, [34].


the other hand, ‘provisional’, ‘interim’ and ‘urgent’ seem to refer to the nature and characteristics of these remedies.\textsuperscript{14}

1.2.1. ‘Provisional’ versus ‘protective’

In practice, the terms ‘provisional’ and ‘protective’ are interchangeably used to refer to the same legal institution. However, it is possible to draw a conceptual distinction between, on the one side, provisional measures and, on the other side, protective measures.

First, a ‘protective’ or ‘conservatory’ remedy is normally ‘provisional’ in nature but that is not always the case. Some ‘protective’ measures may have been intended from the outset to stand as final.\textsuperscript{15} For instance, a final award of provisional damages is intended to be a definitive protective decision. By contrast, an order for interim payment is a remedy of provisional nature irrespectively of whether it becomes a definitive or final resolution of the dispute. Thus, a conservatory measure will not be provisional if it is intended to stand as final from the outset in the sense that it cannot be juridically re-examined at the same level of adjudication.

Similarly, not every ‘provisional’ remedy is necessarily ‘protective’. It has been argued that some provisional measures such as orders for security for costs and orders for the production of documents are not of conservatory nature.\textsuperscript{16} It is doubtful, however, that an order for security for costs is not protective. An order for costs obliges the claimant to deposit a sum of money in the form of a bank guarantee or deposit.\textsuperscript{17} Obviously, that order is a conservatory measure since it ensures that funds will be available to cover the award or judgment on costs by guaranteeing the enforcement of that decision.\textsuperscript{18} A better example in this context is the institution of interim payments. In France, the \textit{réfééré-provision} is a provisional

\begin{itemize}
\item \textsuperscript{14} ibid.
\item \textsuperscript{15} Emmanuel Gaillard and John Savage (eds), \textit{Fouchard Gaillard, Goldman on International Commercial Arbitration} (Kluwer 1999) 709.
\item \textsuperscript{16} Yesilirmak (n13) 9.
\item \textsuperscript{17} Alan Redfern and Sam O’Leary, ‘Why is it time for international arbitration to embrace security for costs’ (2016) 32 Arb Int 397, 399.
\item \textsuperscript{18} ibid 403.
\end{itemize}
remedy that enforces the right of the creditor to a part, or the whole amount claimed, provided that the obligation to pay cannot be seriously challenged. As it can be seen, an order for interim payment does not protect the status quo or the rights of the parties, but it enforces the ‘incontestable’ right of a creditor without delay on a provisional basis.

Therefore, strictly speaking, not all provisional measures are protective and not all protective measures are provisional. And some legal systems seems to have made a distinction in that regard. For instance, according to Article 818 of the Italian Code of Civil Procedure, an arbitral tribunal seated in Italy cannot order any conservatory measures (provvedimenti cautelari). However, the said article omits provisional measures (provvedimenti provvisori) from such prohibition. This omission has been interpreted by some scholars as a clear distinction between provisional measures on the one side, and protective measures on the other side. Thus, according to these commentators, tribunals seated in Italy may grant orders for interlocutory payment or any other provisional measures.

Figure 1.1. Distinction between protective measures, provisional measures, and “provisional and protective measures”.

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On the face of it, one might have assumed that this clear terminological and conceptual distinction has been widely adopted by legal systems in both litigation and arbitration. Yet, one must be cautious with respect to linguistics. Article 35 of the Brussels I Recast, for example, illustrates that terminology does not always follow the dividing line between provisional measures and protective measures posed above. Although the English version of the aforementioned provision refers to “provisional, including protective, measures”, the French, Italian and Spanish translations of the Regulation – which are equally official versions – include some variations to the said expression. In the French text, it is not specified that provisional measures may include protective ones since the wording is mesures provisoires ou (or) conservatoires. Similarly, in the Italian text, the title of section 10 reads provvedimenti provvisori e (and) cautelari. Finally, the Spanish version of Article 35 refers to medidas provisionales o cautelares that is, provisional or precautionary measures. The main and critical issue here is to determine whether the Regulation includes the two alternative categories of, respectively, provisional measures and protective measures as suggested by, for example, the Italian version. The answer is clearly negative. Nor is the Brussels I Regulation including here measures of protective nature that do not have a provisional character as a strict reading of the French text would suggest. Scholars such as Pretelli have suggested that the terms ‘provisional’ and ‘protective’ in the Regulation seem to simply refer to the main characteristics of these types of remedies, namely, protective and provisional nature. The better approach is, however, to adopt the reasoning of the European Court of Justice in Van Uden, where it was held that an order for interim payment may constitute a measure within the terms of the Regulation as long as “repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim”. As it can be seen, purely provisional measures without protective effect may be included within the scope of the Regulation

23 Ibid.
24 Ibid.
26 Ibid [47].
irrespectively of the terminology used in the different versions of the Brussels Recast.

This thesis, with respect to its scope, follows the same approach by analysing the jurisdictional regimes of provisional, including protective, measures in international arbitration and international litigation. Whilst this study is mainly focused on remedies which are both provisional and protective, reference is also made to purely provisional measures such as interim payments. By contrast, protective measures which intend to stand as final from the outset in the sense that, once made, such measures cannot be juridically re-examined at the same level of adjudication are outside the scope of this thesis.

![Figure 1.2](image.png)

**Figure 1.2.** Provisional, including protective, measures: the coloured grey area delimits the scope of this thesis.

### 1.2.2. ‘Provisional’ versus ‘interim’

Secondly, the potential distinction between ‘provisional’ and ‘interim’ should also be examined from the outset. ‘Interim’ and ‘provisional’ refer to the lack of *res judicata* effect of the measures which can be subsequently revisited by the court or tribunal with jurisdiction on the merits. Nonetheless, the term ‘interim’ has been surrounded by confusion in some legal systems especially due to its different uses in litigation.
For instance, in Scottish litigation, whilst an ‘interim decree’ ordering the payment of money is not a provisional measure but a final and definitive resolution on the matter dealt by the decree, an ‘interim interdict’ is an injunction of provisional nature.\(^{27}\) Scottish litigators have no problem distinguishing them, however, it is easy to see why the term may have caused some problems. In order to avoid confusion, in international arbitration, ‘provisional’ seems to be preferred over ‘interim’. This can be illustrated, for example, with the adoption of the terms “provisional award” by the Scottish Arbitration Act to name what was previously known as interim award.\(^{28}\) Indeed, the 2010 Act tried to clarify the issue by adopting terms widely accepted in international arbitration practice. Nevertheless, the expression “interim relief” seems to be preferred by English litigation practitioners and the said terminology can also be found in the Civil Procedure Rules. It is clear then that “interim relief” will coexist with “provisional and protective measures” and that both expressions can be used interchangeably.

Lastly, some arbitration scholars have proved the relatively little importance which should be given to semantics with a final remark. These commentators have argued that there is a \textit{sui generis} category of provisional measures which are not represented by a specific term. The previous terminology, it has been claimed, fails to consider the specificity of the measures designed to ensure the enforcement of the final decision on the merits.\(^{29}\) Yet, widely construed, these remedies may be included within the ‘protective’ term since the ultimate goal is to protect the right of the parties to justice through the enforcement of the final judicial or arbitral decision. And undoubtedly, these remedies are provisional since they lack \textit{res judicata} effect. In any event, it has been shown that the usage of terminology seems, in some cases, arbitrary. For that reason, rather than an assessment of the terminology used in a particular context, a legalistic analysis should be the preferred option to determine, on a case-by-case basis, the legal concept and scope of the term. Consequently, for the purposes of this thesis, the issue of terminology should not be of major concern. The term ‘protective’ is used along with ‘conservatory’, ‘interim’ or

\(^{28}\) SAR, Rule 53.
\(^{29}\) Gaillard and Savage (n15) 709.
‘provisional’ as synonyms, to refer to provisional, including protective, measures as defined in the previous subsection.

2. Characteristics of provisional and protective measures

2.1. Provisional nature or periculum in mora

It should come as no surprise that final remedies are excluded from the realm of provisional measures. This is an obvious consequence of the interim or provisional nature of the said remedies. Although it has been unanimously accepted that one of the main characteristics of provisional relief is its lack of finality, there is no consensus as to what ‘lack of finality’ means. Undoubtedly, in international litigation whether or not a specific remedy is considered as final depends on concepts and elements of national law. In international arbitration, national law also plays an important role since, irrespectively of whether or not an international concept of arbitral interim relief exists, arbitrators and practitioners usually bring to the hearing room local concepts and peculiarities of their respective legal systems. Unsurprisingly then, scholars and practitioners with different legal backgrounds applying the same reasoning may reach conflicting conclusions about the finality of a measure. An example of this controversy is the debate surrounding the French référé-provision and the Dutch kort geding. Whereas a majority of scholars have defended the provisional character of these measures, such remedies have not been recognised as provisional by other commentators who argue that, in a practical sense, decisions in summary proceedings are final.

These conflicting views can be avoided if a wide interpretation of ‘provisional nature’ is adopted. Adopting a wide approach, a remedy rendered by a court or tribunal is provisional if it does not have res judicata effect. The essential element which

defines a provisional remedy is not its temporary effect. Rather, the critical element here is a juridical concept – the lack of res judicata; that is to say, the power of courts and tribunals to modify, suspend, confirm, or overrule the previous decision on the basis that it does not possess res judicata effect. The concept of res judicata – in Latin, “a matter judged” – varies significantly between legal systems but for the purposes of this thesis, “res judicata effect” is understood as the effects of a decision that cannot juridically be re-examined at the same level of adjudication. Accordingly, it should be materially irrelevant whether or not the measure becomes, in a practical sense, final or not. In this context, two examples can be provided. Consider, first, a provisional order that eventually becomes final because the parties amicably settle their dispute. The parties decide not to pursue further litigation or arbitration proceedings; yet, conceptually, the provisional order could still be modified or suspended by the court or tribunal deciding on the merits if such proceedings were pursued. Consider now an interim order which is suspended by the competent court or tribunal deciding on the merits. Whilst the order of the first example became final, the second decision had a temporary nature. Nevertheless, irrespective of the interval in which these orders were in place, both were from a doctrinal point of view, provisional measures. Accordingly, in contrast to the suggestions of some scholars, the characteristic of ‘provisional nature’ should not be construed as ‘temporary effect’. From a legal point of view, a provisional measure is a decision that lacks res judicata. From a practical perspective, whether or not the provisional measure becomes final, will depend on different aspects, and it is materially irrelevant for the purpose of determining the conceptual nature of interim relief.

2.2. Protective nature or fumus boni iuris

‘Protective nature’ is the second main element of this category of remedies. All interim measures of protection have, as a purpose, the protection of the status quo and the rights of the parties pending the final resolution of the dispute or its enforcement. ‘Protective nature’ can be understood either as avoiding some degree of harm to the parties or as preserving the status quo and the rights of the parties.

33 cf Nicholas Rose, Pre-emptive Remedies in Europe (Longman 1992) 282.
34 Kramer (n32) 318.
35 Rose (n33).
Once again, in a transnational context, this characteristic should be widely construed.

Several commentators have argued that some measures frequently classified within the category of provisional and protective measures do not have protective nature.36 First, interim payments have been traditionally excluded on the basis that such remedies are not of protective character. As anticipated above, in some cases, behind an interim payment there is an incontestable right of a party to obtain the whole or part of the final relief sought on a provisional basis. Rather than protecting the rights of the parties or the status quo, in this case, an order for interim payment executes an incontestable right with respect to the final relief sought by the creditor. Interim payments are, in some legal systems, rendered as of right. In the context of a Dutch kort geding, for example, the applicant does not have to show a state of financial need as a consequence of the debtor’s non-payment, nor does it have to demonstrate a risk of dissipation of assets or insolvency. It has been previously explained that the ‘protective character’ of an interim remedy should be understood as preserving the status quo and protecting the rights of the parties. Obviously, the protection of the rights of the parties cannot be interpreted as including the possibility to obtain the final relief sought as of right. Interim payments are, in some cases, provisional measures without protective character.37

Secondly, one might argue that security for costs, anti-suit and anti-arbitration injunctions, and orders for the preservation of evidence or the production of documents are not protective or do not preserve the status quo. Yet, those who put forward such a restrictive approach fail to take into account the aims of the law of interim protection of rights. Interim orders for the preservation of evidence, for example, are not just a mere procedural issue if such evidence is at risk of destruction. In the absence of a remedy securing important evidence or the property at dispute, how could the tribunal or court with jurisdiction on the merits adjudicate the dispute? If a provisional remedy is not rendered to secure evidence at risk, the

36 See Jean-François Poudret and Sébastien Besson, Comparative Law of International Arbitration (2nd edn, Sweet and Maxwell 2007) who analyse this issue on pages 519-520.
37 See § 3.1.5.
court or tribunal would not have substantial evidence to assess the case. Similarly, if a provisional measure is not rendered in order to secure the property at dispute, the arbitral or judicial decision could be simply an unenforceable piece of paper.

Some arbitral and judicial decisions may distinguish between the protection of the status quo –restrictively interpreted – and the protection of other elements. It would then be possible to distinguish between different ‘protective remedies’ such as measures preserving the status quo, measures protecting the proceedings, measures protecting evidence, and measures protecting the ultimate decision on the merits. These are simply, different ways of classifying protective relief. For the purposes of this thesis, “protective character” is understood as the preservation of the status quo and the protection of the right of the parties to justice which encompasses, among others, the protection of the proceedings and the protection of the right of the parties to resolve their disputes through the agreed dispute resolution method, or in the agreed forum. In sum, it can be concluded that, regardless of whether the given remedy is directly protecting the position of the parties or status quo, the proceedings, some evidence, the property at dispute, or the enforcement of the final arbitral or judicial decision, the rights of the parties to justice is always the fundamental principle requiring interim protection.

2.3. Measures ancillary to the proceedings on the merits?

Traditionally, it has been argued that one of the main characteristics of provisional and protective measures is the instrumentality of these remedies with respect to the proceedings on the merits. However, some relatively recent developments may seem to point to a different conclusion. First, legal systems such as France with the référé-provision, and the Netherlands with the kort geding, have conceptualised some provisional remedies as independent and without any connection with subsequent proceedings. Thus, in these cases, the applicant is not required to file an action on the merits. It is then important to distinguish between provisional and protective measures on one side, which are by definition instrumental with respect to the proceedings on the merits, and provisional measures on the other side which
may be conceptualised as independent from the main action. Secondly, the European Court explained in *Van Uden* that “provisional [including protective] measures are not in principle ancillary to [the proceedings on the merits] but are ordered in parallel to such proceedings”. The first reading of this passage may give the impression that the concept of provisional and protective measures have evolved to an independent institution that exists regardless of the proceedings on the merits. Yet, injunctive remedies do not “come from nothing” – there should be a dispute, of one form or another, which triggers the request for provisional and protective measures. Provisional and protective measures are, indeed, instrumental with respect to the proceedings on the merits since the *raison d’être* of interim protection of rights is to maintain the *status quo* and to protect the rights of the parties while the resolution of their dispute or the enforcement of the final decision is pending.

### 2.4. Relief available before the final resolution of the dispute?

In legal systems such as England and Scotland, it is well-established the possibility to obtain post-judgment and post-award injunctions which aim to secure the enforcement of the final decision on the merits. In these systems, such injunctions are normally categorised as provisional measures. However, in other legal systems, once the final judgment or award is rendered, post-judgment or post-award measures are deemed as part of the enforcement stage. A further question then follows: can these injunctions be defined as provisional measures, enforcement measures or both?

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38 See Fig 1.1.
39 *Van Uden* (n25) para 33.
40 See also *Broad Idea International v Convoy Collateral v Cho Kwai Chee* [2021] UKPC 24, [15] and [83] where the Privy Council argued that freezing injunctions are not ancillary to a cause of action and there is no reason to link such remedies to the existence of a cause of action.
41 See, eg, *Fourie v Le Roux* [2007] UKHL 1, [2007] 1 WLR 320 (the applicant “must at least point to proceedings already brought, or (…) to be brought, so as to show where and on what basis he expects to recover judgment against the defendant”).
43 Arts 22(5) and 47 of the Brussels I Regulation treated post-judgment measures as part of the enforcement process. See also Art 40 of the Brussels I Recast. Hill and Chong (n1) 357.
To begin with, it is important to note that post-judgment or post-award remedies can be subsequently modified or even suspended if there is a change of circumstances as to the factual or legal situation between the parties. Secondly, these measures do not enforce the final arbitral or judicial decision. A freezing order, for example, does not provide the final relief sought by the parties but preclude a potential dissipation of assets. In other words, rather than enforcing the decision on the merits, a post-judgment or post-award injunction secure its enforcement. Thirdly, broadly speaking, there are no considerable differences between a freezing injunction granted before or after a final judgment or award. English courts have accepted in a recent case,\(^{44}\) that pre- and post-judgment freezing injunctions are different in the sense that in the pre-judgment stage, it has not yet been proved that the applicant will succeed on the merits. This is particularly important with respect to the *Angel Bell exception* or ‘ordinary course of business exception’ which allows the respondent against whom a freezing order is in place, to dispose of assets in the ordinary course of business.\(^{45}\) In pre-judgment injunctions, it was held, such exception is likely to be included.\(^{46}\) In post-judgment situations, however, injunctions may be more draconian and may even prohibit ordinary business transactions.\(^{47}\) As it can be seen, this is a difference as to the scope of the remedies which does not impact on the provisional and protective nature of both pre and post-judgment injunctions.

As it was explained by Kerr LJ in *Babanaft International SA v Bassatne*,\(^{48}\) behind the categorisation of post-judgment and post-award injunctions as provisional measures or as enforcement remedies, there is a jurisdictional issue. On the one side, enforcement measures are normally subject to the exclusive jurisdiction of the state where the assets are located.\(^{49}\) On the other hand, the jurisdiction to render provisional measures is not limited to the existence of assets within the jurisdiction. If such injunctions are categorised as provisional measures, national courts of a given country could render freezing injunctions over foreign assets pending the enforcement in a third country of a judgment or award which was rendered in its


\(^{45}\) *See* *Iraqi Ministry of Defence v Arcepey Shipping Co SA (No 2)* [1981] QB 65.

\(^{46}\) *Wilson* (n44) [45], quoting *Soinco SACI v Novokuznetsk Aluminium Plant* [1998] QB 406.

\(^{47}\) ibid [56].


\(^{49}\) ibid 35.
territory. Obviously, this is a matter for every legal system to determine but there are no reasons to reject that, conceptually, post-award and post-judgment remedies may be categorised as provisional measures. Accordingly, for the purposes of this thesis, the scope of the concept of provisional measures is set out with respect to the effective recognition and enforcement of the final decision for two reasons. First, this option is allowed by several legal systems, and secondly, such remedies may be particularly useful in a cross-border context, where it is inevitable the existence of delays between the resolution of the dispute and the enforcement of the final decision.

3. Different types of provisional and protective measures

Provisional and protective measures can be categorised according to several criteria. This section classifies provisional relief according to, first, the function or purpose of the measure; secondly, the object against which the order is directed; and thirdly, the authority granting the remedy. Finally, other forms of classification are also explored. Before the discussion turns to the assessment of the different types of provisional measures, a few words about such categorisations are required.

Several commentators have been concerned about problems arising out of a strict and closed interpretation of the different classifications of interim relief. That concern follows from the fact that a given provisional remedy may be included within two or more groups. By way of example, in the case of a classification based on the functions of interim relief, some measures may have more than one purpose, and consequently, its inclusion in one group or another should not be seen in any sense as closed. In sum, the different categories or types of interim relief presented below are not intended to be interpreted as mutually exclusive.

50 ibid.
52 ibid.
3.1. Categorisation according to the functions and purposes of interim relief

Classifying provisional measures according to their purpose is probably one of the most popular forms of categorisation among scholars. Branson, for example, distinguishes three types of interim relief the purpose of which is to facilitate the conduct of the proceedings, to avoid loss or damages, and to facilitate the enforcement of the final decision.\(^{53}\) Likewise, Kramer has distinguished between conservatory, regulatory and anticipatory measures.\(^{54}\) Furthermore, Semple has divided interim relief into measures which, first, preserve the status quo to ensure enforcement, second, stabilise the legal relations between the parties and, lastly, preserve evidence.\(^{55}\) Some of these classifications are either simplistic or ill-considered.\(^{56}\) For that reason, this section provides a coherent and comprehensive classification that includes six different categories.

3.1.1. Provisional measures that maintain the status quo

The first category of provisional measures includes a wide range of orders which aim to maintain the status quo pending a final decision on the merits or its enforcement. The term ‘status quo’ has been interpreted in a US case as “the last actual peaceable uncontested status which preceded the controversy”.\(^{57}\) In many cases, the preservation of the status quo has been assessed with respect to the availability of a judgment or award on damages. Accordingly, not every factual or legal change of circumstances between the parties amounts to interim protection. Frequently, interim protection is only offered if an award or judgment on damages cannot cover the losses that one party may suffer. These losses might be, for example, cash-flow problems, damages to its reputation, or losses of business opportunities.\(^{58}\) For that reason, courts and tribunals normally assess, in the context of an application for a

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\(^{54}\) Kramer (n32) 307.

\(^{55}\) Morek (n53) 77.


\(^{57}\) *Susanville Indian Rancheria v Leavitt*, 2007 WL 662197, 7 (USDC ED Cal).

\(^{58}\) Blackaby, Partasides and others (n51) 432.
measure to maintain the status quo, the damage or harm that the parties may suffer in the course of the proceedings.\textsuperscript{59}

National courts and tribunals have primarily used interlocutory injunctions or interim interdicts to preserve the status quo. Interlocutory injunctions can be defined as orders requiring a party to do or refrain from doing something. One of the most prominent examples of this type of provisional relief is the remedy rendered by an English court in the Channel Tunnel\textsuperscript{60} case, which ordered the performance of one of the contractual obligations included in the underlying contract. In this case, the plaintiffs entered into a construction project with a consortium of British and French companies to build a channel tunnel between England and France.\textsuperscript{61} After the contractors threatened the employers to suspend the works alleging a breach of contract, the plaintiffs applied for an injunction restraining the defendants from ceasing the construction work.\textsuperscript{62} In this case, if a provisional measure had not been granted, the damages could have been enormous and impossible to recover at a later stage and, in an extreme scenario, it could also have forced the plaintiffs out of the market.\textsuperscript{63}

Additional examples of this category of relief are orders requiring a party to continue shipping products, to stop using intellectual property rights, to stop selling the goods of the counterparty or to order the sale of perishable goods.\textsuperscript{64} Lastly, orders prohibiting the aggravation of the dispute should also be included here since such remedies aim to prevent actions of the parties which would provoke unnecessary damage to their relationship. For example, orders prohibiting a party from making any public statements can also be classified within this category of interim relief.\textsuperscript{65}

\textsuperscript{59} Born (n56) 2488.
\textsuperscript{60} Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334.
\textsuperscript{61} ibid.
\textsuperscript{62} ibid.
\textsuperscript{63} Lew and Mistelis (n56) 596.
\textsuperscript{64} ibid.
\textsuperscript{65} Born (n56) 2489.
3.1.2. Provisional measures that ensure the enforcement of the ultimate judgment or award

Interim relief included in this category has the purpose to secure the enforcement of the ultimate judgment or award in cases where the defendant tries to frustrate the result of the litigation or arbitration process by, for instance, compromising property or dissipating assets. Examples of provisional measures under this category include freezing injunctions, orders for depositing moveable property, preliminary seizure and attachment orders, and sequestration of the property in dispute.

Even though the purpose of these remedies is the same in every legal system, their content, nature, and effects differ widely from one country to another. In civil law jurisdictions, the most powerful weapon in the hands of the plaintiff is the preliminary seizure and attachment of assets. Some examples of these remedies are the French saisie conservatoire or the Spanish embargo preventivo. In legal systems of the common law tradition such as England, the most powerful remedy within this category is the Mareva or freezing injunction. Interim freezing injunctions are orders operating in personam which prevent the defendant from disposing assets before the enforcement of the final decision on the merits. The primary aim of this remedy is to prevent the situation by which the defendant strategically moves assets outside the territorial jurisdiction of a court in order to make himself judgment or award-proof. Accordingly, the purpose of this remedy is to avoid the plaintiff from getting a pyrrhic victory in the form of an unenforceable decision. From a practical point of view, these remedies play an important role in situations of extreme urgency. In fact, a freezing order is a very useful remedy in the context of the current online banking services, where a transfer of assets outside the jurisdiction of a court can be completed within seconds. Unsurprisingly then, the majority of freezing orders are issued as a result of

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67 Yesilirmak (n13) 12.
68 Lew and Mistelis (n56) 597.
69 French Code of Civil Execution Procedures, Articles L521-1 to L523-2.
71 This remedy took its name from the decision of the English Court of Appeal in *Mareva Compania Naviera v International Bulkcarriers* [1980] 1 All ER 213.
an _ex parte_ application, on the basis that the speed and element of surprise on the defendant are essential to ensure the effectiveness of the measure.⁷²

Disclosure orders ancillary to Mareva injunctions should also be included within this category. Obviously, if the assets of the defendant are to be frozen, an order requiring the disclosure of the extent and location of these assets is ancillary to the freezing injunction.⁷³ Disclosure orders are not only an important strategic element in the hands of the claimant, but these remedies also fulfil two important functions with respect to the defendant and third parties. First, disclosure orders avoid the defendant from being treated oppressively by preventing freezing injunctions with draconian effects,⁷⁴ and secondly, ancillary orders protect third parties, namely the bankers, which are simply holders of the assets.⁷⁵

Finally, other remedies such as the appointment of a receiver should also be included here. In cases where the competent authority has enough reasons to believe that the disputed property is at risk of destruction and that it should be excluded from the possession of both parties, a receiver can be appointed while the resolution of the dispute is pending.⁷⁶

### 3.1.3. Provisional measures that ensure the preservation of evidence

This category of interim relief includes measures to collect, preserve, or make records of evidence that may not be available at a later stage of the proceedings. These remedies aim to avoid situations where a party attempts to destroy evidence before the commencement or during the arbitration or litigation proceedings in order to frustrate the rights of the counterparty. Conversely to freezing injunctions, these

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⁷² Hill and Chong (n1) 340.
⁷³ Ibid 345.
⁷⁴ If the defendant has more than one asset within the jurisdiction and “if each banker prevents the drawing from his account to the limit of the sum claimed, the defendant will be treated oppressively and the plaintiff may be held liable on his undertaking in damages”. See _A v C_ [1981] QB 923, 940.
⁷⁵ “The very generality of the order creates difficulty (...) for the bankers, who (...) may be unaware of the existence of other assets of the defendant within the jurisdiction; (...) if a more specific order is possible, it may give much protection to the defendant’s bankers”. Ibid 940.
⁷⁶ Alexander Layton and Hugh Mercer (eds), _European Civil Practice_ (Vol 1, Sweet and Maxwell 2004) 154.
measures are not exclusively designed to prevent the unlawful conduct of a party but they also preserve evidence in situations where external factors may compromise essential information. By way of example, if a dispute is exclusively based on the quality of the perishable goods to be delivered, it is reasonable to assume that a record or preservation order would be granted in advance of the proceedings.\textsuperscript{77} Obviously, if a preservation order or a proper record of such goods is not made at an early stage, the dispute will not be determined according to proper standards of justice. In other words, failure to secure evidence that is crucial to the resolution of a dispute will lead to a denial of justice since the tribunal or court would have nothing to scrutinise when adjudicating the merits of the case.

Examples of these remedies are the inspection, custody or detention of property, taking of samples, carrying out searches or ordering a party to disclose evidence.\textsuperscript{78} In this context, it is essential to refer to a particular order of investigative nature that is available under English law. These remedies, commonly known as Anton Piller orders or search orders, contribute to the preservation of evidence and property by permitting the claimant to access the premises of the defendant\textsuperscript{79} under the supervision of a solicitor without prior warning.\textsuperscript{80} Another example of this \textit{sui generis} type of relief is the taking of the oral evidence of witnesses in cases of extreme urgency. As Maher and Rodger have suggested, in cases where a crucial witness is of advanced age or suffers a terminal illness, failure to obtain evidence on commission would compromise the proper resolution of the dispute if, at a later stage, the witness is no longer alive or cannot attend the hearings.\textsuperscript{81} As it can be seen, whether the preservation of evidence is to be made by securing, collecting or making records will depend on the facts of the case. Whilst in the case of perishable goods, a record would be the most appropriate approach, in the second example, collecting evidence and examining the witness of advanced age would be the only possible option.

\textsuperscript{77} Blackaby, Partasides and others (n51) 429.
\textsuperscript{78} Hill and Chong (n1) 347.
\textsuperscript{79} W D Park and S J H Cromie, \textit{International Commercial Litigation} (Butterworths 1990) 289.
\textsuperscript{80} Hill and Chong (n1) 348.
\textsuperscript{81} Maher and Rodger (n66) 306.
Finally, two additional remarks should be made. First, it is important to distinguish between the collection of evidence vis-à-vis the preservation of evidence when the protection of the rights of the parties is a matter of urgency.\textsuperscript{82} Whilst the ordinary collection of evidence is purely a matter of procedure, its preservation clearly falls within the concept of interim relief for the purposes of this thesis. Secondly, measures falling within this category should not be considered as remedies protecting the proceedings. It is undeniable that this category of relief is concerned with evidence which is, obviously, an essential part of the proceedings on the merits. However, the principal aim of these measures is not to protect the proceedings but to safeguard the rights of the parties to justice. As it was previously explained, if a measure that preserves crucial evidence is not rendered, the right of the parties to have their dispute resolved according to adjudicatory procedures would be frustrated. In contrast to the measures explained in this subsection, the following category of provisional remedies does protect the conduct of the proceedings.

3.1.4. Provisional measures with respect to parallel proceedings

In some legal systems, national courts have developed controversial instruments which aim to protect litigation proceedings in cases where one of the parties tries to frustrate the legitimate jurisdiction of a court by commencing or continuing proceedings in a different forum.\textsuperscript{83} These remedies, designed in common law legal systems for cross-border litigation proceedings, were later adopted in the arbitration setting to protect the jurisdiction of arbitral tribunals.\textsuperscript{84} As it was previously anticipated, the final or interim nature of these injunctions depends on whether the given court or tribunal has made a final determination as to its jurisdiction. In fact, if the court or tribunal has asserted jurisdiction, an anti-suit or anti-arbitration injunction may be intended to stand as a final protective measure.

Two remedies deserve consideration here, namely, anti-suit and anti-arbitration injunctions. On the one hand, anti-suit injunctions are orders requiring the defendant

\textsuperscript{82} Layton and Mercer (n76) 161.
not to commence or continue litigation proceedings in a foreign court. These injunctions operate against the defendant and, consequently, they are not directed against the courts of the foreign legal system. However, it is axiomatic that “the in personam effect” has not been enough to dissipate the doubts of civilian legal systems which believe that anti-suit injunctions are incompatible with the principle of international comity. This controversy has even reached the European Court of Justice in Turner v Grovit\(^85\) and West Tankers.\(^86\) In these decisions, the Court examined the impact of the English practice of anti-suit injunctions on the judiciary of other Member States. Unsurprisingly, the Court held that these judicial remedies cannot be allowed within the European Jurisdictional Area. By contrast, in another landmark decision, the European Court appeared to confirm the right of arbitrators to render anti-suit injunctions. In Gazprom,\(^87\) the Court agreed with AG Wathelet that the Brussels regime "must be interpreted as not precluding a court of a member state from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that member state". The Court, however, did not go as far as the Advocate General and it did not reject the principles laid down in Turner and West Tankers in the context of court-ordered anti-suit injunctions.

On the other hand, anti-arbitration injunctions are orders, usually granted by national courts, which restrain a party from commencing or continuing arbitration proceedings. Its justification has been based on the absence of a valid arbitration agreement. Nonetheless, some commentators have considered that these remedies are contrary to the principle of competence-competence by which an arbitrator has the power to decide on its own jurisdiction.

### 3.1.5. Provisional measures that anticipate final relief

Some commentators have considered that one of the main characteristics of provisional relief is the absence of prejudgment of merits. Although it is true that

\(^{85}\) Case C-159/02 Turner v Grovit [2004] ECR I-3565.
\(^{86}\) Case C-185/07 Allianz SpA v West Tankers Inc [2009] ECR I-663.
\(^{87}\) Case C-536/13 Gazprom v Lietuvos Respublika EU:C:2015:316.
courts and tribunals should not completely anticipate the final decision, some legal systems have permitted provisional measures of anticipatory effects. The main example of this type of provisional measure without protective effect is the institution of interim payments.

Interim payments are not, in general terms, protective measures. If a sum of money is due and undisputed, these remedies are normally granted as of right. One may argue that the substantive standards of “urgency” and “serious or irreparable harm” which are supposedly required in order to obtain an order for interim payment are enough to classify these remedies as protective. However, the practice of interim payments demonstrates that some courts and tribunals have adopted a very lax approach to such requirements, especially in the context of monetary claims. In the Dutch kort geding proceedings, for example, urgency is a legal prerequisite that needs to be satisfied in order to obtain interim payments. However, this requirement has not been controlled strictly by Dutch courts. Indeed, if the claim is not contested or if it is reasonably not contestable, the court will accept that urgency has been met. Similarly, with respect to serious harm, Dutch courts have interpreted that the claimant does not need to be in a state of financial need to obtain an interim payment. Notwithstanding the above, it is equally true that orders for interim payments can be rendered as protective measures if their aim is, for example, to ensure that the applicant remains in business or the continuation and execution of a particular project. This approach may be preferred by arbitral tribunals since, in arbitration, concerns about independence and impartiality have restricted the adoption of measures that may be seen as anticipating the merits of the dispute.

88 Kramer (n32) 307.
92 ibid.
93 Arbitration Guidelines 2016, Chartered Institute of Arbitrators, 16.
Secondly, with respect to the potential provisional character of these measures, there are conflicting views among scholars. According to some authorities, interim payments should be considered as court orders or partial awards of final relief rather than provisional measures.\textsuperscript{94} Born argues that interim payments prejudge the dispute and, therefore, such remedies should be excluded from the concept of provisional relief. As explained above, the European Court of Justice entered into this debate in the \textit{Van Uden} case. In this dispute, it was held that some decisions regarding interim payments can pre-empt the decision on the substance of the dispute.\textsuperscript{95} However, the Court concluded that interim payments may be considered provisional relief to the effects of the Brussels Regulation if they can be reversed to its original state in cases where the applicant is not successful on the merits, that is, if such measures have a strict provisional nature.

Lastly, a final remark should be made. In some legal systems, interim payments can be granted in summary proceedings by judicial and arbitral bodies without jurisdiction on the merits. That is the case of, for example, the Dutch \textit{kort geding} or the French référé-provision – summary decisions that can be subsequently modified or discharged by a court with jurisdiction on the merits. Of course, courts and tribunals with jurisdiction on the merits also have the power, under many national laws, to order interim payments. In England, for example, an arbitral tribunal is empowered to render interim payments by section 39 of the Arbitration Act.

\textbf{3.1.6. Provisional measures requiring security}

Costs in cross-border commercial disputes are often very high. This type of remedy aims to protect the successful party by ensuring the recovery of its litigation or arbitration expenses and legal costs associated.\textsuperscript{96} Security for costs can be defined as orders issued by tribunals or courts requiring a party to deposit a sum of money in

\textsuperscript{94} Born (n56) 2499.
\textsuperscript{95} Maher and Rodger (n66) 314.
\textsuperscript{96} Lew and Mistelis (n56) 600.
the form of a bank guarantee or deposit to ensure to the counter-party the recovery of its expenses.\footnote{Layton and Mercer (n76) 151.}

This type of measure may be appropriate in cases where it is highly likely that one of the parties is not able to afford the costs of the counterparty if ordered to do so. Therefore, such remedies prevent claims brought by insolvent parties but also, frivolous claims.\footnote{Arbitration Guidelines 2016 (n93) 16.} Likewise, it is an appropriate remedy if the claimant strategically attempts to frustrate its potential obligation to pay legal costs. Finally, it should be noted that courts and tribunals, when deciding whether to grant security for costs, may consider whether the party applying for the measure is responsible for the financial situation of the counterparty. In such cases, courts and tribunals are likely to reject the requested relief.\footnote{Born (n56) 2495.}

3.2. Categorisation according to the object

3.2.1. Provisional measures operating \textit{in rem} and \textit{in personam}

With respect to the person or object against which the provisional measure is directed, a distinction can be drawn between interim relief operating \textit{in rem} and \textit{in personam}. On the one hand, remedies operating \textit{in personam} are directed against a named individual and its purpose is to compel the defendant to do or stop from doing something.\footnote{Hill and Chong (n1) 3.} On the other hand, provisional measures operating \textit{in rem} are directed against a thing – the \emph{res} –, as distinct from a person.\footnote{Layton and Mercer (n76) 156.}

In English law, for example an injunction freezing the assets of the defendant is an \textit{in personam} order since it does not attach the property of the defendant, nor does it create any priority of the claimant over the rest of the creditors of the defendant.\footnote{Hill and Chong (n1) 343.}
the person to whom the injunction is directed does not comply with its terms, that person would be subject to contempt of court. Depending on each case, the penalties range from sequestration of assets to immediate prison sentence.\textsuperscript{103} These injunctions have also a “\textit{quasi in rem}” effect due to the operation of the doctrine of contempt of court as applied to third parties having notice of the freezing order. The “\textit{quasi in rem}” effects of this doctrine were, for example, summarised by Lord Denning in \textit{Z Ltd v A-Z}\textsuperscript{104} in the following terms: “every person who has knowledge of [a freezing order] must do what he reasonably can to preserve the asset. He must not assist in any way to the disposal of it. Otherwise, he is guilty of a contempt of court.”

By contrast, proceedings \textit{in rem} in England operate against a thing – the \textit{res} –, normally a ship.\textsuperscript{105} In admiralty proceedings, the claimant is entitled to have the \textit{res} arrested as a provisional measure if it is physically within the jurisdiction,\textsuperscript{106} and the arrestment is directed against the ship itself irrespective of the person in possession.\textsuperscript{107}

\textbf{3.2.2. Provisional measures securing moveable and immoveable property}

The Scottish legal system provides an exceptional example of the distinction between provisional measures against moveable and immoveable property. The types of diligence on the dependence (interim relief) against the moveable property of the defender are, first, arrestment of moveable property including intangible property held by third parties\textsuperscript{108} and, second, interim attachment of tangible property held by the defender.\textsuperscript{109} Conversely, if the property is heritable (immoveable), Scots law provides the institution of inhibition on the dependence.

\begin{thebibliography}{99}
\bibitem{103} ibid.
\bibitem{104}[1982] QB 558.
\bibitem{105} In England, interim orders \textit{in rem} can also involve cargo, freight or even aircraft.
\bibitem{106} Hill and Chong (n1) 348.
\bibitem{108} Dundas and Bartos (n27) 336. See, eg, \textit{Fish & Fish v Sea Shepherd UK} [2011] CSOH 122, 2012 SLT 156.
\end{thebibliography}
To begin with, arrestment is a measure that freezes money and other types of moveable property\textsuperscript{110} of the defender held by third parties in the likely event that the respondent will become insolvent or will dissipate assets.\textsuperscript{111} Accordingly, this measure prevents the third party who is holding the property, usually a bank,\textsuperscript{112} from handing over it to the defender.\textsuperscript{113} However, this remedy does not confer to the applicant preferences over the creditors of the defender, nor does it transfer rights of ownership\textsuperscript{114} except in the case of arrestment of ships.\textsuperscript{115} The effects of this measure are limited to the destruction of the link between the defender and the third party who holds the moveable property.\textsuperscript{116} So, for example, if the bank of the defender is served with a warrant for arrestment, the bank – the arrestee – would not be allowed to transfer the funds affected by the order, and therefore, these funds would be effectively frozen. In contrast to English freezing orders, the institution of arrestment appears to effectively operate without recourse to the sanction of contempt of court since an arrestee who does not comply with an arrestment order may have to pay its amount or value to the arrester. Secondly, with respect to moveable property held by the defender himself, the pursuer can apply for an interim attachment of corporeal moveable property. The Scottish courts will normally grant it if the pursuer has a prima facie case, if there is a substantial risk of insolvency of the defender or dissipation of assets,\textsuperscript{117} and finally, if it is considered reasonable.\textsuperscript{118}

As regards immoveable property, inhibition is an order to stop the defender from disposing of heritable property held by him. This remedy provides the pursuer with an opportunity to limit or reduce the possibility of transfer of such property or the granting of any real right by the defender.\textsuperscript{119} Yet, in the same way as arrestment, it does not include any transfer of rights to the pursuer.\textsuperscript{120} The existence of public

\begin{footnotes}
\item[110] Including incorporeal property such as debts. See, eg, \textit{China National Star Petroleum v Tor Drilling} 2002 SLT 1339.
\item[111] Dundas and Bartos (n27) 336.
\item[112] Rose (n33) 331.
\item[113] Maher and Rodger (n66) 330.
\item[114] Alexander Layton and Hugh Mercer (eds), \textit{European Civil Practice} (Vol 2, Sweet and Maxwell 2004) 688.
\item[115] Gore-Andrews (n107) 583.
\item[116] ibid.
\item[117] Aird (n109) 158.
\item[118] Dundas and Bartos (n27) 334.
\item[119] ibid 336.
\item[120] Gore-Andrews (n107) 585.
\end{footnotes}
records in Scotland makes the institution of inhibition on the dependence an effective mechanism.\textsuperscript{121} In fact, the public registers would write down that the defender is subject to inhibition proceedings and, as a result, he could not freely dispose of his heritable property.\textsuperscript{122}

The distinction between moveable and immoveable property regarding provisional relief is not, of course, exclusive of Scots law. In Germany, for example, the Code of Civil Procedure distinguishes in sections 930 and 932 respectively between \textit{Arrestpfandrecht} on moveable property and \textit{Arresthypothek} on immoveable property.\textsuperscript{123}

3.3. Categorisation according to the authority granting interim relief

National courts and arbitral tribunals cannot grant the same type of interim relief. A first approximation to international arbitration is enough to conclude that the range of remedies available to tribunals is more restricted than those available to courts.\textsuperscript{124} Therefore, it is possible to suggest a potential categorisation that distinguishes between measures rendered by national courts, and measures rendered by arbitral bodies.

Four elements impact on the type of relief available to arbitral bodies. First, arbitrators do not have coercive powers. As a result, many arbitral tribunals have held that they do not possess any authority to render measures that require the exercise of coercion such as remedies ordering the attachment of property of the

\begin{itemize}
\item \textsuperscript{121} Rose (n33) 332.
\item \textsuperscript{122} Layton and Mercer (n114) 689.
\item \textsuperscript{123} Alexander Bruns, ‘Provisional Measures in European Civil Procedural Laws – Preservation of Variety or Need for Harmonisation?’ in Rolf Sturmer and Masanori Kawano (eds), \textit{Comparative Studies on Enforcement and Provisional Measures} (Mohr Siebeck 2011) 184.
\item \textsuperscript{124} Nevertheless, some scholars suggest that in Germany and Switzerland, tribunals may render a wider range of measures than those available to national courts. See Donal Francis Donovan, ‘The Allocation of Authority Between Courts and Arbitral Tribunals to Order Interim Measures; A survey of Jurisdictions, the Work of UNCITRAL and a Model Proposal’ in Albert Jan van den Berg (ed), \textit{New Horizons in International Arbitration and Beyond} (ICCA Congress Series 12, Kluwer 2004) 205.
\end{itemize}
defendant.\textsuperscript{125} By contrast, tribunals seated in legal systems such as France have consistently rendered penalties for non-compliance as permitted by French law.\textsuperscript{126} Yet arbitrators cannot order the enforcement of interlocutory remedies, so the execution of such penalties depends on the \textit{imperium} of French courts. Secondly, given the consensual nature of arbitration, arbitrators do not have jurisdiction over third parties. It follows that arbitral tribunals are not able to grant any remedy with respect to assets, goods or property held by a third party.\textsuperscript{127} In other words, third-party orders can only be granted by national courts. Thirdly, arbitrators cannot render interim relief until the tribunal is constituted. In a majority of cases, interim relief is needed in situations of urgency, where the tribunal has not been appointed or is still unable to act. It is true, however, that this problem has been mitigated with the development of emergency arbitrator procedures. Yet this limitation still remains intact in \textit{ad hoc} arbitration. Lastly, in a majority of legal systems, arbitrators are not permitted to render \textit{ex parte} relief. In 2006, the UNCITRAL Model Law was modified to address such a limitation. Some legal systems have now adopted Article 17B(1) which recognises the power of tribunals to issue \textit{ex parte} preliminary orders.\textsuperscript{128} However, this development is very controversial in the arbitration setting, where \textit{ex parte} relief is seen as inappropriate.\textsuperscript{129} As one commentator has noted, generally, an arbitral tribunal cannot be constituted without informing both parties.\textsuperscript{130} By the time the tribunal is fully constituted, a party may have dissipated assets or destroyed evidence before any \textit{ex parte} order can be rendered.\textsuperscript{131}

### 3.4. Other forms of categorisation

Finally, it should be noted that it is possible to adopt other forms of classification. By way of example, an arbitral tribunal has held that there is a clear distinction between

\textsuperscript{126} See, eg, \textit{Final Award of August 1994 in ICC Case 7895} (2000) 11 ICC Ct Bull 64.
\textsuperscript{127} Yesilirmak (n13) 69.
\textsuperscript{128} Born (n56) 423.
\textsuperscript{130} Lew and Mistelis (n56) 607.
\textsuperscript{131} ibid.
interim measures related to the merits of the claim such as freezing orders or interim injunctions, and interim measures related to the procedure which would include anti-suit and anti-arbitration injunctions. The tribunal based the said distinction on the fact that the substantive standards or requirements to be applied in each of these categories are different.

By way of further example, in some legal systems, it is possible to distinguish between interim relief available from courts with jurisdiction on the merits, and interim relief available from courts without jurisdiction on the merits. In Scotland, for example, the type of remedies available in cross-border commercial disputes depends on whether Scots courts have jurisdiction on the merits. If Scots courts do not have jurisdiction, only arrestment, inhibition, interim interdicts and orders for the preservation of evidence would be available to support the conduct of foreign proceedings. By contrast, if Scots courts have jurisdiction on the merits, a wider range of remedies would be available which would include, for example, orders as to the interim possession of the property at dispute. This potential distinction is based on the availability of different types of measures but also, on the existence of different prerequisites governing each of these categories. As it can be seen, there are numerous options or criteria to categorise interim relief.

4. The importance of research in the specialist areas of provisional and protective measures and international jurisdiction

The importance of provisional and protective measures has been long recognised in transnational commercial disputes. From the introduction of Article XVIII in the first set of arbitration rules adopted by the ICC in 1922 which gave arbitrators “the right to render a provisional decision, providing for such measures of preservation as may be indispensable”, to the inclusion of Article 24 in the Brussels Convention of

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133 Maher and Rodger (n66) 333.
134 ibid.
135 Yesilirmak (n13) 13.
136 Rules of Conciliation and Arbitration of the International Chamber of Commerce 1922, Art XVIII.
1968, policymakers, scholars and business community have accepted the legal maxim of “justice delayed is justice denied”. It was indeed noticed that a final decision on the merits could be useless if there were not in place mechanisms preserving the legal and factual status quo and ensuring the proper enforcement of the final decision. Accordingly, provisional and protective measures were acknowledged as important instruments ensuring fairness and justice in situations where the final resolution of a dispute between merchants of different countries was pending. Today, interim protection of rights in transnational commercial disputes has become more significant than ever before due to globalisation and the development of new proceedings where the parties can obtain urgent relief. Complex arbitration and litigation proceedings, for example, are now the general rule rather than the exception and so delays between the commencement of a dispute and its enforcement are remarkably longer. Globalisation and advances in technology have also made it easier for a potential recalcitrant party to frustrate the ultimate decision on the merits by dissipating assets within seconds. As it can be seen, research on provisional measures remains an important instrument to assess the appropriateness of the framework of interim relief in light of current economic and technological changes.

If interim measures are important as a legal institution, determining the authority to render such remedies is equally important to ensure effective and coherent protection of rights. In domestic disputes, the question of where to seek interim relief is relatively a minor issue. By contrast, in disputes with international elements, the identification of the proper forum to obtain provisional measures is a crucial task in both arbitration and litigation since first, party initiative is the only option to obtain provisional measures in commercial disputes; second, there is a plurality of fora

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138 There are conflicting views as to the author of this expression. Some sources have attributed these words to William E Gladstone, British Prime Minister in the late 1800s. See Tania Sourdin and Naomi Burstyn, ‘Justice Delayed is Justice Denied’ (2014) 4 Victoria UL & Just J 46.
140 Yesilirmak (n 13) 15.
141 Conversely, in investment arbitration, the importance of the jurisdictional question may be mitigated by the fact that tribunals can recommend remedies on their own initiative.
where interim relief might be available; and third, courts, tribunals and emergency arbitrators do not possess the same competence to render injunctive relief. In the context of international litigation, the availability of fora other than the courts with jurisdiction on the merits was recognised, to a great extent, due to the role of European jurisdictional instruments which overturned local case law and national legislation. In the arbitration setting, there is equally, a plurality of options. The development of emergency arbitrator proceedings in the last decade has permitted arbitration users to avoid, to some extent, court intervention. Yet, the option to obtain provisional relief from courts of the seat and courts of non-seat countries is still an available and important alternative in the arbitral process.

5. Purpose and aims of the thesis

The purpose of this thesis is to comprehensively examine the law of jurisdiction in the specialist area of interim protection of rights. Each chapter of the main body of this thesis – Chapters 3 to 6 – analyses and identifies the main problems that arise in each dispute resolution system within the field of jurisdiction widely interpreted. As it will be demonstrated, the jurisdiction of courts and arbitral bodies, and their competence to render provisional and protective measures are different concepts that are, however, strongly interrelated. Accordingly, each of the chapters mentioned above examines jurisdictional and competency problems that are prevalent in arbitration and litigation in order to assess the current state of the law of jurisdiction in the area of interim relief. In fulfilment of the purpose and aims of this thesis, these chapters include, by way of conclusions, several recommendations to the different actors involved in each dispute resolution method, that is, i) arbitration and litigation users; ii) law and policymakers – including arbitral institutions –; and finally, iii) the adjudicatory bodies involved – either courts, tribunals or emergency arbitrators.

142 In England, for example, the legislation implementing the Brussels Convention –Section 25 of the Civil Jurisdiction and Judgments Act 1982– reversed the effects of the Siskina doctrine according to which interim relief was only available if English courts had jurisdiction on the merits. Similarly, in Scotland, there were no remedies available to support foreign proceedings so the Brussels Convention promoted a process of adaptation.

143 See Ch 2.
Specifically, within the subject-matter of jurisdiction and competence to render provisional and protective measures, the aim of the thesis is threefold. First, from a jurisdictional point of view, this project aims to provide guidance to arbitration and litigation users in order to identify, as the law stands, the forum or fora where interim relief is available in transnational commercial disputes, including the most appropriate of all possible alternatives. Furthermore, from the point of view of the competence of courts and arbitral bodies, this thesis describes and assesses the potential limitations imposed on the authority of courts and arbitrators to render interim relief. Only through a jurisdictional and competency assessment of both dispute resolution systems, can the parties adopt an informed decision as to the appropriate forum to seek interim measures. Secondly, this thesis intends to assist law and policymakers, including arbitral institutions, in identifying how to best protect the rights of the parties by adopting a jurisdictional and competency framework that is based on proper legal principles and that ensures effective protection of rights. Thirdly, this thesis identifies several problems and emerging trends, and accordingly, it draws conclusions and recommendations from the practical experience of interim protection of rights in litigation and arbitration. These recommendations may facilitate the work of courts and arbitral bodies and may offer predictability to counsels, litigants, and arbitration users.

6. Research Methodology

The thesis begins by using a purely doctrinal methodology in chapters 1 and 2, where it is set out, respectively, the legal foundations of the institution of interim relief and the basic concepts of the law of jurisdiction as applied in international litigation and international arbitration. As already anticipated, there are as many definitions of “jurisdiction” and “provisional and protective measures” as there are legal systems. However, this thesis demonstrates, after a close examination of local concepts, that there are clearly more similarities than differences. This allows defining a legal regime for both “jurisdiction” and “provisional and protective measures” detached from peculiarities of legal systems and dispute resolution methods. Subsequently, this thesis examines, in chapters 3 to 6, the law of jurisdiction to render interim remedies in international commercial transactions. The methodology then consists
of, first, gathering the relevant sources and describing the law of jurisdiction; and secondly, identifying the problems that arise in each dispute resolution system, and providing solutions and recommendations accordingly. Soft-law sources, multilateral and regional instruments, national law applicable to litigation proceedings, arbitration legislation of different legal systems, and arbitration rules of major arbitration institutions are used to ascertain the law of jurisdiction as it currently stands. Even though this project has an eminently practical approach, legal scholarship is also comprehensively analysed throughout the thesis to facilitate the undertaking of ascertaining the law as it stands. Finally, the research methodology moves to a practical sphere in order to analyse and discuss how the different decision-makers are applying, in practice, the jurisdictional and competency frameworks in force in the litigation and arbitration settings. At this stage, courts decisions, as well as awards rendered by tribunals and emergency arbitrators are carefully examined to obtain conclusions that are later turned into legal recommendations. Furthermore, these results are compared with the approaches of commentators to discern whether or not legal scholarship in this area reflects the daily practice of international commercial transactions.
CHAPTER 2

Jurisdiction and competence: an essential distinction to the law of interim protection of rights

The term “jurisdiction” is widely used and misused in legal terminology.\(^1\) Jurisdiction can be used to refer to the power of the judiciary or arbitral bodies, to the exercise of that power, to the territory within which the said power is being exercised, and even to the judicial bodies exercising the aforementioned authority within a given geographical area.\(^2\) Etymologically, jurisdiction is a word formed by two Latin terms; “\textit{iuris}” equivalent of law or right and “\textit{dictio}” which transposed means the power of saying or the power to speak.\(^3\) Thus, in a literal sense, jurisdiction can be defined as the power or authority to determine what the law is.\(^4\) Remarkably, each branch of law has its \textit{sui generis} concept of jurisdiction. In the conflict of laws,\(^5\) the law of jurisdiction can be defined as the set of principles and rules that determine the circumstances under which national courts or arbitral tribunals are permitted to adjudicate a dispute with international elements. At first blush, this concept does not seem to pose special problems. On closer examination, however, the notion of jurisdiction in private international law is enormously complex since it encompasses different meanings depending on the legal system under consideration, with two paradigms of jurisdiction being traditionally identified by scholars.\(^6\) To complicate

\(^1\) Mauro Cappelletti, ‘Jurisdiction, Competence and Venue’ in Mauro Cappelletti and others (eds), \textit{Civil Procedure in Italy} (Springer 1965) 80.


\(^5\) In this thesis, “conflict of laws” should be understood as a synonym of private international law rather than a reference to choice-of-law issues.

matters further, concepts such as “competence” and “procedural powers” are frequently conflated with “jurisdiction” in the particular context of interim relief. Arbitral tribunals, for example, repeatedly refer to their “jurisdiction” to render provisional measures in cases where, rather than jurisdiction, the issue at stake is primarily, their competence or procedural powers.\(^7\) Given first, their different conceptual nature, and second, the fact that these concepts may come into contact with one another in the context of interim protection of rights, it is important to establish a clear distinction at the very outset.

This chapter examines and clarifies the main concepts of the law of jurisdiction that impact on the framework of interim protection of rights. Section 1 analyses, in general, the different types of jurisdiction in cross-border matters, with a special focus on the distinction between adjudicatory jurisdiction and competence. Section 2 identifies the main differences between arbitral and judicial jurisdiction. Section 3 categorises the power to render interim measures of protection and distinguishes it from concepts such as adjudicatory jurisdiction and the subject-matter component of the concept of competence. Schedule V establishes a clear distinction between the main legal concepts used throughout this thesis. Finally, section 4 concludes.

1. Concept and types of jurisdiction in private international law

Jurisdiction in private international law presupposes or derives from the existence of disputes with international elements. In international litigation, the existence of elements pointing to different legal systems or fora requires a \textit{sui generis} jurisdictional analysis – different to that of domestic jurisdiction – in order to determine the courts of the legal system entitled to adjudicate a particular cross-border dispute. In international arbitration, the existence of international elements may also impact on the jurisdiction and powers of arbitrators. Indeed, a majority of legal systems have distinguished between national and international arbitration by

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adopting a different legal regime depending on the domestic or international nature of the proceedings. The UNCITRAL Model Law, which is regarded as the instrument incorporating the standards and principles of best arbitration practice, defines arbitration as international if any of the following elements are satisfied: i) if the parties have their place of business in different States, ii) if the place of arbitration or the place of performance of the obligations are located outwith the State where the parties have their place of business or iii) if the parties have agreed that the subject-matter of the agreement relates to more than one country. Accordingly, as anticipated above, the existence of international elements in the arbitration setting may impact on the jurisdiction and authority of arbitral tribunals. In the US, for example, arbitrators have the power to adjudicate antitrust or competition disputes if the arbitration is international, but such power does not exist in a domestic context.

Accordingly, the first relevant distinction which can be drawn from a jurisdictional point of view is between national and international jurisdiction. The former is purely a domestic matter; for example, in England whether a specific dispute should be heard by a county court or the High Court. By contrast, the latter refers to the power of national courts or arbitral tribunals to adjudicate disputes with international elements.

1.1. International jurisdiction: jurisdiction to adjudicate and competence

A first approximation to the law of jurisdiction in international private disputes is frequently insufficient to ascertain the complexity of the notion of international jurisdiction. The concept of international jurisdiction incorporates, in private international law, two different constituent elements, namely adjudicatory jurisdiction and competence. To begin with, the notion of jurisdiction includes an element or

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8 UNCITRAL Model Law 2006, Art 1(3).
9 It is true, however, that legal systems may decide not to adopt this distinction since the New York Convention refers to “foreign arbitral awards” rather than to “international arbitral awards”. However, even if a given country adopts a single legal instrument for domestic and international arbitration, it does not follow that the legal regimes of domestic and international arbitration are entirely the same. In domestic arbitration, the lex fori would govern every aspect of the arbitral process: the validity of the agreement, the procedure, the grounds to challenge the award or the form of the award. By contrast, if an arbitration has connections with several countries, the legal regime of the arbitral process would not be the same as in domestic cases.
dimension the purpose of which is the allocation of adjudicatory authority to arbitral tribunals or to the courts of a given legal system.\textsuperscript{11} This component has been called adjudicatory jurisdiction or jurisdiction to adjudicate and it is, frequently, the first issue to consider in cross-border matters since it identifies the forum or \textit{fora} where the dispute may be resolved.\textsuperscript{12} Put differently, this element determines the courts or arbitral tribunal with authority to adjudicate a dispute with international elements.\textsuperscript{13} So, for example, if there is a commercial dispute between a company registered in country A and another company incorporated in country B about the delivery of goods in country C, the jurisdictional question would be: should the courts of country A, B or C decide the merits of the dispute?

Several categorisations can be made within the notion of adjudicatory jurisdiction. To begin with, jurisdiction to adjudicate\textsuperscript{14} may be subdivided into two categories: jurisdiction \textit{in personam} on one hand, and jurisdiction \textit{in rem} on the other.\textsuperscript{15} Jurisdiction \textit{in personam} or personal jurisdiction is the power of national courts or tribunals to make a binding order against a named individual. It is then said that the aforementioned individual is subject to the personal jurisdiction of the courts of the forum or the arbitral tribunal, and therefore, bound by the judgment or award rendered by these authorities.\textsuperscript{16} By contrast, jurisdiction \textit{in rem} is the power to adjudicate a claim which applies only to a thing, the \textit{res}. In England, for example, international claims \textit{in rem} normally involve a ship and fall within the competence of the Admiralty Court.\textsuperscript{17}

\textsuperscript{11} Michaels (n4) 1043.
\textsuperscript{13} ibid.
\textsuperscript{14} In the United States, this type of international jurisdiction has been called judicial jurisdiction. Nevertheless, this expression is not appropriate in a transnational context because judicial bodies are not the only authorities dealing with private international law. In civil law countries, for example, Latin notaries usually deal with a wide range of international family law matters. For that reason, it is more appropriate to refer to adjudicatory jurisdiction or jurisdiction to adjudicate. See Arthur T von Mehren and Donald T Trautman, ‘Jurisdiction to Adjudicate: A Suggested Analysis’ (1966) 79 Harvard Law Review 1121, 1125.
\textsuperscript{16} Hill and Chong (n12) 3.
\textsuperscript{17} ibid 4.
Figure 2.1. Types of jurisdiction in cross-border private disputes.

The distinction between jurisdiction *in personam* and *in rem* is not the only possible categorisation within the concept of adjudicatory jurisdiction. In France, *compétence internationale* has been traditionally divided into direct and indirect jurisdiction\(^\text{18}\) because jurisdiction to adjudicate becomes relevant at two crucial stages. First, the rendering court or tribunal will only hear the case if it has jurisdiction to do so.\(^\text{19}\) Secondly, the requested authority to recognise and enforce a foreign decision will not normally accept the effects of that decision unless the rendering court or tribunal had jurisdiction.\(^\text{20}\) The former category is named direct jurisdiction and the latter is called indirect jurisdiction.\(^\text{21}\) This categorisation is based on the fact that the issue of jurisdiction as a requirement for recognition (indirect jurisdiction) is conceptually different to the issue of jurisdiction as a requirement for adjudication (direct

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\(^\text{18}\) This distinction was first introduced by Bartin, a French scholar, and it has been widely endorsed by the French judiciary. See Etienne-Adolphe Bartin, *Principes de droit international privé selon la loi et la jurisprudence françaises*, § 127 (Editions Domat-Montchrestien 1930) 317.

\(^\text{19}\) Michaels (n4) 1046.

\(^\text{20}\) ibid.

\(^\text{21}\) Frequently, indirect jurisdiction was called “international jurisdiction” or “international competence” as opposed to direct jurisdiction. This terminology, as Nussbaum argues, is unfortunate and should be avoided. See Arthur Nussbaum, ‘Jurisdiction and Foreign Judgments: Jurisdiction, Competence and Venue’ (1941) 41 Columbia Law Review 221, 225.
jurisdiction). As a leading commentator has suggested with respect to the term “indirect jurisdiction”, one might legitimately question whether, in these instances, there is jurisdiction at all. For that reason, some legal writers have suggested that the previous terminology should be replaced by a more accurate term such as “fictional jurisdiction”. However, the semantics proposed by French scholars do not appear to be problematic since the term “indirect” refers to the assessment of direct jurisdiction exercised by a foreign authority.

The second element of the concept of jurisdiction has been named in a majority of legal systems as “subject-matter jurisdiction”, “jurisdiction to prescribe” or “legislative jurisdiction” and more generally as “competence”. Competence is a concept that can be divided into two different strands. First, the subject-matter component of the concept of competence defines the actions, brought by the parties, that are within the power of a court or tribunal. In this sense, competence describes the authority of courts and tribunals to adjudicate disputes of a specific nature. By way of example, in Spain commercial courts have competence over commercial issues. In the arbitration setting, this conceptual element is equally important since it includes the notion of arbitrability, that is, the category of matters or actions that can be submitted to arbitration. Secondly, the concept of competence includes a second component which determines the relief or remedies that can be granted by a court or tribunal. The power of a court, for example, to render a decree of divorce should be classified within the concept of competence. Likewise, the powers of a tribunal to render monetary compensation, final injunctions, or declaratory relief would also be categorised as matters of competence. Yet there are two important problems with the second strand of the notion of competence: first, the lack of consensus as to categorisation or classification of the remedies that a court or tribunal may render;

22 Michaels (n4) 1046.
23 Nussbaum (n21) 225.
24 Ibid.
25 In the United States, the term subject-matter jurisdiction is used in a different sense.
28 Maher and Rodger (n2) 1, and Garner (n2) 980.
29 Ibid.
and secondly, that the said categorisation will impact on the terminology used to refer to this second component of the concept of competence. On the one hand, legal systems of civilian tradition have tended to consider the potential relief awarded by a court or arbitral body as a substantive issue governed by the law applicable to the merits\textsuperscript{30} – and therefore, terminologically, this component has been simply named as “competence”. On the other hand, common law systems have classified the remedies granted by a court or tribunal as a procedural matter governed by the \textit{lex fori}.\textsuperscript{31} In \textit{Bank Mellat v GAA Development},\textsuperscript{32} for example, an English court argued that “the nature of a plaintiff’s remedy is a matter of procedure which is governed by the \textit{lex fori}”.\textsuperscript{33} In common law systems then, the second dimension of the concept of competence appears to be named as “procedural powers”. Interestingly, this is also the approach adopted in international arbitration.\textsuperscript{34}

In any event, and regardless of the disagreement as to categorisation and terminology, two issues should be clarified with respect to the concept of competence. First, it is pertinent to make clear that, from an analytical point of view, competence and adjudicatory jurisdiction are different concepts. In practice, competence and jurisdiction may overlap but, from a conceptual point of view, they are different. Competence cannot be included within the concept of adjudicatory jurisdiction since it does not constitute a basis for the assertion of jurisdiction, nor does it determine the forum where the dispute may be resolved. Instead, competence just lays down outer limits of international jurisdiction;\textsuperscript{35} and accordingly, such a concept should not be conflated with jurisdiction as the inquiry of identifying the forum or \textit{fora} with authority over the parties. Secondly, as just noted, the notion of competence is important in the context of transnational disputes since it describes the limitations on the jurisdiction of courts and tribunals over disputes with foreign

\textsuperscript{31} Adrian Briggs, \textit{Private International Law in English Courts} (OUP 2014) 149.
\textsuperscript{32} [1988] 2 Lloyds Rep 44.
\textsuperscript{33} ibid 53. See also \textit{Harding v Wealands} [2006] UKHL 32, [2007] 2 AC 1.
\textsuperscript{34} George A Bermann, \textit{International Arbitration and Private International Law} (Brill 2017) 453. See, eg, Stefan Leimgruber, ‘Declaratory Relief in International Arbitration’ (2014) 32 (3) ASA Bull 477, 480, who argues that arbitrators should categorise remedies as a procedural matter.
\textsuperscript{35} Michaels (n4) 1047.
elements.\textsuperscript{36} Indeed, in its simplest terms, this second conceptual element delimits the outer boundaries of the reach of an institution, either an arbitral body or a national court.\textsuperscript{37} It follows that competence may, in some cases, impact on the adjudicatory jurisdiction of courts and tribunals since competency rules may determine limits of international jurisdiction.\textsuperscript{38}

1.2. Competence as a limitation on the jurisdiction to adjudicate of courts and tribunals

The boundaries laid down by competency norms on the exercise of adjudicatory jurisdiction can be divided into two categories. Before further analysis is conducted, it is important to clarify that these competency norms – which delimit the scope of judicial authority – should be clearly distinguished from the other two aspects of the concept of competence – the undertaking to determine what a court can or cannot do –, that is, competence \textit{ratione materiae} and the remedies either interim or final that a court may render.

1.2.1. Competency restrictions detached from jurisdictional norms

A competency rule may prohibit the exercise of adjudicatory powers over a specific matter even if, in principle, the rules of jurisdiction conferred authority to the courts of the forum or to a given arbitral tribunal. In these cases, such subject-matter provisions would prohibit the exercise of power irrespectively of the rules of adjudicatory jurisdiction. Even though this normative category is easily identifiable in arbitration due to the concept of arbitrability, in international litigation such rules may be more difficult to be ascertained.

To begin with, in the litigation setting, some common law systems have recognised residual cases in which competency rules would prohibit the exercise of jurisdiction

\textsuperscript{37} Michaels (n4) 1042.
\textsuperscript{38} Ibid 1044.
even if service of process could be made on the defendant.\textsuperscript{39} For example, under common law, an English court had no competence to adjudicate a dispute on title to foreign land.\textsuperscript{40} By way of further example, an English court had no competence as regards the validity of intellectual property rights granted or arising under foreign law.\textsuperscript{41} These competency restrictions detached from jurisdictional rules are, however, very rare since common law rules for service on the defendant out of the jurisdiction normally incorporate competence limitations.\textsuperscript{42} However, such rules may be still relevant in exceptional cases since, in common law systems, jurisdictional bases are normally very broad. Accordingly, these bases have to be narrowed down through the exercise of judicial discretion or with the application of common law rules and higher law constraints. By contrast, in civilian traditions, these competency rules are, to a large extent, irrelevant due to the strict application of hard-and-fast rules of jurisdiction.\textsuperscript{43} The rationale behind such an approach is that the rules of jurisdiction are already very narrow since, first, competency limitations are included – though not always – in the bases of international jurisdiction and, secondly, the connecting link is seen as a strong and determinant factor to the exercise of authority. A court of a civilian system with jurisdiction to adjudicate a dispute cannot refuse the exercise of that power unless the rule of jurisdiction is contradicted by a right or provision of higher normative range according to the principle of legal hierarchy.\textsuperscript{44} Indeed, in these legal systems “when an action has been filed and jurisdiction exists, that jurisdiction must be exercised”\textsuperscript{45} since the refusal of a court to exercise international jurisdiction in cases where that jurisdiction exists would amount to a denial of basic constitutional rights.\textsuperscript{46} The irrelevance of competency limitations of this kind in civilian traditions can be illustrated, for example, with the German concept of

\textsuperscript{39} Briggs (n31) 169.
\textsuperscript{40} Hook (n36) 445. See also, \textit{British South Africa Co v Companhia de Moçambique} [1893] AC 602.
\textsuperscript{41} Briggs (n31) 170.
\textsuperscript{42} Hook (n36) 447.
\textsuperscript{43} Michaels (n4) 1052.
\textsuperscript{44} Excluding, of course, cases where the \textit{lis pendens} rule may be relevant.
\textsuperscript{45} Stephen C McCaffrey and Thomas O Main, \textit{Transnational Litigation in Comparative Perspective: Theory and Application} (OUP 2010) 175.
\textsuperscript{46} In Spain, for instance, Article 24 of the Constitution includes as a fundamental right “the access to justice according to the (Spanish) law”. A Spanish court has to strictly apply international jurisdictional rules unless these rules are contradicted by a provision or right of higher hierarchy; otherwise, the refusal of a court to exercise jurisdiction would be an infringement of Article 24 of the Spanish Constitution and Article 6 of the European Convention on Human Rights.
competence or *Gerichtsbarkeit* which is primarily restricted to matters of immunity – a higher law constraint – and with no practical importance outside such matters.⁴⁷

In international arbitration, competency rules may also prevent the exercise of arbitral adjudicatory jurisdiction due to the particular subject-matter of the dispute. Arbitrability may arise at different stages of the arbitral process so, in each stage, the relevant applicable law determines the categories of disputes that can be submitted to arbitration according to its own arbitrability norms. Like in international litigation, party autonomy has no role in these types of limitations since the parties cannot disapply these rules either by agreement or by submission of the defendant. As it can be seen, the critical issue here is not party autonomy or jurisdiction to adjudicate, but the subject-matter of the dispute.⁴⁸ Yet there is an important difference between arbitration and litigation as to the rationale or purpose of these subject-matter restrictions. On the one hand, in international litigation, the main rationale of competency rules limiting the jurisdiction of national courts is extraterritoriality, that is, to avoid trespassing upon the sovereign power of a foreign state. The principle of comity, a pivotal doctrine in private international law, is based on the respect for the territorial sovereignty of other states.⁴⁹ As Millett LJ explained in *Credit Suisse v Cuoghi*, "comity between the courts of different countries requires mutual respect for the territorial integrity of each other’s jurisdiction".⁵⁰ On the other hand, in international arbitration, the main rationale of competency rules limiting the jurisdiction of arbitrators is the notion of public policy or public interest. Indeed, the legislature of a given state may consider that a certain category of actions cannot be submitted to arbitration on public interest grounds, for example, in order to protect a weak party.⁵¹

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⁴⁷ Michaels (n4) 1042.
⁴⁸ Briggs (n31) 170.
⁵¹ Bermann (n34) 181.
1.2.2. Higher law constraints

Secondly, higher law constraints may prohibit the exercise of jurisdiction even if the applicable rules confer adjudicatory jurisdiction to judicial or arbitral bodies. Courts and tribunals are subject to higher law constraints derived from public international law, human rights, constitutional provisions, and general principles of law such as international comity. These are boundaries to the exercise of arbitral authority and to the sovereign power of a state since competence here limits the matters or circumstances under which tribunals and courts can adjudicate disputes with international elements. Once again, extraterritoriality is behind the purpose of this normative category. As it was held by an English court in *Masri v Consolidated Contractors International (No. 2)*:

> “the mere fact that an order is *in personam* and is directed towards someone who is subject to the personal jurisdiction of the English court does not exclude the possibility that the making of the order would be contrary to international law or comity, and outside the subject-matter jurisdiction of the English court.”

By way of example, consider that in the context of a non-commercial dispute being litigated in France, a company applies to the Scottish courts for an arrestment on the dependence against assets being held by, and property of a foreign state. Irrespective of whether Scots rules of international jurisdiction confer adjudicatory authority to render interim relief, the principle of state and diplomatic immunity holds that the scrutiny of the act of a foreign sovereign is outside the competence of Scots courts. Specifically, section 13 of the State Immunity Act 1978 prohibits interim relief granted against a State. In this example, it is irrelevant to determine whether Scotland is the forum with jurisdiction to adjudicate since competence is lacking due to a higher law constraint. Of course, higher law constraints are not exclusively found

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54 Ibid [35].
55 Briggs (n31) 55.
in international litigation. In *ICC Case 7210*, for example, an arbitral tribunal had to determine whether it had powers to render injunctive relief against a state. In this case, such competency limitation was imposed on the procedural power or competence of the tribunal rather than jurisdiction itself. The tribunal correctly categorised the problem as affecting its powers in the following terms: “the defendants’ submissions on this issue [are] relevant to the question of the exercise of such jurisdiction rather than to its existence”. Unfortunately, the tribunal did not assess whether the *lex arbitri* – French law – included any competency restriction in the form of a higher law constraint with respect to its power to render interim relief.

In England, competency restrictions on the adjudicatory authority of courts have been discussed under the concept of “justiciability”. The doctrine of non-justiciability refers to the situation where an international or domestic law principle – for example, the principle of state immunity or Article 9 of the Bill of Rights respectively – or the “respect for institutional or constitutional competence” debars the courts from asserting adjudicatory jurisdiction. The area of “foreign policy” and particularly, the Crown Act of State and Foreign Act of State, are also used as examples of non-justiciable issues. Notable in the previous passage is the reference of Lord Mance to “competence”. This again supports the classification of non-justiciability issues under the wide umbrella of “competence”. Rather than identifying the court with adjudicatory jurisdiction over the parties or the natural or substantial connection that is required in cases where there are international elements, non-justiciability delimits what a court can or cannot do – the extent or scope of its powers – since this is a defence which involves a potential rejection to adjudicate upon what would otherwise be an ordinary private international law or civil law case.

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58 ibid 747.
59 ibid.
2. The law of jurisdiction in transnational commercial disputes: differences between arbitral and judicial jurisdiction

2.1. The different focus of the law of international jurisdiction as a legal discipline in litigation and arbitration

The law of international jurisdiction has, from a doctrinal point of view, a different focus depending on the dispute resolution system adopted by the parties. Although most of the jurisdictional categories explained above are present in both arbitration and litigation and their concepts remain unchanged, there are some remarkable differences as to the scope or focus of the law of jurisdiction. One of the elements which clearly distinguishes the field of jurisdiction in international arbitration and international litigation is competence.

Competence has never been of special interest to the conflict of laws. In doctrinal terms, private international law as an international litigation undertaking has been exclusively focused on jurisdiction to adjudicate. In a dispute with international elements, the discipline of the conflict of laws aims to identify the State with the most substantial connection, and therefore, the most appropriate forum to exercise adjudicatory powers over the parties. The notion of competence, however, is conceptually linked to determining the boundaries or scope of the powers of courts rather than identifying the specific court with adjudicatory powers. As it was previously anticipated, private international law had, traditionally, little interest in competency matters. And the rationale of the said lack of interest is simple. Competence is neither a private law nor a private international law event. Determining the competence or reach of the powers of an institution lies within the domestic or internal order of a state and, consequently, goes beyond private international law. Competence is not a sui generis chapter of the conflict of laws,

61 Bermann (n34) 77.
62 Ibid. It should be noted that “domestic or internal order” is not a reference to national law as the source of the norms. Rather, this passage attempts to make a contrast between “competence” – a concept that can be
and it can be found in any legal discipline. Conversely, jurisdiction as understood in private international law is a concept on its own, different to the jurisprudential developments of other branches – such as those of public international law – the purpose of which – identifying the forum with the most substantial connection in disputes with international elements – cannot be found anywhere else. Notwithstanding this general principle, it is true that private international law has a limited interest in competency matters but this is a result of personal jurisdiction alone. Questions of extraterritoriality are, as noted above, an important part of private international law since it is essential to examine whether the powers exercised by a court outside its forum are compatible with international comity, that is, with the existence of a substantial connection pointing to another forum State.

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**Figure 2.2 Focus of the law of jurisdiction in private international law as an international litigation undertaking.** “Adjudicatory jurisdiction” and the boxes of darker grey colour are the primary focus of the law of international jurisdiction in private international law. This discipline has also limited interest in competency matters as far as they determine international limits to the exercise of adjudicatory jurisdiction.

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found in any legal discipline, including areas of legal scholarship of purely domestic nature (e.g. domestic private or commercial law) – as opposed to “jurisdiction”, a private internal law event.

63 ibid.

64 ibid 78.

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By contrast, competence is at the heart of international commercial arbitration. An arbitral tribunal is restricted to rule on the categories of disputes submitted to it by the parties in their arbitration agreement, and the remedies or relief that the said tribunal may render should be within the limits imposed by the relevant applicable law. Undoubtedly, arbitral tribunals operate under higher competency constraints than national courts.

In contrast to competence, the “adjudicatory jurisdiction” dimension of the concept of international jurisdiction is central to both arbitration and litigation. An arbitral tribunal, like a court, must determine whether any authority over the parties exists and, if so, how far such authority reaches. In fact, one of the central chapters of international arbitration is the study of the adjudicatory authority of arbitral tribunals over the parties on the basis of the existence of a valid and enforceable arbitration agreement. Yet an important difference with respect to international litigation should be mentioned here. Given that international arbitration is exclusively based on the consent of the parties to arbitrate, jurisdiction in rem does not exist in the arbitration setting. Put differently, the consensual nature of arbitration is the key element that restricts adjudicatory jurisdiction in arbitral proceedings to personal jurisdiction.

Finally, one last remark should be made as to the distinction between direct and indirect jurisdiction in arbitration. Although indirect jurisdiction is conducted exclusively by national courts, this typology of jurisdiction is as important in international arbitration as it is in international litigation. As explained above, indirect jurisdiction denotes the power of an authority to conduct an assessment of the adjudicatory jurisdiction exercised by an arbitral tribunal or a foreign court. One way in which disapproval for the assertion of arbitral jurisdiction is expressed is through the refusal of a state or law district to enforce an award rendered by a tribunal without personal jurisdiction over the parties. The other way is the annulment of awards by the courts of the seat on the same ground. However, the annulment or setting aside of an arbitral award is not a private international law event but simply,

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65 At least, if the issue of arbitral jurisdiction has been challenged by one of the parties.
66 Bermann (n34) 129.
67 Ibid.
an internal or domestic act by which a state annuls a decision rendered in its territory.\textsuperscript{68}

\textbf{Figure 2.3. Focus of the law of jurisdiction in international arbitration.} The primary focus of international arbitration in competency aspects and the irrelevance of jurisdiction \textit{in rem} due to the principle of party autonomy distinguishes the law of jurisdiction in international arbitration and international litigation.

2.2. The different paradigms or meanings of adjudicatory jurisdiction in arbitration and litigation

Whilst regarding the categorisation between personal jurisdiction and competence, international arbitration seems to entirely mirror international litigation and, generally, private international law, there are important conceptual differences, particularly in the field of personal jurisdiction.

\textsuperscript{68} ibid 487.
2.2.1. International litigation

i) Adjudicatory jurisdiction in international litigation: the European and American paradigms of jurisdiction

As anticipated in the introduction to this chapter, private international law as an international litigation enterprise displays a range of jurisdictional approaches depending on the legal system under consideration. These different approaches have been named by leading scholars on the field as “jurisdictional paradigms”. Traditionally, two paradigms of jurisdiction have been identified in the context of disputes with foreign elements.

On one side of the spectrum, the American or common law approach to personal jurisdiction is not concerned about potential conflicts of legal systems on a horizontal level, but it is centred on a ‘unilateral’ determination of the circumstances under which a judicial authority can exercise adjudicatory jurisdiction over a given person. Put differently, the traditional common law concept of personal jurisdiction does not respond to a multilateral and distributive paradigm but rather, to an internal approach where the focus is largely put on the vertical relationship between the court and the parties.

On the other side of the spectrum, the European approach to personal jurisdiction mostly relies on a horizontal distribution of the adjudicatory powers between different fora. Rather than an internal or domestic matter where the focus is placed on the vertical relationship between the parties and the court, personal jurisdiction is, under the European perspective, a matter of international distribution. In other words, the

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69 In order to conduct a comparison arbitration-litigation, under this subsection, adjudicatory jurisdiction refers, exclusively, to personal jurisdiction.
70 See, eg, Michaels (n6), and McClean and Ruiz Abou-Nigm (n26) 5-012.
71 Michaels (n4) 1043-1051.
72 ibid.
74 Michaels (n4) 1043-1051.
main issue under this approach is to identify the most appropriate forum state or states vis a vis other forum states in accordance with limited and narrowly defined bases of jurisdiction which determine what is to be considered as a substantial connection.\textsuperscript{75}

Some scholars have claimed that, in international litigation, the European and common law paradigms of jurisdiction illustrate a case of functional equivalence, that is, different jurisdictional approaches developed by different legal systems which serve the same functions.\textsuperscript{76} Precisely, the possibility to adopt different approaches to pursue the same functions has led to the fact that such concepts or paradigms are difficult to reconcile.\textsuperscript{77}

ii) Adjudicatory jurisdiction and the “paradigm” of international judicial cooperation

A relatively recent approach has conceptualised adjudicatory jurisdiction in international litigation through the notion of international judicial cooperation. International judicial cooperation is not, per se, a jurisdictional paradigm, but rather, an internationalist or even universalist approach to the discipline of private international law. The notion of international judicial cooperation has been traditionally applied to the areas of proof of foreign law, taking of evidence abroad, and service of documents in foreign countries. That said, several legal systems and soft-law instruments have also adopted this principle in the field of international jurisdiction. Access to justice is a pivotal principle to understand the impact of international judicial cooperation on adjudicatory jurisdiction. The fundamental right of access to justice is a human right protected by international instruments\textsuperscript{78} and modern constitutions which, according to some scholars, imposes on states the obligation to assist other states in the administration of justice. This obligation, which extends under this approach to the area of international jurisdiction, seems to be

\textsuperscript{75} ibid.
\textsuperscript{76} Michaels (n4) 1067.
\textsuperscript{77} See, however, the attempts of the Hague Conference to conclude a convention which would reconcile both paradigms – in particular, the Preliminary Draft Convention on Jurisdiction and Foreign Judgments.
\textsuperscript{78} See Art 8 of the Universal Declaration of Human Rights and Art 6 of the European Convention on Human Rights.
particularly prevalent in Latin American countries. In Argentina, for example, in the context of interim protection of rights, Article 2603 of the Civil and Commercial Code confers ancillary jurisdiction to local courts if a foreign court with jurisdiction on the merits requires the judicial cooperation of Argentinian authorities.

2.2.2. International arbitration

i) Adjudicatory jurisdiction of courts in international arbitration: an international and horizontal paradigm of jurisdiction

Judicial jurisdiction in the context of international arbitral proceedings responds to a multilateral paradigm of jurisdiction which has, at its core, the notions of conflict of legal systems and territoriality. First, the law of judicial jurisdiction in international arbitration has, as the main purpose, the distribution of adjudicatory powers due to the existence of potential conflicts between legal systems. That is particularly true in the context of the supervisory and supportive powers of national courts. As will be explained, the juridical domicile of an arbitration or arbitral seat is the main connecting factor that distributes the powers to control and assist an arbitration between the different courts of different fora. Indeed, the courts of the seat are widely acknowledged as the primary forum for the supervision and support of international arbitration proceedings. Secondly, territoriality is the raison d’être of the law of international jurisdiction. The law of judicial jurisdiction has been traditionally developed on a territorial playground in which the only potential fora were territorial entities, that is, sovereign nation-states. In a world divided into different states or law districts, the purpose of connecting factors is to determine which, of all elements pointing to different legal systems, is the natural or most appropriate connection allowing the courts of a forum to adjudicate a particular dispute.

See, for example, the TRANSJUS Principles for Transnational Access to Justice of the American Association of Private International Law.
As it can be seen, the legal structure of judicial jurisdiction in arbitration seems to be equivalent to the European paradigm of jurisdiction as it was named by von Mehren and Michaels.\textsuperscript{80} Territoriality, the existence of a plurality of legal systems which may be called to support and supervise an arbitration, and the fact that the seat is recognised as the primary or natural forum for the exercise of jurisdiction, support the categorisation of judicial jurisdiction in the context of arbitral proceedings as a multilateral and horizontal paradigm.

ii) Why is this paradigm of jurisdiction inappropriate to explain the jurisdiction of arbitrators?

The paradigm of judicial jurisdiction in arbitration cannot be transplanted into the context of the adjudicatory authority of arbitrators. At first sight, two main reasons support the need for a distinction between judicial and arbitral jurisdiction in the arbitration setting. First, as regards conflict of legal systems, it is inaccurate to state that the law of jurisdiction distribute adjudicatory powers between arbitral tribunals since they do not exist permanently as courts. Arbitral tribunals are a product of party autonomy. Once the award is rendered and notified to the parties, the arbitral process is terminated and the tribunal dissolved.\textsuperscript{81} If something is ephemeral, it is inappropriate then to refer to the distribution of adjudicatory powers since, in most cases, there are no potential conflicts of jurisdiction which may arise between more than one arbitral fora. That said, it is true that a given tribunal may also compete with a second tribunal for adjudicatory authority over the same dispute or claim. For example, a single dispute may give rise to the constitution of two different tribunals due to the existence of two versions of the same agreement; or a particular claim may give rise to both commercial and investment arbitration.\textsuperscript{82} In any case, the potential jurisdictional conflicts between tribunals are very rare and, in a majority of


\textsuperscript{81} A remarkable exception is found in s 57 of the English Arbitration Act which recognises, unless otherwise agreed by the parties, the power of a tribunal to correct its award or to grant an additional award. Strictly speaking, setting aside and enforcement proceedings are not part of the arbitral process but rather, attempts to annul or enforce an arbitral decision. In most cases, that decision is honoured by the award-debtor.

\textsuperscript{82} Bermann (n34) 258.
cases, they are based on pathological arbitration clauses. It follows that arbitral jurisdiction does not respond to a horizontal or multilateral design, and jurisdictional rules do not have, at least in the context of arbitral tribunals, a distribution purpose.

Second, with respect to territoriality, arbitral tribunals do not have any governmental role, nor do they administer justice in the name of a given state. Tribunals are entirely private entities. Does that mean that territoriality has no role in the assertion of jurisdiction by arbitral tribunals? Are tribunals completely detached from territorial structures and, therefore, floating in the international legal firmament? Frequently, arbitrators have no relationship with the state where the arbitration has its legal domicile but that is not enough to conclude that arbitral jurisdiction is detached from national legal orders. Even though territoriality may be harder to be seen in international arbitration than in international litigation, there is still an important and pronounced territorial component in the arbitral jurisdictional framework. Territoriality does not arise in the context of arbitral jurisdiction as the inquiry of identifying a forum state as opposed to another forum, but as it will be explained, it is essential to determine the legal system that will enforce and legitimate the contractual choice of the parties in favour of arbitrators.

iii) Differences as to the territorial structure of personal jurisdiction

Where, for example, a contractual dispute arises between two Scotsmen and all elements relevant to the dispute point to Scotland, a Scottish court would never consider the issue of jurisdiction in personam over the parties. That court may not be competent to adjudicate the particular claim, but it is certain that the dispute would be judicially determined in one of the six Scottish sheriffdoms and Scots law would be applicable to the merits of the claim. Conversely, if the same dispute incorporates a foreign element, then the court would necessarily\(^3\) consider whether it possesses personal jurisdiction by reason of a substantial connection between the parties or the dispute and Scotland. Thus, jurisdiction in personam presupposes territoriality and,

\(^3\) At least if one of the parties seeks to resist the jurisdiction of the Scottish court.
therefore, requires as a prerequisite, a plurality of legal systems or law districts that may come into conflict.

In the context of arbitral jurisdiction, however, personal jurisdiction does not arise as a result of territoriality. Conversely to the conflict of laws, jurisdiction in personam in the arbitration setting emerges due to the nature of arbitration as a consensual and alternative dispute resolution system. Consent, and the dichotomy between the legal and constitutional authority of courts to adjudicate disputes on the one side, and arbitration as an alternative option on the other side, are behind personal jurisdiction in arbitration. Arbitral jurisdiction derives from consent. Arbitrators have jurisdiction in personam if, and only if, the parties have consented to arbitration by excluding the adjudicatory authority of the judiciary – unless, of course, arbitration is mandated by law. It follows that personal jurisdiction is, primarily, a matter of consent. Consent is, however, not exclusive to international arbitration. In international commercial litigation, parties are normally permitted to exercise party autonomy by including a choice of court agreement within their main contract. In these cases, there is no dichotomy but a territorial choice of any of the forums or law districts in which the world is divided. Conversely, the choice in arbitration is not, in principle, territorial but between courts and tribunals. Therefore, in arbitral proceedings, personal jurisdiction does not emerge as a result of territoriality.

iv) A common law paradigm of jurisdiction: arbitral jurisdiction through an internal and vertical prism

As it has been explained, the jurisdiction of arbitral tribunals does not respond to a multilateral and distributive paradigm but rather, to an internal approach where the focus is largely put on the vertical relationship between the tribunal and the parties. Put bluntly, the architecture of arbitral jurisdiction is largely similar to the common law or American paradigm of jurisdiction in the conflict of laws. It follows that arbitral jurisdiction is essentially an inquiry into the vertical relationship between an
adjudicatory body – the arbitral tribunal – on the one side, and the party who seeks to resist the jurisdiction of that private non-governmental body, on the other.

As noted above, jurisdiction in international litigation illustrates a case of functional equivalence. In international commercial arbitration, however, there is no such functional equivalence. The inexistence of potential conflicts between arbitral fora demonstrates that arbitrators and courts do not face the same jurisdictional problems. On the one hand, national courts should be primarily concerned about the allocation of powers between the arbitral tribunal and the courts of different states which may have authority to support the arbitral process. On the other hand, arbitrators should be primarily concerned about the vertical protection of a party who did not consent to arbitrate or whose claim cannot be brought to arbitration.

To conclude, the architecture or legal structures of arbitral and judicial jurisdiction are remarkably different. However, as it has been shown, arbitral jurisdiction and judicial jurisdiction in the arbitration setting find their structural foundations in one of the two theories which explain the law of personal jurisdiction as a central chapter of private international law. Indeed, from a jurisdictional point of view, international arbitration did not reinvent the wheel.

2.3. Practical differences between arbitration and litigation regarding adjudicatory jurisdiction

Having explained the different focus of the law of jurisdiction as a legal discipline and the different conceptual approaches to jurisdiction in arbitration and litigation, this subsection turns to examine important practical differences regarding adjudicatory jurisdiction.
2.3.1. Adjudicatory jurisdiction in general: differences between arbitration and litigation regarding the legal consequences in cases of absence of adjudicatory jurisdiction

This first difference is well-known and rather simple. The absence of arbitral jurisdiction is more far-reaching regarding its consequences than judicial jurisdiction.\footnote{Bermann (n34) 79.} Irrespective of whether a court finds that it does not have jurisdiction over the parties and the subject-matter, a court of another legal system may still assert and exercise jurisdiction. Indeed, the claim can still proceed to litigation in another forum. Conversely, the decision of a tribunal denying the existence of arbitral jurisdiction means that the action cannot proceed to arbitration unless there is another arbitration agreement over the same subject-matter or the parties subsequently agree on a \textit{clause compromissoire} or submission agreement.\footnote{If that circumstance is permitted by the relevant law.}

2.3.2. Personal jurisdiction: differences between arbitration and litigation regarding the legal consequences in cases of absence of personal jurisdiction

The legal consequences in cases of potential absence of personal jurisdiction are more pronounced in arbitration than in litigation. In cross-border litigation, where a court does not have personal jurisdiction over a party, there is always an alternative, at least in international commercial disputes. The apparent absence of judicial jurisdiction can be ultimately solved by the submission of the parties to the forum that did not have any base of consensual or connected jurisdiction to justify the exercise of adjudicatory powers. In fact, the ‘last submission’ would override the apparent lack of jurisdiction, and a forum that presumably had no authority to adjudicate a given dispute would eventually obtain personal jurisdiction over the parties. By contrast, in international arbitration, if an arbitration agreement does not exist due to lack of consent or if it is inapplicable or unenforceable, arbitral jurisdiction has never existed and the dispute cannot be resolved in the arbitral forum – unless, of course, there is a subsequent \textit{clause compromissoire} between the parties. A \textit{clause compromissoire} is, however, different to the appearance of the parties before a court of law. Whilst
national courts are always available for the parties to appear, arbitral tribunals must be created by an arbitration agreement.

3. Categorising the power to render interim measures of protection: the competence of courts and tribunals as distinct from jurisdiction

Unlike the categorisation of final remedies where, as explained above, there is no consensus as to their procedural or substantive nature, from a private international law sense, it appears uncontroversial that interim measures of protection are a matter of procedure. The term “procedure” has been defined on numerous occasions by different scholars and judicial authorities. In *Poyser v Minors*, for example, Lush LJ explained that procedure “denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right”. Although it is obvious that each legal system may adopt a different concept for internal or domestic purposes, and that, from a strict doctrinal point of view, there are some grey areas where the distinction between substance and procedure is still difficult to be ascertained, one can be confident to argue that, from the point of view of private international law, the concept of procedure is wide enough to include interim measures of protection. In fact, in virtually all legal systems, provisional and protective measures have been categorised as a procedural matter governed by the *lex fori* in international litigation, and by institutional rules and the *lex arbitri* in international arbitration.

3.1. The power to render interim measures of protection *vis-à-vis* jurisdiction

In the context of the current discussion, one point must be clarified from the outset. The power to render interim measures on one side, and the jurisdiction of a given
court or tribunal over the parties on the other, are different concepts with different legal implications. Accordingly, where the issue in question is to determine if a judicial or arbitral body possesses the authority to render interlocutory relief in general, or with respect to a particular type of remedy, the issue shall be clearly distinguished from the adjudicatory power of that judicial or arbitral body. Of course, in practice, “jurisdiction” and “the power of a court or tribunal to render interim relief” are strongly interconnected. Perhaps that is the reason which explains the wrong references of courts and tribunals to their “jurisdiction” to grant provisional measures, where the issue was one of competence or procedural powers.91

3.2. The power to render interim measures of protection as a component of the notion of competence

From a doctrinal point of view, the power to render provisional measures should be classified within the concept of competence. As already explained,92 the notion of competence includes two strands; one which determines the remedies or relief that a court or tribunal can render, and another one which delimits the actions, brought by the parties, that are within the power of a judicial or arbitral body. It is in the former category, where the power to render injunctive relief should be categorised. Obviously, the authority to render provisional measures cannot be classified within the subject-matter component of the concept of competence which may be also called competence ratione materiae (the latter category).

From a practical point of view, however, there is no consensus on whether the power to render interim relief is a matter of competence or one of procedural powers. Whilst in private international law as a litigation undertaking, a majority of legal systems seems to prefer the term “competence”, in international arbitration “procedural powers” appears to be the most commonly used terminology. In addition, terminology may depend on the specific circumstances of each case. By way of

91 Surprisingly, courts and tribunals wrongly categorise “jurisdiction” and “competence” very frequently. See Schedule I.
92 See § 1.1.
example, one might argue that the issue of whether a national court has the authority to render an anti-arbitration injunction is simply one of procedural powers to be determined in accordance with the relevant applicable law, that is, the *lex fori*. By contrast, one might also argue that the power to render an interim order for the seizure of the property at dispute is part of the competence of courts. In an international context, however, this potential distinction based on the typology of remedies has not been adopted. The procedural power of a court or tribunal to render provisional measures, if so named, is not something distinct from competence. Rather, the power to render injunctive relief is simply a competency aspect since the notion of competence aims to determine the relief that a court or tribunal with adjudicatory powers may render.

All in all, a terminological distinction may be useful for pedagogical purposes. As already explained, the different components of the concept of competence may impact on the authority of courts and tribunals to render interim relief. So different terminology, – procedural powers and competence –, allows to clearly distinguish between the authority to render provisional remedies, on one side, and the potential limitations or boundaries imposed on the powers of courts and arbitral bodies, on the other side. By way of example, an applicant may request the preservation of a document that is outside the subject-matter of a given arbitration, and therefore, outside the competence *ratione materiae* of the given tribunal. Or a higher law constraint may prohibit the exercise of procedural powers if provisional measures are sought, for example, against assets held by a foreign state. Different terminology then facilitates a clear distinction between the authority to render interlocutory relief and the potential boundaries imposed on that authority by reason of competency restrictions.

In any event, it should be immediately pointed out that both “competence” and “procedural powers” refer to the same concept, that is, to the judicial or arbitral

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94 See § 1.2.2.
96 See § 1.2.2. and, in particular, ICC Case 7210.
authority to render interim relief, and that no doctrinal distinction is intended as a result of the said terminological distinction. Throughout this thesis, the terms “competence” and “procedural powers” are interchangeably used to refer to the power of courts and arbitral bodies to render interim measures as one of the strands or components of the concept of competence.97

97 See Schedule V.
CHAPTER 3

Jurisdiction and competence of national courts to render provisional and protective measures in international commercial litigation

This chapter is divided into two main parts. The first part examines the jurisdiction of national courts to grant interim measures of protection in cases where such courts also possess jurisdiction on the merits. After analysing the legal nature of this power, the first part of this chapter explores jurisdiction within and outwith the European Area. Finally, at the end of this part, recommendations in the form of conclusions are presented. The second part of this chapter investigates the legal framework of ancillary jurisdiction to render injunctive relief in cases where national courts do not possess substantive jurisdiction. This part includes three subsections. Under the first subsection, a comprehensive analysis of sources is conducted. The second subsection assesses and categorises the different connecting elements adopted by legal systems. Finally, the third subsection concludes.

1. Powers of courts with substantive jurisdiction to render provisional and protective measures

The authority of courts with jurisdiction on the merits to render provisional and protective measures is almost universally acknowledged. Indeed, it is widely accepted and uncontroversial that where a legal system is the forum for the trial of the claim, its courts also have the authority to grant interim relief with respect to the substantive proceedings.¹ In these cases, no more restrictions than those

established by the *lex fori*, and essential principles of public international law\(^2\) can be imposed on national courts as to the characteristics, requirements, extraterritorial nature or types of provisional measures that can be rendered.\(^3\)

1.1. The legal nature of the power of courts with substantive jurisdiction to render provisional and protective measures

One of the questions that has not attracted attention from commentators is the legal nature of the power of a court with substantive jurisdiction to render interim measures. Perhaps this analysis has been discouraged by the fact that such an authority is almost universally acknowledged by scholars and legal systems. Yet, one might ask whether the issue of adjudicatory jurisdiction arises at all in the context of provisional and protective measures rendered in the proceedings on the merits. Even though this analysis is certainly an academic undertaking rather than a study with practical impact, understanding the legal nature of such authority may be useful to explain the different legislative developments adopted by legal systems. Three options are possible in the context of the current discussion:

a. **Inherent powers.** This approach is based on the premise that the power to render interim relief derives from the rule of adjudicatory jurisdiction under which the court has asserted jurisdiction over the parties and the subject-matter. In these cases, the power to render provisional measures cannot be detached from the adjudicatory jurisdiction on the merits and it is not a different or separate category of jurisdiction but rather, a judicial power that derives from the existence of jurisdiction on the merits. Indeed, the substantial connection between the forum and the parties or their dispute is sufficient for a national court to exercise its powers in the context of interim protection of rights. Simply, the issue of adjudicatory jurisdiction does not arise.

\(^2\) See Ch 2, § 1.2.2.
b. Inherent jurisdiction. The second alternative is to distinguish between, on one side, adjudicatory jurisdiction with respect to the merits, and on the other side, adjudicatory jurisdiction with respect to interim protection of rights. If one acknowledges that jurisdiction to render interim relief is completely detached from jurisdiction over the merits as a separate category of adjudicatory jurisdiction, while accepting that the former is derived from the latter, the authority of courts with substantive jurisdiction to render injunctive relief may be classified as “inherent jurisdiction”. A leading scholar, for example, has explained that “because the court has jurisdiction over the substance (...), it also derives its jurisdiction to grant interim relief from the jurisdictional rule conferring substantive jurisdiction”. The terminology used here, which is prevalent in legal instruments and scholarly commentary, appears to categorise the power to render injunctive relief by a court with substantive jurisdiction as “jurisdictional”.

c. Independent rule of jurisdiction. Finally, some legal systems have included specific rules of jurisdiction conferring powers to national courts in these circumstances. The Swiss Private International Law Act 1987, for example, provides in Article 10 that “jurisdiction to order interim relief lies: a. with either the Swiss courts or authorities having jurisdiction for the principal action; or b. with the Swiss courts or authorities at the place where the interim measures are to be enforced.”

1.2. The power of national courts with jurisdiction on the merits to render provisional measures in the European Jurisdictional Area

1.2.1. Provisional and protective measures generally

In the European Area, the courts of a particular legal system having jurisdiction over the substance may also render the full range of provisional measures available under its national law, subject to the conditions and requirements imposed by the lex fori, and with the effects and scope determined by its own domestic law. The

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4 Hill and Chong (n1) 352.
Brussels I Regulation\(^5\) and the Lugano Convention\(^6\) did not include any explicit rule of jurisdiction conferring authority to courts with substantive jurisdiction,\(^7\) but this approach was confirmed by the Van Uden\(^8\) and Mietz\(^9\) cases. Unsurprisingly, in these decisions, the European Court of Justice made clear that a court with substantive jurisdiction under the Brussels and Lugano regimes also has jurisdiction to render provisional measures without being subject to any further requirements or preconditions.\(^10\) Therefore, if a court of a Member State has asserted substantive jurisdiction over a defendant, whether under the Brussels I Regulation Recast\(^11\) or the Lugano Convention, that court may grant any type of interim relief available under its national law, including extraterritorial measures, on both pre-judgment and post-judgment cases since its authority derives from the rule conferring substantive jurisdiction.\(^12\)

A different provision that has caused some confusion\(^13\) is Article 35 of the Recast. It should be noted that this provision is only relevant in cases where the court granting provisional, including protective, measures does not possess jurisdiction to decide the substance of the claim. In its simplest terms, Article 35 as interpreted by the European Court includes, first, a competency restriction – the effects of the remedies rendered under this provision are limited to the territory of the Member State granting such measures –\(^14\) and second, a jurisdictional condition – the exercise of Article 35 is conditional on the existence of a “real connecting link” between the measure


\(^{7}\) The closest one can get to a jurisdictional rule is Recital 33 and Article 2(a) of the Recast. Recital 33 confirms the free circulation of remedies rendered by courts with substantive jurisdiction and Article 2 defines the term “judgment” as including decisions on provisional measures rendered by courts with substantive jurisdiction in order to ensure their free circulation in the European Area.


\(^{10}\) See, eg, Re Grant of an Extraterritorial Injunction, Oberster Gerichtshof [2009] ILPr 22, 25 (SC, Austria).


\(^{12}\) Hill and Chong (n1) 352.

\(^{13}\) For example, in Case 125/79 Denilauler v Couchet Frères [1980] ECR 1553, reliance on Article 24 of the Brussels Convention, what is now Article 35 of the Recast, was not necessary since the measure was granted by a court with jurisdiction over the merits.

\(^{14}\) See Recital 33 of the Brussels Recast.
sought and the territorial jurisdiction of the Member State. Obviously, the restrictions that apply in cases where jurisdiction to render provisional relief is derived from Article 35 of the Recast are completely irrelevant to courts that possess substantive jurisdiction.

Whilst the power to render provisional measures by a court with jurisdiction on the merits seems, from a theoretical point of view, straightforward and uncontroversial, there appear to be practical problems with respect to its applicability. Once the court with jurisdiction on the merits has been seised of proceedings, it is uncontroversial that the said court has also the power to render provisional relief as it considers appropriate. Nevertheless, some problems may arise if the proceedings on the merits have not been brought in a particular legal system, or if the court with jurisdiction on the merits has stayed proceedings in the context of a *lis pendens* situation, that is, while the court first seised decides on its jurisdiction.\(^\text{15}\) In these cases, whether a national court is subject to the restrictions imposed by Article 35 remains an open question since the Court of Justice has not provided any guidance on the boundaries or scope of application of the said provision. Under Article 35, any court of a Member State may render provisional relief, albeit subject to significant restrictions, in cases where “the courts of another Member State have jurisdiction as to the substance of the matter”. It is unclear, however, whether this provision applies exclusively to courts not having jurisdiction on the merits or, conversely, to courts not exercising jurisdiction on the merits regardless of whether such substantive jurisdiction exists. This problem, which to date has not been solved by legislation or case law, has generated conflicting approaches.

In the European Jurisdictional Area, one might have thought that a court having jurisdiction as to the substance but not effectively exercising it, is subject to the limitations of Article 35.\(^\text{16}\) That would mean that if the main proceedings have not

\(^{15}\) Hill and Chong (n1) 352.
\(^{16}\) Andrew Dickinson, ‘Provisional Measures in the “Brussels I” Review: Disturbing the Status Quo?’ (2010) 6 J PIL 519, 546. See also, Francisco Garcimartin, ‘Provisional and Protective Measures under the Brussels I Recast’ (2014-2015) 16 YB PIL 57, 60, who argues that the purpose of conferring jurisdiction to render interim relief to the courts with substantive jurisdiction is to concentrate all related actions in the same court.
been brought yet to the competent court, or if another court of a Member State has been seised first, provisional measures may be issued but subject to the territorial restrictions and jurisdictional conditions of Article 35. That said, an important group of scholars and several legal systems have deemed appropriate the opposite side of the spectrum. Van Calster, for example, argues that even if the court has stayed its jurisdiction as a result of the *lis alibi pendens* rule, the court retains authority to grant the relief it deems appropriate.\(^{17}\) Likewise, before the British departure from the European Area, an English court held in *Morgan v Primacom*\(^{18}\) that irrespectively of whether a court stays its substantive jurisdiction under Article 29(1), while awaiting a decision on jurisdiction from a previously seised court, the court staying proceedings retains the power to render relief without the restrictions of Article 35.\(^{19}\) Although this matter is still hotly debated by European scholars, there seems to be a prevailing opinion\(^{20}\) according to which courts with substantive jurisdiction may render provisional and protective measures without being subject to any further requirements even if the proceedings on the merits are commenced in a different forum. It should be emphasised, however, that neither of the two previous approaches acknowledges the possibility of excluding the restrictions imposed by Article 35 once the court has declined jurisdiction in favour of the court first seized under Article 29(3) of the Recast.\(^{21}\)

Finally, one of the aspects hardly examined by commentators is the authority to render post-judgment provisional measures in the European Area. Even though post-judgment remedies are not concerned with enforcement as such but pave the way for execution,\(^{22}\) the Brussels-Lugano regime has treated them as enforcement measures.\(^{23}\) This unusual interpretation of the concept of interim relief is a direct consequence of the operation of two jurisdictional rules: Article 24(5) and Article 40

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\(^{19}\) Ibid [70]-[73].

\(^{20}\) Marta Petergás Sender and Thomas Garber, ‘Provisional, including protective, measures’ in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law: The Brussels Ibis Regulation* (vol 1, Ottoschmidt 2016) 794.


\(^{23}\) Hill and Chong (n1) 357.
of the Brussels Recast. First, Article 24(5) confers exclusive jurisdiction in matters related to enforcement, to the courts of the Member State in which the judgment is to be enforced. Secondly, Article 40 allocates the authority to render provisional measures in post-judgment cases to the courts of the Member State where a judgment has been registered to be enforced; authority which is to be exercised in accordance with the domestic law of the enforcing State. Of course, this power is subject to the conditions and limitations imposed by Article 35 of the Recast since, in these cases, provisional measures are being rendered by a court without jurisdiction on the merits; specifically, by the court of an enforcing state. The same conclusion was reached by the English Court of Appeal in Banco Nacional de Comercio Exterior v Empresa de Telecomunicaciones de Cuba where a worldwide freezing injunction was sought in order to support enforcement proceedings in England of a judgment rendered in Italy. In fact, the Court of Appeal analysed whether the “real connecting link” as established by the European Court in Van Uden was satisfied. In this case, however, the court concluded that only a domestic freezing injunction was appropriate since the defendant was not domiciled in England and the worldwide injunction would have been directed against assets held outside England.

At first glance, after reading articles 24(5) and 40, one might have concluded that once a judgment on the merits has been delivered, the Brussels-Lugano framework removes the authority to render interim relief from the courts with substantive jurisdiction in favour of the enforcing courts. Yet, some authorities have not adopted this approach. In England, for example, it has been argued that a court that has exercised substantive jurisdiction may also render post-judgment remedies pending enforcement of the English decision in another Member State. To begin with, this view is based on the Van Uden decision where it was held that a national court with substantive jurisdiction under the Brussels Regulation also has jurisdiction to order interim relief without any further requirements and as available under national law –

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24 ibid.
26 ibid [28].
27 ibid [29].
28 Van Uden (n8) [19].
of course, post-judgment remedies are available under English law. Secondly, English courts have consistently held that provisional measures do not fall within the autonomous definition of “measures of enforcement” as set out by Article 24(5) of the Recast. In *Bananaf International v Bassatne*, Kerr LJ resorted to the Jenard Report to determine that measures of enforcement are remedies involving “recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments.”

Thus, as long as provisional measures do not amount to the use of force or coercion, such remedies do not fall within Article 24(5). This passage has been also applied in *Masri v Consolidated Contractors International (No 2)*, as adopted by the European Court in *Reichert v Dresdner*, in order to conclude that freezing orders and receivership orders are outside the scope of Article 24(5) and that English courts, if seised of proceedings on the merits, have the authority to render post-judgment measures.

After the British departure from the European Jurisdictional Area, this approach may have been weakened. It is not inconceivable, however, that other Member States may continue to show support towards this jurisdictional interpretation as long as post-judgment provisional measures are available under their own national law.

1.2.2. The European Account Preservation Order

Over the past five decades, the Brussels-Lugano framework was the only option for parties seeking to obtain interim relief in the European Area. Yet, in 2014 a new European regulation introduced the first cross-border procedure designed to

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31 *Bananaf* (n29) [34].
34 *Masri* (n32) [123].
prevent a party from dissipating assets before or after a judgment on the merits is rendered. Unlike the Brussels-Lugano regime which did not create any type of interim remedy, this regulation has established the first uniform and truly European provisional and protective measure with its own legal regime. The European Account Preservation Order (EAPO), available from 2017, allows courts of Member States other than Danish courts to freeze assets held by a debtor in a bank account of another Member State. The EAPO is an *ex parte* remedy and, unlike *ex parte* measures rendered under the Brussels-Lugano framework, these orders may enjoy free circulation in the European Area without any special procedure as to recognition or declaration of enforceability. Thus, in international commercial litigation, two alternatives are now available for litigants in the European Area. First, national courts with or without jurisdiction on the merits may grant the range of remedies available under national law in accordance with the Brussels-Lugano framework. Secondly, courts of Member States with jurisdiction on the merits may issue an EAPO in order to freeze assets held by a party in a bank account located in another Member State.

One of the most striking aspects of the new regulation is its jurisdictional structure. Interestingly, the jurisdictional regime of the European Account Preservation Order does not replicate the Brussels-Lugano framework according to which courts with substantive jurisdiction and courts without jurisdiction on the merits may render provisional, including protective, measures. Although the European Commission proposed to adopt the same jurisdictional structure by conferring the power to render preservation orders to courts without jurisdiction on the merits, the European Parliament did not adopt such a rule. Article 6(3) of the Proposal provided: “(...) the courts of the Member State where the bank account is located shall have jurisdiction to issue an EAPO which is to be enforced in that Member State”. Notable in this context are the similarities between the proposal of the Commission for an EAPO,

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36 This terminology is possibly misleading. The Regulation uses “creditor” and “debtor” to refer, respectively, to the applicant and to the natural or legal person against whom the order is sought. See Art 4(6)-(7).
37 EAPO Regulation, Art 11.
38 See Recital 33 of the Brussels I Recast.
39 EAPO Regulation, Art 22.
and the case law of the European Court which limits the effects of interim remedies rendered under Article 35 to the territory of the courts not having substantive jurisdiction. However, as just noted, the power to render preservation orders has been exclusively reserved to the courts with substantive jurisdiction. Accordingly, for the purposes of an EAPO, Article 35 of the Recast is completely irrelevant.

The EAPO Regulation includes four different rules of jurisdiction. Article 6 distinguishes between pre- and post-judgment orders and also includes two special rules: one for cases where the debtor is a consumer, and one for cases where the creditor has obtained an authentic instrument. Consumer contracts and authentic instruments are beyond the scope of this thesis. For that reason, only the general jurisdictional rules as to pre- and post-judgment orders are examined below.

To begin with, jurisdiction to render a preservation order before an action has been filed or while the proceedings on the merits are pending lies with the court with jurisdiction over the substance of the matter. Accordingly, jurisdiction to render this European remedy has to be determined by reference to the jurisdictional bases included in articles 4, and 7 to 26 of the Brussels Recast. Two issues require clarification here. First, not every court with substantive jurisdiction has the power to render a preservation order since, under Article 3(1), the issuing court cannot be the court of a Member State where both the bank account is located and the creditor is domiciled. Secondly, the debate previously explained as to the jurisdiction of a court that has not been seised of proceedings is also present in the context of the EAPO. Although one might argue that the *raison d’être* of allocating authority to grant provisional measures to the courts with substantive jurisdiction is to concentrate all actions in the same court, some commentators have questioned this approach. In fact, several scholars have claimed that even if the rules of jurisdiction point to the same forum, different courts may decide on the EAPO application and on the

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41 EAPO Regulation, Art 6(1).
43 See § 1.2.1.
44 Garcimartín (n16) 60.
In this context, the legislative history of the EAPO Regulation appears to reinforce the latter view according to which preservation orders can be issued by courts not seised of proceedings on the merits. In its proposal, the Commission recommended settling this debate by conferring jurisdiction to the court of the Member State where the claimant has brought, or intended to bring, proceedings on the merits in cases where more than one court may assert substantive jurisdiction. Nevertheless, the European legislator dropped that provision, and therefore, it is possible to argue that proceedings on the merits can be commenced in a different Member State from that where the EAPO is sought.

Secondly, the Regulation confers authority to render post-judgment preservation orders to the courts of the State where the judgment is issued or the court settlement is concluded. Once again, the jurisdictional regime of the EAPO Regulation clearly diverges from the Brussels-Lugano framework of post-judgment provisional, including protective, measures. As already explained, under the Brussels-Lugano regime, post-judgment remedies have been treated as enforcement measures and, therefore, jurisdiction lies with the courts of the place of enforcement. By contrast, the EAPO Regulation has adopted the opposite view by allocating jurisdiction in post-judgment cases to the courts of the State where the judgment was rendered. In other words, the courts exercising substantive jurisdiction maintain the power to render preservation orders after the judgment is delivered. Obviously, the courts having substantive jurisdiction but not effectively exercising it, do not maintain the said power in the post-judgment stage.

The jurisdictional structure of the EAPO Regulation demonstrates that, unlike provisional measures under the Brussels-Lugano regime, the preservation order is treated by the European lawmaker as a genuine provisional and protective measure.

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45 Cuniberti and Migliorini (n42) 101.
46 Commission Proposal (n40) Art 6(2).
47 Cuniberti and Migliorini (n42) 100.
48 EAPO Regulation, Art 6(3).
49 Unless, of course, a given legal system has different courts for enforcement matters. In France, for example, le Juge de l'exécution would have authority in these cases as set out by the French Code of Civil Execution.
It is true, however, that some scholars have reached the opposite conclusion. Cuniberti and Migliorini, for example, argue that European preservation orders have been designed as enforcement measures in post-judgment cases. The rationale of such a conclusion is that post-judgment orders aim at the preservation of enforceable titles as opposed to pre-judgment orders which ensure the payment of a claim. It is further argued that under the Regulation the enforcement of an EAPO shall be terminated if the judgment on the merits is suspended in the Member State where it was rendered. However, it should be immediately pointed out that this approach is very unconvincing. First, in legal systems with a strong tradition of post-judgment provisional measures, such remedies are defined with respect to the judgment on the merits rather than to the claim of the plaintiff. Once a judgment has been delivered, it simply does not make any sense to refer to the claim of the pursuer. And obviously, it does not follow that such measures are enforcement remedies simply because they attempt to secure the enforcement of a judgment.

Secondly, from a jurisdictional perspective, the view of Cuniberti and Migliorini does not seem correct either. In fact, under the EAPO Regulation post-judgment preservation orders cannot be rendered by enforcement courts but by courts that exercised jurisdiction on the merits. So, how can an enforcement measure be rendered by a court without authority to enforce?

The very recent development of the European Preservation Order illustrates the importance of interim relief in cross-border matters and how supranational entities may innovate by creating *sui generis* provisional measures. In such a process of legislative innovation, the development of a consistent jurisdictional framework is a crucial undertaking. In fact, many practitioners have claimed that this measure is doomed to failure due to its jurisdictional defects. Although preservation orders are the only *ex parte* remedies entitled to free circulation in the European Area, many disadvantages in the jurisdiction field such as the arbitration exclusion or the jurisdictional limitation in favour of the courts with substantive jurisdiction may impact

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50 Cuniberti and Migliorini (n42) 94.
51 ibid.
52 EAPO Regulation, Art 34(1)(b)(iii).
on the potential success of this remedy. It is, however, relatively early to empirically assess the success or failure of the EAPO Regulation.\textsuperscript{54}

1.3. The power of courts with substantive jurisdiction to render provisional measures in cases where the Brussels-Lugano and EAPO\textsuperscript{55} frameworks do not apply

There are cases where the courts of a European legal system cannot apply the Brussels-Lugano framework,\textsuperscript{56} for example, because the defendant is domiciled outside the European Area.\textsuperscript{57} In these situations, the courts of Member States should apply their own national rules of jurisdiction pursuant to Article 6 of the Brussels I Recast. Accordingly, where the defendant is not domiciled in a Member State, national courts having jurisdiction over the substance of the matter may assume jurisdiction to render provisional measures in accordance with local jurisdictional bases found in bilateral or multilateral conventions,\textsuperscript{58} local statutes and case law.

Virtually all European systems recognise that before an action has been filed or while the substantive proceedings are pending, jurisdiction to render interim relief lies with the courts having jurisdiction on the merits. In Italy, for example, Article 10 of the Private International Law Act\textsuperscript{59} provides that Italian courts possess jurisdiction to render provisional measures if the remedy is enforceable in Italy, or if Italian

\textsuperscript{54} In 2019, the European Court delivered its first decision on the Regulation. In Case C-555/18 \textit{KHK v BAC}, the Court ruled that a title has to be enforceable for an act to be considered an authentic instrument under the EAPO Regulation.

\textsuperscript{55} From a jurisdictional point of view, the EAPO Regulation is entirely dependent on the Brussels-Lugano framework. This is so for the simple reason that the EAPO Regulation only confers authority to the courts of Member States having jurisdiction on the merits. Accordingly, references in this section to the Recast also include the EAPO.

\textsuperscript{56} Strictly speaking, the courts of Member States will have to apply the Brussels-Lugano framework which then authorises the application of domestic law.

\textsuperscript{57} See Art 6(1) of the Recast and Art 4(1) of the Lugano Convention.

\textsuperscript{58} Spain, for example, has concluded an important number of bilateral conventions. See, eg, the 1989 Convention between Spain and Mexico which provides in Article 21 that a court enforcing a judgment rendered in the other State Party to the Convention may render provisional measures. See also, Article 26 of the 1989 Convention between Spain and Brazil; Article 14 of the 1987 Convention between Spain and Uruguay; and Article 8 of the 2000 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters between Spain and El Salvador.

\textsuperscript{59} Legge 31 maggio 1995, n 218, Riforma del Sistema Italiano di Diritto Internazionale Privato.
courts have jurisdiction on the merits. As regards post-judgment remedies, there is not a prevailing view on how to allocate international jurisdiction between the different courts of different fora. Whilst some legal systems have traditionally treated post-judgment remedies as enforcement measures, other legal systems – of which England is the paradigm – have permitted courts with substantive jurisdiction to render protective relief pending the enforcement of the decision in a third country.

One of the best examples to illustrate the treatment of post-judgment remedies as enforcement measures is the Spanish legal system. Article 22 sexies of the Organisation of the Judiciary Act\(^{60}\) is the relevant rule of international jurisdiction which allocates authority to render interim relief to the courts with jurisdiction on the merits.\(^{61}\) However, a different provision addresses the issue of post-judgment provisional measures in transnational disputes. Under the heading of “judicial process of exequatur”, Article 54(2) of the International Judicial Cooperation Act\(^{62}\) allows enforcing courts in Spain to render post-judgment remedies in accordance with the Code of Civil Procedure, where the legal regime of provisional measures is contained. One might argue that these two articles can be read together as allocating jurisdiction in the post-judgment stage to courts with substantive jurisdiction and enforcing courts. However, two provisions of the Code of Civil Procedure designed for domestic litigation demonstrate that post-judgment measures are treated under Spanish law as enforcement remedies. First, Article 731(1) provides that if the applicant seeking an interim remedy is also successful with respect to the merits, any provisional measure rendered before the judgment has been delivered, stays automatically in force for a period of 20 days in order to allow the plaintiff to start execution proceedings. As it can be seen, the 20-day rule attempts to fill the lacunae derived from the fact that under the Code of Civil Procedure, there is no rule allowing courts with substantive jurisdiction to render a new provisional measure once the judgment has been delivered.\(^{63}\) Secondly,

\(^{60}\) Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial.
\(^{61}\) According to this provision, Spanish courts have also ancillary jurisdiction if the measure is enforceable in Spain.
\(^{62}\) Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil.
\(^{63}\) Once a judgment has been rendered, the court which exercised jurisdiction on the merits is able to modify or lift a measure if the circumstances of the case have changed, and as long as the judgment has not been registered yet for execution.
pursuant to Article 723(2), the power to render a new interim remedy in post-judgment cases lies, depending on the circumstances of the case, with the enforcing courts or the courts of appeal.

Leaving the jurisdictional debate on post-judgment remedies aside, a final observation should be made. One of the most remarkable differences between the authority to render provisional measures by courts with substantive jurisdiction under the Brussels-Lugano regime on one side, and in cases where the Brussels-Lugano framework does not apply on the other side, is that in the latter case, the power to render interim relief by courts with substantive jurisdiction can be exercised on the basis of exorbitant bases of jurisdiction.64 Indeed, the private international law rules of the forum may confer authority to render interim relief on the basis of, for example, the nationality of the defendant or the domicile of the claimant. By contrast, in cases where the Brussels-Lugano regime is applicable, such exorbitant grounds are not available.

1.4. The power to render provisional measures by courts with substantive jurisdiction outside the European Area

Nearly all systems of law outside the European Area also accept that jurisdiction to render provisional measures lies with the courts having jurisdiction on the merits. In these cases, local courts should resort to, first, bilateral or multilateral conventions if applicable, and second, to their own rules of private international law. In Japan, for example, the Civil Provisional Remedies Act65 provides in Article 11 that an application for interim measures can only be filed if the Japanese courts have jurisdiction on the merits or if the property or assets to be seised are located in Japan. By way of further example, the Civil and Commercial Code of Argentina66 provides in Article 2603 that Argentinian courts have jurisdiction to render provisional

64 Cuniberti and Migliorini (n42) 99.
66 Código Civil y Comercial de la Nación (Argentina), ley 26.994.
and protective measures if they have jurisdiction on the merits of the case, and
regardless of the location of the parties and their property.

Finally, it should be noted that the same issues explained in the previous subsection
also arise here. First, different legal systems may have different approaches as to
the jurisdictional regime of post-judgment protective remedies. On this matter, there
is simply no consensus. Secondly, courts with substantive jurisdiction may exercise
authority to render provisional measures on the basis of exorbitant bases of
jurisdiction if the private international law rules of the forum include such exorbitant
grounds. Thirdly, the power to render provisional measures may derive from the
defendant’s submission to the adjudicatory jurisdiction of a court. In some legal
systems, the power to render interim relief on the basis of the submission of the
defendant, either *ab initio* or by continued participation in the proceedings, may also
extent to post-judgment remedies.

**1.5. Conclusions**

The authority of courts with substantive jurisdiction to render interim relief is a widely
acknowledged principle of international law. Yet this jurisdictional principle is not as
simple as one might have thought. Due to the strong link between the proceedings
on the merits and the power to render interim relief, divergent views may arise as to
the application of this rule before the substantive proceedings are commenced or
once the judgment on the merits is rendered, that is, while there are no proceedings
on course. In this context, several points or conclusions may be made.

First, as regards the power to render interim relief by a court not seised of the
substantive dispute, the better view is to accept that it is not necessary for a court
having substantive jurisdiction to be seised of proceedings on the merits in order to
render interim relief. As long as the court has substantive jurisdiction, the power to
render injunctive remedies should not be subject to any further requirement or
territorial limitation. This principle aims to ensure that interim measures are fully
available before the proceedings on the merits are commenced. In a similar vein, there should not be a requirement imposed on the applicant to subsequently start proceedings in the same court where interim relief was sought. Jurisdictional rules have been traditionally designed as providing many fora to the parties. Ultimately, the decision as to where to start proceedings on the merits is on the claimant. Obviously, the obligation to file an action before the courts where interim relief is sought would undermine the jurisdictional framework in place in many legal systems. Furthermore, there are no solid reasons in support of the adoption of such a restricted jurisdictional approach.

Secondly, as regards post-judgment remedies, the best approach is to allocate jurisdiction to courts with substantive jurisdiction and enforcing courts. The process leading up to the registration of a judgment in a third legal system for recognition and enforcement takes time. This is particularly true in complex litigation where it is not always evident the country or countries where the judgment may be enforced. Furthermore, other steps such as the translation of the judgment or the obtention of certified copies required by the enforcing court may considerably delay the registration of the judgment for enforcement. In the post-judgment stage, a recalcitrant judgment-debtor might easily dissipate assets if the court which exercised jurisdiction on the merits does not have the authority to render protective relief. In this context, it should be also noted that enforcing courts can only render protective remedies once the judgment has been registered for enforcement. Although it is true that the judgment-creditor had the option to apply to the courts of other legal systems in the pre-judgment stage on the basis of the location of assets or the domicile of the defendant, not in every case interim protection would be needed while the proceedings on the merits are pending. For these reasons, courts with substantive jurisdiction should be permitted: i) to attach provisional measures to their judgments on the merits and/or ii) to render post-judgment protective relief in

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67 Some scholars have argued that it is possible to impose territorial restrictions on the powers of national courts before an action on the merits has been filed. This would prioritise a tidy design of jurisdictional rules over interests of justice in cases where no courts have been seised yet of proceedings.

68 See Petergás Sender and Garber (n20) 793, who also support this conclusion on the basis that the pursuer would have to investigate the appropriate forum to obtain interim and final relief in situations where provisional measures may be urgently needed.
order to ensure cross-border enforcement. Concerns as to potential conflicts between exclusive jurisdiction to enforce on one side, and jurisdiction to render provisional relief on the other side, should be immediately disregarded. First, as long as enforcement proceedings have not been commenced, there is no such conflict. Secondly, even if the judgment has been registered for enforcement, post-judgment protective measures do not enforce the final relief provided by the judgment on the merits. It is true, however, that in order to avoid interference with enforcing courts, post-judgment measures should not include the exercise of coercive powers.

Finally, legal systems should consider limiting the power of courts with substantive jurisdiction to render interim relief to its territory in cases where the courts of another legal system have exclusive jurisdiction or where the parties have adopted an exclusive choice of court agreement. In the European Jurisdictional Area that is the approach currently in force.

2. Powers of courts without substantive jurisdiction to render provisional and protective measures

Traditionally, the ancillary jurisdiction of national courts to grant interim measures in support of foreign litigation proceedings has not been as well established and widely accepted as the scenario analysed in the previous section. Nevertheless, over the last 40 years, legal systems have systematically expanded the adjudicatory jurisdiction of national courts in order to support proceedings conducted in a foreign country. Currently, the principle of ancillary jurisdiction to render interim and protective remedies is recognised by a wide range of sources.
2.1. Sources

2.1.1. Soft-law sources

i) The American Law Institute-UNIDROIT Principles of Transnational Civil Procedure

The ALI-UNIDROIT Principles of Transnational Civil Procedure have addressed the issue of ancillary jurisdiction in the context of interim measures. Principle 2.3 of this instrument provides that:

“A court may grant provisional measures with respect to a person or property in the territory of the forum state, even if the court does not have jurisdiction over the controversy.”

The first observation which may be made with respect to this passage is its unfortunate linguistic formulation. Two interpretations are possible due to the usage of the expression “even if”. To begin with, one might argue that the drafters of the UNIDROIT Principles referred, in general, to the power to render interim relief irrespectively of the jurisdiction on the merits. If one were to adopt this approach, Principle 2.3 could be applied to courts with substantive jurisdiction and courts with ancillary jurisdiction since “even if” could be interpreted as “no matter whether or not the court has substantive jurisdiction”. Based on this interpretation, it is possible to argue that this principle makes no distinction between ancillary jurisdiction and jurisdiction over the merits. This appears to be the approach adopted by Ruiz Abou-Nigm, who also argues that under this principle the authority of national courts is not limited to measures of strict territorial nature. Despite the fact that this reasoning might have been one of the plausible options intended by the drafters, the accompanying commentary to the UNIDROIT Principles clearly points to the second possible interpretation. In the commentary, the drafters explain that Principle 2.3 deals with the allocation of jurisdiction to sequestrate or attach “locally situated property”. It is obvious that under this provision a worldwide freezing order cannot be rendered. The commentary goes on to say that: “the procedure with respect to

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69 ALI-UNIDROIT Principles of Transnational Civil Procedure 2004 and Accompanying Commentary.
property locally situated is called *quasi in rem* jurisdiction in some legal systems*. This again points to a territorial limitation on the exercise of ancillary jurisdiction. *Quasi in rem* actions are based on the existence of adjudicatory powers of the courts of the forum over property rights of a person who is absent from the territorial jurisdiction of these courts.71 As it can be seen, this is clearly, a distinct jurisdictional base from that conferring authority to render interim relief as a result of having jurisdiction over the merits. In sum, Principle 2.3 seems to be inspired by Article 35 of the Brussels Recast which, as it was anticipated in the previous subsection, allows the exercise of ancillary jurisdiction to render interim relief, albeit subject to a strict territorial limitation.

**ii) The International Law Association Principles on Provisional and Protective Measures in International Litigation, also known as the Helsinki Principles**

In contrast with the ALI-UNIDROIT Principles, the Helsinki Principles on Provisional and Protective Measures72 deal in greater detail with the jurisdictional regime of interim remedies in international litigation. Principle 10, one of the main jurisdictional provisions, provides that:

“The jurisdiction to grant provisional and protective measures should be independent from jurisdiction on the merits."

Obviously, this principle should be considered in light of its heading which reads “ancillary jurisdiction”. As confirmed by Nygh, Chairman of the Committee which drafted the principles, “ancillary jurisdiction” refers to proceedings on provisional measures brought in a legal system other than the one where proceedings on the merits have been or are about to be commenced.73 The definition put forward by the Helsinki Principles is important since it suggests that courts having jurisdiction on the merits but not effectively exercising it are subject to the territorial limitations imposed

by principles 11 and 17. However, as it was explained in subsection 1.2.1 of this chapter, this approach is not currently the prevailing view among scholars. The second provision which is important in the context of the current discussion is Principle 11. It reads as follows:

“The mere presence of assets within a country should be sufficient basis for the jurisdiction to grant provisional and protective measures in respect of those assets.”

Remarkably, the drafters did not include the domicile of the defendant as a connecting factor. Yet, it seems reasonable as a matter of policy and logic to include both the location of the assets and the domicile of the defendant as grounds allocating ancillary jurisdiction to courts without jurisdiction on the merits. The reasons behind the narrow scope of this provision are not clear, but it is important to keep in mind that the Helsinki Principles were drafted 25 years ago when the field of ancillary jurisdiction was still in its infancy. Another important feature of Principle 11 is the territorial scope of the remedies granted by courts without substantive jurisdiction. This important limitation, also included in the ALI-UNIDROIT Principles, is subsequently confirmed by Principle 17 which provides that ancillary jurisdiction should be restricted to assets located within the territorial jurisdiction of the court.

Finally, it should be pointed out that the jurisdictional scheme of the Helsinki Principles includes a relatively controversial provision. Principle 14 confers authority to the courts with substantive jurisdiction to exercise a “supervisory role” over remedies “granted in other countries, considering in particular whether (...) those measures are justifiable in the light of the action as a whole”. To begin with, the expression “other countries” demonstrates that the drafters did not conceive cases where there is more than one substantive proceeding pending before the courts of different fora.74 Secondly, the “supervisory role” proposed in the Principles should not lead the courts with substantive jurisdiction to “supervise” a foreign sovereign nation and its laws. Although direct cooperation between courts with substantive

74 ibid 121.
jurisdiction and courts with ancillary jurisdiction is highly desirable, the “supervisory role” formula should perhaps be changed for another less interventionist terminology.

iii) The European Law Institute-UNIDROIT European Rules of Civil Procedure (2020 Consolidated draft)

Under Rule 202(3) of the European Model Rules,\(^7^5\) national courts have ancillary jurisdiction to grant “such provisional and protective measures necessary to protect interests located within the jurisdiction or the subject-matter of which have a real connecting link with the territory of the court, or that are necessary to support proceedings brought in another country”. For a model law directed at lawmakers of different European states, this is not a simple and easy-to-interpret provision. In the accompanying commentary to the text, the drafters further explain that ancillary jurisdiction can be exercised: i) where local interests need protection (e.g. evidence, assets (…) located in that jurisdiction); ii) where there is an otherwise close connection between the measure sought and that jurisdiction (e.g. restraining order relating to acts taking place in that jurisdiction) or iii) where the measures are necessary to support substantive proceedings brought in another country.\(^7^6\)

It is questionable, however, whether this is a good approach to ancillary jurisdiction for the following reasons. First, the requirement of “close connection” in the first and second conditions seems to suggest that a substantial connection between, on one side, the remedy, the parties and their dispute, and on the other side, the territorial jurisdiction of a court may not be required in all circumstances. Secondly, the most alarming aspect of Rule 202(3) is the last condition according to which courts have ancillary jurisdiction if the remedies sought are necessary to support proceedings brought in another country. In this context, one might ask: what is this “necessity test”? Is it based on the case law of the European Court? Can the necessity test be exercised without the requirement of a “real connecting link” or “substantial

\(^7^6\) ibid 362.
connection” between the measure, the parties or their dispute, and the territorial jurisdiction of a court? In fact, this provision could be interpreted as providing a discretionary power that would allow courts to ignore the requirement of a real connecting link. By doing that, courts would be disregarding the basic principles and foundations of the law of international jurisdiction.

In the context of the current discussion and in order to assess the appropriateness of Rule 202(3), it may be useful to compare it with the jurisdictional rules adopted, for example, in Italy, Spain and Switzerland which provide that ancillary jurisdiction lies with the courts where the given remedy is enforceable or is to take effect. It is not clear then why the drafters of the ELI-UNIDROIT Rules have adopted such a complicated and inconsistent provision, rather than implementing a simple solution that already existed in several European legal systems.

iv) The Principles on Transnational Access to Justice (TRANSJUS) of the American Law Association of Private International Law77

This instrument has adopted a clear internationalist perspective on the exercise of adjudicatory jurisdiction since its goal is to articulate the adjudicatory powers of courts in a “coordinated and cooperative manner in order to achieve effective transnational justice”.78 Three provisions of these principles should be analysed in the context of the current discussion. First, Article 3(10) provides that:

“courts may always exercise jurisdiction to issue provisional measures of protection for person or property within their territory, irrespectively of the court [with jurisdiction on the merits] (...), and ultimately subject to the decision of the internationally competent court”.

Accordingly, Article 3 establishes a clear base of ancillary jurisdiction founded on the presence of the defendant, evidence, or assets within the territorial jurisdiction of the court. As regards competence, the wording of Article 3 – “within their territory” – effectively rejects the scenario where national courts are permitted to render

77 TRANSJUS Principles approved by the Assembly of the American Law Association of Private International Law, in Buenos Aires, on 12 November 2016.
78 See the ‘Preface’ of the TRANSJUS Principles.
extraterritorial measures by reason of the presence of a person within its territorial jurisdiction. Interesting are, in this context, the similarities between the TRANSJUS Principles and the territorial restrictions of Article 35 of the Brussels Recast. The second key element of Article 3 is the fact that, under the TRANSJUS principles, the court with ancillary jurisdiction is subject to the decisions of the court with jurisdiction on the merits. Under this provision then, a court with substantive jurisdiction might discharge or modify a remedy rendered by a foreign court with ancillary jurisdiction. This is, however, very controversial in many legal systems, and therefore, this principle does not seem to – or attempt to – be of universal application.

Article 7(7) is another important provision dealing with post-judgment interim measures. Even though the TRANSJUS Principles do not clarify whether the court with jurisdiction on the merits “retains” jurisdiction to render post-judgment remedies, Article 7(7) unequivocally confers jurisdiction to the enforcing courts.

Finally, one of the most remarkable aspects of this instrument can be found in Article 8(5). This provision sets out the principle of international judicial cooperation as applicable in the context of applications for interim relief. Under this article, the different courts having jurisdiction to render interim measures should establish direct communications among each other and their judges may hold common hearings via videoconference or similar means.

2.1.2. Multilateral and regional sources

i) Inter-American Convention on Execution of Preventive Measures

The 1979 Inter-American Convention on Execution of Preventive Measures, along with the 1968 Brussels Convention, were the earliest international instruments recognising ancillary jurisdiction to render provisional measures in the context of transnational disputes. Yet, in contrast with the Brussels Convention, the legal regime of ancillary jurisdiction was, under the Inter-American Convention, more

detailed and sophisticated. Article 10 confers the courts of States Parties\textsuperscript{80} to the Convention the power to render territorial measures “regardless of” the court having jurisdiction on the merits and “provided that the property or right that the measure will affect is located in the territory under the jurisdiction of the (…) court addressed by the party”. As it can be seen, three elements distinguish the Inter-American Convention from the Brussels regime. First, unlike Article 24 of the Brussels Convention which did not include any explicit reference to territorial restrictions, the Inter-American instrument made clear from the very beginning that ancillary jurisdiction is, under its framework, limited to measures of territorial nature. By contrast, under the Brussels-Lugano regime, ancillary jurisdiction has been subsequently developed through case law\textsuperscript{81} in order to restrict Article 24, what is now Article 35 of the Recast, to the same territorial scope. Secondly, the Inter-American Convention clearly established the connecting factor required to exercise ancillary jurisdiction. In fact, jurisdiction was allocated to the courts of the place where the property or right is located. Conversely, Article 24 of the Brussels Convention did not refer to any connecting factor. Finally, another interesting aspect that is absent from Brussels-Lugano is the framework of interjurisdictional cooperation between courts with substantive jurisdiction and courts with ancillary jurisdiction. The Inter-American Convention provides, in this context, that if the proceedings on the merits have been commenced, the court exercising ancillary jurisdiction shall immediately inform the court with substantive jurisdiction.\textsuperscript{82}


Despite the attempts of some MERCOSUR legal systems to promote interjurisdictional cooperation in the field of interim relief, there are no legal instruments in force that allocate ancillary jurisdiction to courts without jurisdiction on

\textsuperscript{80} Out of 35 Members of the Organization of American States, this instrument has been adopted by 16 Central and South American countries.

\textsuperscript{81} As decided in Mietz and Van Uden.

\textsuperscript{82} Inter-American Convention (n79) Art 10.

As regards the Ouro Protocol, three central provisions deserve to be explored in depth. First, under Article 4, judicial authorities of States Parties to the Asunción Treaty—the foundational treaty of MERCOSUR—should enforce interim relief rendered by courts of other State Parties if such courts have jurisdiction on the merits. Obviously, under the Protocol on Preventive Measures, the power to render provisional remedies by courts with substantive jurisdiction exists. Secondly, Article 11 treats post-judgment provisional measures as enforcement remedies by conferring jurisdiction in these cases to enforcing courts. Finally, Article 14 includes a mechanism of interjurisdictional cooperation according to which national courts should transmit the following information to any other court involved: i) the date fixed by which the applicant shall initiate proceedings on the merits, and ii) the date where the proceedings have been commenced by the pursuer or the fact that an action has not been filed yet. Unfortunately, the Ouro Preto Protocol did not include any provision allocating ancillary jurisdiction to render interim relief. It is worth noting that this was the result of the resistance of Brazil which opposed the idea of a MERCOSUR instrument on interim relief.

As regards the Agreement on Jurisdiction in the field of international transport of goods, Article 6 provides that ancillary jurisdiction to render interim relief lies with the court where the vehicle is located, if such vehicle is the object against which the remedy is sought. This jurisdictional regime applies to the transport of goods by road, rail, and inland shipping. The problem is that this instrument has not yet entered into force. Pursuant to Article 9, the Agreement enters into force 30 days

85 Treaty establishing a Common Market (Asunción Treaty) between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Asunción, 26 March 1991, 2140 UNTS 257.
86 Ruiz Abou-Nigm (n70) 774.
after the first two ratifying States deposit the instrument of ratification. As of December 2021, only Brazil has complied with this requirement back in 2004.

iii) Preliminary draft of the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

Although the 2019 Judgment Convention adopted by the Hague Conference on Private International Law\(^\text{87}\) is an enforcement instrument that does not address the issue of provisional and protective measures,\(^\text{88}\) the idea of a worldwide convention on international jurisdiction has been at the core of this institution for some time now. In fact, in the context of interim relief, a very sophisticated model of ancillary jurisdiction was put forward by a draft convention which was later abandoned.

The 1999 Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters\(^\text{89}\) allocated ancillary jurisdiction in two cases: i) with respect to property, to the courts of the State where the property is located and only in respect of that property and ii) with respect to persons and conducts,\(^\text{90}\) to any court of a Contracting State as long as such court can enforce compliance within its territorial jurisdiction. Under the first heading of jurisdiction, there is a connecting factor – the location of property – and a territorial limitation – a worldwide remedy, for example, could not have been rendered –. Under the second jurisdictional base, there does not appear to be *prima facie* any connecting factors: in fact, any court appears to have been authorised to render interim measures irrespectively of the proceedings on the merits.\(^\text{91}\) On closer examination, however, the requirement of enforcement within the territorial jurisdiction of the court is impliedly recognising the fact that a substantial connection between the parties or their conduct is needed; otherwise, a court could not enforce compliance. Furthermore, under the second

\(^{87}\) As of December 2021, not yet in force.

\(^{88}\) See Art 3(1) of the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.


\(^{90}\) Ibid Art 13.

\(^{91}\) Ibid 74.
jurisdictional rule, there are no territorial limitations: a court of a Contracting State could have rendered an order for the disclosure of assets held anywhere in the world, as long as such court was able to enforce the remedy by reason of the domicile of the defendant and through, for example, the threat of contempt of court.92

Unfortunately, as noted above, the attempts of the Hague Conference to adopt a convention on international jurisdiction failed,93 and since then, the interest in ancillary jurisdiction in the multilateral context has not been restored.

2.1.3. European sources: the Brussels I Recast Regulation and the Lugano Convention

The central provision in the European context is Article 3594 of the Brussels I Recast which provides that:

“Application may be made to the courts of a Member State for 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.”

The jurisdictional nature of Article 35 has been a matter of major and endless discussion. In this section, several questions are addressed, namely, is Article 35 a rule of jurisdiction per se? Is it just a precondition to the exercise of jurisdiction? Or does it refer to the rules of jurisdiction available in the forum? In Van Uden, the European Court defined Article 24 of the Convention, what is now Article 35 of the Brussels I Recast, as a rule of jurisdiction.95 Nevertheless, it has been widely accepted by scholars that Article 35 is not a self-standing jurisdictional rule. Van

92 ibid.
94 In similar terms, Article 31 of the Lugano Convention recognises the power of courts to render provisional, including protecting, measures even if the courts of another State bound by the Convention have jurisdiction as to the substance.
95 Van Uden (n8) [20].
Calster, for example, argues that Article 35 is an additional, subsidiary rule with reference to national law. He considers that the Brussels I Recast is not regulating provisional measures as such and therefore, as the Jenard Report sets out, in each Member State application may be made to the courts for provisional measures to be rendered, “without regard to the rules of jurisdiction laid down in the [Regulation]”.

Similarly, Maher argues that Article 35 does not set any ground of jurisdiction for applications for protective measures. The only reference is to the jurisdiction of courts of another Member State as to the substance of the matter. Likewise, Nuyts claims that in Van Uden it was implicit that the jurisdiction of national courts is to be found in the private international law rules as they apply in the forum State. On the face of it, it seems uncontroversial that Article 35 is not a conventional rule of jurisdiction. Then, what is the legal nature of Article 35?

The jurisdictional examination of Article 35 is, under this section, conducted in two stages. To begin with, this section starts from the outset by analysing in a methodological manner the legal nature of Article 35 through the case law of the European Court of Justice and the official interpretative reports. Article 35 itself offers little or no guidance on how to interpret the jurisdictional regime of provisional and protective measures. A crucial point is then to examine the official interpretative reports and European case law. As it will be seen, these elements are also inconclusive regarding key jurisdictional issues. For that reason, further analysis will discern whether Article 35 is a) a rule of jurisdiction on its own with the “real connecting link” requirement being the connecting factor, b) a mere reference to the rules of international jurisdiction of the forum, or c) a permitted-excluded base of jurisdiction.

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96 Van Calster (n17) 185.
97 Jenard Report (n30) 42.
98 Gerry Maher QC and Barry J Rodger, Civil Jurisdiction in the Scottish Courts (Thomson Reuters 2010) 186.
99 Ibid.
100 Nuyts (n3) para 12.17.
2.1.3.1. The official interpretative reports and the case law of the European Court of Justice on Article 35 of the Brussels I Recast

The primary sources to examine the European framework of ancillary jurisdiction are Article 35, the official interpretative reports, and the case law of the European Court. Therefore, this subsection proposes to dissect Article 35 in smaller parts or elements where appropriate references are made to the official reports and case law in order to facilitate the understanding of the legal nature and anomalous structure of this provision. Under this subsection, Article 35 is divided into four constitutive parts. In practical terms, however, these four subdivisions should not be considered as strictly independent since the same interpretative problem may sit in two or more different subdivisions at once.

**Part I: is Article 35 a rule of jurisdiction?**

Article 35 starts by providing that “application may be made to the courts of a Member State”. This introductory part might give a clue about the legal nature of Article 35. In fact, the reference to the courts of Member States together with its location in chapter II, which has “jurisdiction” as a heading, might have been enough to conclude that Article 35 is a rule of international jurisdiction. Obviously, these elements may be circumstantial and therefore, further analysis is required.

**Part II: the problem of categorisation**

Article 35 continues in the following terms: “Application may be made to the courts of a Member State for such provisional, including protective, measures”\(^{101}\). This part of Article 35 raises a question of crucial significance to the conflict of laws: is the classification of “provisional, including protective, measures” to be made by the lex fori, or is that matter to be determined according to an autonomous and unified European concept? Although the answer to this question is already settled for some time now, it may be appropriate to explain how the problem of categorisation was

\(^{101}\) Emphasis added.
solved. The starting point is that Article 35 does not explicitly provide an answer to the categorisation issue.\textsuperscript{102} Similarly, the official interpretative reports do not offer any satisfactory guidance on this matter. The Jenard Report is the only instrument that comes close to the issue of classification since it provides that “as regards the measures which may be taken, reference should be made to the internal law of the country concerned”.\textsuperscript{103} This passage seems to suggest that categorisation is a matter for the internal law of each legal system.\textsuperscript{104} However, the better view is to accept that the report is simply rephrasing the wording of Article 35 which provides that the measures to be rendered under the Brussels regime are national remedies as found in the internal law of each Member State. It should come as no surprise then, that in the absence of guidance in Article 35 itself and the reports, the answer to the classification problem lies within the case law of the European Court.

In a series of decisions, the European Court of Justice has dealt with categorisation in the context of, what is now, Article 35. In \textit{De Cavel v De Cavel (no 1)},\textsuperscript{105} the Court decided that the question of whether a provisional and protective measure fall within Article 24\textsuperscript{106} was determined not by the nature of the remedy but by the nature of the rights which that measure seeks to protect.\textsuperscript{107} The Court further elaborated that idea in \textit{De Cavel v De Cavel (No 2)},\textsuperscript{108} confirming that the Brussels jurisdictional framework does not link ancillary claims under which provisional and protective measures fall, to the treatment of the principal claim.\textsuperscript{109} As a result, categorisation of a remedy as “provisional, including protective” should not be made according to the subject-matter of the principal claim, but on the basis of the subject-matter of the remedy.\textsuperscript{110} Whilst in the previous cases the Court was impliedly accepting that classification must be made in an autonomous and independent manner, it was not

\begin{flushleft}
\textsuperscript{103} Jenard Report (n30) 79.
\textsuperscript{104} Maher and Rodger (n102) 311.
\textsuperscript{105} Case C-143/78 \textit{De Cavel v De Cavel (no 1)} [1979] ECR 1055.
\textsuperscript{107} \textit{De Cavel (no 1)} (n105) 1066.
\textsuperscript{108} Case C-120/79 \textit{De Cavel v De Cavel (No 2)} [1980] ECR 731.
\textsuperscript{109} ibid 740.
\textsuperscript{110} ibid 741.
\end{flushleft}
until *CHW v GJH*\(^{111}\) where another European institution, the Commission, explicitly supported a European and independent interpretation.\(^{112}\) In this case, the applicant sought an order for the delivery of a codicil that had evidential value in divorce proceedings. The question arose as to whether that remedy could be included in the scope of the Brussels I regime. The Court of Justice pointed out that the provision governing provisional measures cannot be relied on to bring within the scope of the Regulation remedies relating to matters which are excluded from it.\(^{113}\) Finally, the Court explicitly made clear in *Reichert v Dresdner Bank*\(^ {114}\) that “provisional, including protective, measures” is an autonomous European concept. The Court argued that the meaning of that expression must be understood as “measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case”.\(^ {115}\)

In sum, the main conclusion on this second constitutive part of Article 35 can be provided with only four words: national remedies, European concept. As just noted, the case law of the European Court had a crucial role in the development of the answer to the classification issue. Even though potential interpretative problems might arise regarding the concept provided by the Court,\(^ {116}\) it is beyond doubt that the categorisation of provisional measures for the purposes of Article 35 must be made in accordance with a European and autonomous concept. Furthermore, it is also beyond doubt that Article 35 does not itself create any European remedy.

\(^{111}\) Case C-25/81 *CHW v GJH* [1982] ECR 1189.
\(^{112}\) ibid 1195.
\(^{113}\) ibid 1204.
\(^{115}\) ibid [34].
\(^{116}\) Indeed, what constitutes a provisional measure for the purposes of Article 35 remains far from certain.
Part III: is Article 35 a reference to the remedies available under national procedural law, a reference to the rules of jurisdiction available in the forum or both?

The third part of Article 35 reads as follows: “for such provisional, including protective, measures as may be available under the law of that Member State”. At first glance, this part of Article 35 can be read either as a provision pointing to the rules of jurisdiction available in the forum or as a reference to the actual provisional remedies found in the procedural law of Member States. In fact, one may ask whether Article 35 is about jurisdiction at all. As in the previous constitutive part, very little guidance can be found in Article 35 itself, therefore, this analysis should primarily focus on case law. In *Van Uden*, the European Court held that Article 24 added a rule of jurisdiction falling outside the system set out by the Convention. According to that interpretation, it is possible to conclude that, what is now Article 35, is just a reference to the rules of jurisdiction of the forum. In the same paragraph, however, the Court clarified that the expression “as may be available under the law of that Member State” means that “the (types of) measures available are those provided for by the law of the State of the court to which application is made”. Accordingly, this paragraph of the *Van Uden* decision appears to suggest that Article 35 is first, a jurisdictional reference to the rules of the forum, and second, a reference to the remedies available under national procedural law. Yet, these preliminary conclusions require further clarification.

First, Article 35 itself is not a reference to the rules of jurisdiction available in the forum. Rather, one can be certain from the wording of this part of Article 35 that the actual reference is to the typologies of interim remedies as available under the internal law of Member States. As it will be explained, originally, the key issue concerning Article 24 was not international jurisdiction but competence, that is,

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117 Emphasis added.
118 See, eg, Michele Angelo Lupoi, ‘Provisional Remedies in the European Space of Justice: Issues of Transnational Jurisdiction and Enforcement’ in Rolf Stürner and Masanori Kawano (eds), *Comparative Studies on Enforcement and Provisional Measures* (Mohr Siebeck 2011) 310, who argues that Art 35 is a reference to the “actual provisional remedies found in the procedural law of the forum”.
119 *Van Uden* (n8) [20].
120 ibid.
121 See § 2.1.3.2, Hypotheses 1 and 2.
whether provisional measures had to be offered by Member States to international litigants. This was so for the simple reason that Article 24 was a provision based on the principle of open jurisdiction. The question was not then to determine a potential connecting factor which has to be satisfied in Article 24 cases, but rather, whether Member States should make its courts competent to render interim relief in aid of foreign proceedings, and if so, which remedies should be offered. Whilst many commentators have repeated the mantra that Article 35 is a reference to the rules of jurisdiction of the forum, none of them seems to have explained the origin, source, reasons, and rationale of such jurisdictional reference. In fact, it is not until the Van Uden decision, where the European Court incorporates international jurisdiction to Article 35 cases by requiring national courts to exercise authority only if a “real connecting link” between the remedy sought and the territorial jurisdiction of the court is satisfied.

Secondly, the reference of this part of Article 35 to remedies available under national procedural law cannot be strictly interpreted since not every domestic remedy may qualify as “provisional, including protective” for the purposes of Article 35. As already explained, in Reicher v Dresdner Bank the European Court held that Article 35 is to be given an autonomous interpretation which does not have to follow the domestic categorisation of Member States.

To conclude, the third constitutive part of Article 35 makes clear that there is nothing such as European remedies under the Brussels-Lugano regime. The “provisional, including protective, measures” passage of Article 35 is just a reference to the remedies available under national procedural law as long as, first, such remedies have been made available to international litigants by the Member State concerned, and secondly, if and only if, such measures comply with the autonomous concept provided by the European Court.
Part IV: the legal nature of the requirement of “the existence of a court of a Member State having jurisdiction as to the substance”

Finally, the last part of Article 35 provides: “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”.\(^{122}\) Two important issues arise in this context. First, whether the “existence of a court having jurisdiction as to the substance” is acting as a connecting factor of a potential rule of jurisdiction, or conversely, whether it is simply a condition for the application of Article 35. Secondly, how the European Court has applied in practical terms, this element or condition.

To begin with, as regards the first question, it is doubtful whether this element is acting as a connecting factor. The reason for such a conclusion can be found in the terminology used by Article 35 itself. Indeed, Article 35 authorises national courts to render interim relief “even if” other courts have substantive jurisdiction. In other words, “despite the possibility that” or “regardless of whether” other courts have jurisdiction on the merits. As it can be seen, if substantive jurisdiction is independent from Article 35, how could that element be a connecting factor requiring satisfaction in order for courts to apply Article 35? Although it seems clear that this element is not a connecting factor, this conclusion is based on a linguistic interpretation of Article 35. Furthermore, the official interpretative reports and the European Court have not provided any explanation on the concept or legal nature of this requirement. For these reasons, further analysis will be conducted in the following subsection.\(^{123}\)

Secondly, the European Court has explained the applicability of the requirement of “the existence of a court having jurisdiction as to the substance” in several disputes. In these cases, the Court has disregarded the expression “even if [other courts have substantive jurisdiction]” which seems to have been interpreted as “if [other courts have substantive jurisdiction]”. In *De Cavel v De Cavel (no 1)*, for example, the Court held that Article 24 is only relevant in cases where courts of another Member States

\(^{122}\) Emphasis added.

\(^{123}\) See § 2.1.3.2, Hypothesis 1.
have jurisdiction over the substance of the dispute.\textsuperscript{124} In similar terms, in \textit{CHW v GJH}, the Court made clear that Article 24 only applies if a court of another State has jurisdiction on the merits.\textsuperscript{125} In this dispute, for example, the Court questioned why the application of Article 24 was being raised since the action over the substance was pending in the Netherlands; forum where the protective remedy was also sought.\textsuperscript{126} Indeed, following the interpretation adopted by the Court, Article 24 did not have any role in this case since Dutch courts had jurisdiction on the merits.\textsuperscript{127} Paradoxically, as it will be explained, the Court has not consistently applied this requirement.\textsuperscript{128}

2.1.3.2. Different alternatives on the jurisdictional nature of Article 35

The official interpretative reports and the case law of the European Court were inconclusive with respect to key matters which are essential to elucidate the jurisdictional nature of Article 35. For that reason, three potential alternatives are explored under this subsection.

\textit{Hypothesis 1: Article 35 is a rule of jurisdiction on its own with the “real connecting link” requirement being the connecting factor}

To start with, Article 35 may be considered as a rule of jurisdiction on its own as part of a required base of jurisdiction which imposes on Member States the obligation to offer provisional measures as they are found in internal law\textsuperscript{129} according to the connecting factor of “real connecting link”.\textsuperscript{130} If that is the appropriate interpretation, Article 35 would be comparable with, for example, Article 7 of the Regulation which is a rule of jurisdiction imposing on Member States the obligation to offer jurisdiction in matters related to contract on the basis of a connecting factor, namely the place of

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\begin{itemize}
\item \textsuperscript{124} De Cave (no 1) (n105) 1067.
\item \textsuperscript{125} CHW (n111) 1204.
\item \textsuperscript{126} ibid 1194.
\item \textsuperscript{127} Maher and Rodger (n102) 315.
\item \textsuperscript{128} See § 2.1.3.2, Hypothesis 1.
\item \textsuperscript{129} Report of the Scottish Committee on Jurisdiction and Enforcement, Maxwell Committee (Edinburgh Her Majesty's Stationery Office 1980) [5.234].
\item \textsuperscript{130} Van Uden (n8) [40].
\end{itemize}
performance. It should be noted that bases of jurisdiction included in European instruments normally require the exercise of that jurisdiction.\textsuperscript{131} The use of discretionary powers by national courts was rejected\textsuperscript{132} by the European Court in \textit{Owusu v Jackson}.\textsuperscript{133} Accordingly, under a required base of jurisdiction, if an action has been raised before a national court and the connecting factor is satisfied, jurisdiction must be exercised since otherwise, a refusal of a court to exercise the powers conferred by a European instrument would, first, undermine the principle of legal certainty;\textsuperscript{134} second, affect the uniform application of jurisdictional rules;\textsuperscript{135} and third, amount to a denial of justice.\textsuperscript{136} Accordingly, if Article 35 is a rule of jurisdiction, there must be a connecting factor on the basis of which courts of Member States shall offer jurisdiction. Nevertheless, as it will be explained, this hypothesis presents several problems. This subsection analyses, first, whether Article 35 is a required base of jurisdiction and, secondly, whether there are elements in the context of the said Article and the case law associated with it, which may be deemed as connecting factors.

Generally speaking, Article 35 has not been interpreted as an obligation imposed on Member States to offer provisional measures in support of proceedings conducted abroad. In this context, the official interpretative reports should be the first sources to be examined. However, out of the official interpretative reports, only the Evrigemis and Kerameus Report provides that “[Article 35] leaves the courts of a State free to order provisional or protective measures available under the law of that State”. Yet, it is unclear whether this report is referring to the obligation imposed on Member States to offer interim remedies to international litigants or, conversely, to the discretionary power of national courts to grant provisional measures. Despite the fact that the interpretative reports have remained silent on the jurisdictional nature of Article 35, this matter has been extensively discussed since, if a Member State does

\textsuperscript{131} Some scholars argue that there are several permitted bases of jurisdiction in the Brussels I Recast. See, for example, Ralf Michaels, ‘Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions’ in Eckart Gottschalk and others (eds), \textit{Conflict of Laws in a Globalizing World: A Tribute to Arthur von Mehren} (CUP 2006).
\textsuperscript{132} Unless authorised to do so by a specific provision of the Brussels Regime.
\textsuperscript{133} Case C-281/02 Owusu v Jackson [2005] ECR I-1383.
\textsuperscript{134} ibid [41].
\textsuperscript{135} ibid [43].
\textsuperscript{136} ibid [42].
not have any provisional remedy available for international litigants, the Regulation would impose the obligation to offer interim remedies as available under local law.\textsuperscript{137} This concern was, for example, addressed in Scotland by the Maxwell Committee. The members of this committee argued that, strictly speaking, Article 35 is a jurisdictional provision\textsuperscript{138} that does not impose such an obligation.\textsuperscript{139} In the same vein, a great majority of scholars have also adopted the same view.\textsuperscript{140} Collins, for example, argues that Article 35 authorises, but does not require, a Member State to offer provisional measures\textsuperscript{141} since it is merely a permissive provision and, therefore, national law may allow that power to be exercised.\textsuperscript{142} Conversely to the approach adopted by the Maxwell Committee and a majority of commentators, in the English case \textit{Republic of Haiti v Duvalier},\textsuperscript{143} Lord Justice Staughton held that:

“it seems to me that the Convention (what is now the Brussels I Recast) requires each State to make available, in aid of the court of another State, such provisional and protective measures as its own domestic law would afford if its courts were trying the substantive action.”\textsuperscript{144}

However, this is a doubtful interpretation since the rationale of Article 35 is not to impose an obligation on Member States to make remedies available to international litigants but, conversely, it is to declare that, notwithstanding the jurisdictional framework of the Regulation and the prohibition of exorbitant bases of jurisdiction, the courts of Member States have the power to grant such provisional and protective

\textsuperscript{137} In this case, Scotland would have been obliged to make available all measures which, at that time, were not available to litigants outwith Scotland. In fact, all interim remedies were only available to litigants in Scottish courts. See Gerry Maher, ‘Provisional and protective measures in respect of foreign proceedings’ (1998) 29 SLT 225.

\textsuperscript{138} Report of the Maxwell Committee (n129) [5.236].

\textsuperscript{139} The Regulation, however, seems to proceed on the assumption that a wide category of measures was already available in aid of foreign proceedings. Thus, the Maxwell Committee recommended making available to foreign litigants most of the remedies that were available to litigants in Scotland.


\textsuperscript{141} Lawrence Collins, \textit{Essays in International Litigation and the Conflict of Laws} (OUP 1994) 215.

\textsuperscript{142} Lawrence Collins, \textit{The Civil Jurisdiction and Judgments Act 1982} (Butterworths 1983) 99.


\textsuperscript{144} ibid 212.
measures as available under existing domestic law. While the words of Staughton LJ may be deemed as the spirit of the Regulation, it does not follow, from a plain reading of Article 35, that such an obligation on Member States exists. Doctrinally, the rationale of Article 35 is not to harmonise jurisdiction nor to unify the provisional remedies of Member States.

Secondly, with respect to the elements which may be considered as potential connecting factors, the only reference in Article 35 is to the substantive jurisdiction of the courts of another Member State. Accordingly, all that is required for the operation of the aforementioned provision is the possibility of substantive proceedings to exist. A court of Article 35 does not have to wait until the main proceedings have actually started, nor is it required for the operation of Article 35 that substantive proceedings will start in the future. The mere possibility that these proceedings might exist is enough to grant relief in Article 35 cases. Thus, an important question follows: is this requirement a connecting factor?

At first glance, the preceding element does not appear to act as a connecting factor. Rather than an element connecting the parties or their dispute to the power of a court to render interim relief, this is simply a condition for the operation of Article 35. A condition which, paradoxically, has not been consistently applied by the European Court. In fact, in Van Uden, the Court concluded that Article 24 of the Convention applies in cases where an arbitration clause confers substantive jurisdiction to an

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145 See the recent decision of the European Court in Case C-581/20 Skarb Państwa Rzeczypospolitej Polskiej reprezentowany przez Generalnego Dyrektora Dróg Krajowych i Autostrad v TOTO (Court, First Chamber, 6 October 2021) where it is argued at [64] that Article 35 ensures the availability of additional fora other than the court with substantive jurisdiction but it does not guarantee that provisional measures will be available to the applicant.

146 Article 35 had, as a result, an indirect harmonisation of jurisdiction without imposing any obligation. In fact, virtually all EU legal systems have accepted jurisdiction in Article 35 cases. Nonetheless, legal systems do not have to make available the same range of internal provisional measures for the purposes of Article 35. For example, Scotland has only made available for the purposes of Article 35 arrestment, inhibition, interim interdicts and orders for the preservation of evidence. This is then an option for every legal system to decide.


148 ibid.

149 Similarly, courts do not have to ascertain the issue of substantive jurisdiction before granting interim relief in Article 35 cases. See, eg, the decision of the French Supreme Court (Cour de cassation, Chambre civile 1, 14 mars 2018, 16-19.731) where it was held that, for the application of Article 35, the courts of a Member State do not have to first determine whether another court of a Member State has jurisdiction over the merits.
arbitral tribunal. Yet, it is arguable whether Article 24 had any relevance at all since the arbitration agreement excluded the power of national courts to decide on the substance of the case.\textsuperscript{150} Surprisingly, the Court decided that Article 24 applied even if the substantive proceedings were conducted before arbitrators.\textsuperscript{151} On the face of it, the Court did not apply “the existence of a national court having jurisdiction on the substance” as a connecting factor. In European private international law, connecting factors should be strictly applied since the development of jurisdictional rules is a matter which traditionally falls on legislators.\textsuperscript{152} If a rule of jurisdiction provides that the connecting factor in disputes falling within a specific subject-matter is the domicile of the defendant, the European Court cannot change domicile for a different connecting element. That possibility would undermine the objectives of the rule of jurisdiction which configures, in the current example, domicile as the most appropriate element connecting a dispute with international elements to a particular forum. The Court could interpret the concept of domicile, whether or not the requirement of domicile is satisfied for a specific rule, or whether the subject-matter of the dispute is within the scope of the legal instrument which provides domicile as the connecting factor. As it can be seen, the decision of the Court in \textit{Van Uden} demonstrates that “the existence of a court of another Member State having jurisdiction as to the substance” is not a connecting factor. Rather than dealing with international jurisdiction, the European Court gave an answer to the question of the scope of Article 35, which applies in cases where the proceedings on the merits are either before arbitrators or before courts of Member States.

The analysis of potential connecting elements should not end up here. In fact, there is another requirement for the operation of Article 35 which seems to act as a connecting factor.\textsuperscript{153} In this context, it is important to note that the aforementioned provision has been developed as the traditional rules of jurisdiction in common law systems. The reason behind such development is that Article 35 was a very broad provision, and therefore, there was a high risk of this article being used to circumvent

\textsuperscript{150} Maher and Rodger (n102) 316.
\textsuperscript{151} \textit{Van Uden} (n8) 34.
\textsuperscript{152} Michaels (n93) 1009. This point illustrates the European approach to the law of international jurisdiction. Conversely, in the United States, the development of rules of jurisdiction is a matter mostly left to judges.
\textsuperscript{153} Ruiz Abou-Nigm (n70) 771.
the jurisdictional framework set out by the Brussels Regulation in Articles 4 and 7-26. In other words, this provision seems to have been adopted by the European lawmaker as a rule of open jurisdiction. Open jurisdiction refers to the scenario where no jurisdictional grounds are set out for a specific action. So, as long as a court is granted competence, the power to render interim relief can be exercised without the need to satisfy a specific connecting factor.\textsuperscript{154} This, however, opened the door to courts of Member States being able to trespass upon the authority of the court having substantive jurisdiction under the rules set out by the Regulation. For that reason, the European Court has been narrowing down Article 35 by imposing limits through case law. One of these limits is the requirement of a real connecting link between the measure sought and the territorial jurisdiction of the court. As it can be seen, this element appears to open up the possibility of Article 35 being categorised as a rule of jurisdiction. The European Court of Justice provided in \textit{Van Uden} that:

\begin{quote}
“the granting of provisional or protective measures on the basis of Article 24 is conditional on, \textit{inter alia}, the existence of a real connecting link between the subject-matter of the measure sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought.”\textsuperscript{155}
\end{quote}

However, it should be immediately pointed out that the requirement of “real connecting link” is not having an adjudicatory function in Article 35 cases. In the context of the current discussion, it is essential to refer to the main concepts of the law of international jurisdiction which were explained in chapter two. Whilst the rules of jurisdiction identify or point to the forum or \textit{fora} considered appropriate to exercise adjudicatory powers on the basis of a connecting factor, competency rules set out limits or boundaries on the powers of these courts. Yet, the “real connecting link” requirement is not pursuing any of these two functions. By requiring “a real connecting link”, the Court is not establishing a connecting factor that distributes international jurisdiction between the different courts of different \textit{fora}. The only reference in the case law of the European Court to what it may have been a


\textsuperscript{155} \textit{Van Uden} (n8) [40].
connecting factor can be found in Denilauler v Couchet Frères where it was held that “the courts of the place (...) where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the grant” of a given remedy. In this context, it is to be noted that this is simply a suggestion of the Court which illustrates what it is meant by “real connecting link”. Accordingly, the better view is to accept that by requiring a “connecting link” the Court is rejecting the principle of open jurisdiction. To put it simply, the “real connecting link” condition is not allocating jurisdiction to the courts of State A or State B but requiring the application of the law of international jurisdiction in Article 35 cases and disregarding the principle of open jurisdiction. In the conflict of laws, the law of jurisdiction requires the existence of a substantial connection between the parties or their dispute and the forum State. Therefore, requiring a “real connecting link” is nothing but making Article 35 conditional on the application by Member States of the law of international jurisdiction.

In sum, as it was demonstrated, Article 35 and its related case law do not embody a rule of ancillary jurisdiction. First, Article 35 is not a base of jurisdiction requiring Member States to offer interim remedies as available under domestic law in support of foreign proceedings. Even though it is highly likely that every European legal system has offered jurisdiction under Article 35, not every legal system has made available interim measures as its own law would afford for domestic litigation, and in any case, the purpose of this article is not to harmonise jurisdiction. Secondly, the said provision does not fit with the European concept of ‘rule or base of jurisdiction’ which normally requires a strict application of connecting factors. Thirdly, under the framework of Article 35, there are no connecting elements distributing ancillary jurisdiction to grant provisional measures between the courts of different fora. The “real connecting link” requirement is not a connecting factor. Rather, the purpose or rationale of that element is to reject the principle of open jurisdiction which seems to have been adopted by the European lawmaker in Article 24 as it was originally drafted.

156 Denilauler (n13) [16].
157 The expression “law of jurisdiction” should not be understood in this context as referring to any particular normative source, but rather, as the area of legal scholarship which requires the existence of a natural or substantial connection in order to assert adjudicatory jurisdiction.
Hypothesis 2: Article 35 is a mere reference to the rules of international jurisdiction of the forum

As it was originally drafted, Article 24 of the Convention was a rule of open jurisdiction. If the rules of the forum conferred competence on local courts, that is, if interim measures were made available to international litigants, there was no need to satisfy any connecting factor. In other words, the question of international jurisdiction did not arise. Yet this situation changed when Article 24 was interpreted by the European Court. As noted above, the Court, by adopting the “real connecting link”, rejected the principle of open jurisdiction and required a connecting factor in Article 35 cases. The “real connecting link”, as already explained, is not part of a rule of jurisdiction but rather, it is a condition imposed on courts of Member States which must require a substantial connection in order to exercise ancillary jurisdiction. Accordingly, it is possible to consider that Article 35 is simply, a reference to local law.

Despite its appearance, Article 35 is not a mere reference to the rules of jurisdiction of the forum. The importance of this provision can be demonstrated with a simple exercise. If Article 35 is a mere reference, the impact of its potential removal from the Regulation would be minimal or inexistent. However, without Article 35, national courts would not have the authority to order interim relief in support of foreign proceedings since the purpose of this provision is to remove the prohibition of national exorbitant bases of jurisdiction and to avoid jurisdictional objections which, otherwise, might be raised by the defendant. And this is particularly relevant to legal systems which have not removed exorbitant bases of jurisdiction from their local law. In Van Uden, for example, the President of the District Court of Rotterdam founded his jurisdiction to grant provisional measures on Article 126(3) of the Dutch Code of Civil Procedure as the court where the claimant was domiciled.158 According to that provision, Dutch courts had jurisdiction to entertain an application made by a claimant with residence in the Netherlands against a defendant with no known

158 Van Uden (n8) [13].
domicile or recognised place of residence there.\textsuperscript{159} Article 126(3) was\textsuperscript{160} a prohibited exorbitant rule of jurisdiction included in Article 3 of the Brussels Convention\textsuperscript{161}, and therefore, prohibited by the said article.\textsuperscript{162} Without Article 24 of the Convention at that time, how could Dutch courts have rendered provisional measures in support of proceedings being conducted in another forum in cases where the defendant raises the existence of an exorbitant base of jurisdiction?

It follows that, by removing Article 35 of the Regulation, national courts may be prevented from rendering provisional relief outside the jurisdictional grounds set out in articles 4 and 7-26.\textsuperscript{163} It is impossible then, to negate the contribution of Article 35 to the jurisdictional framework of interim measures in the European Area. Article 35 is not a mere reference to local law, on the contrary, this provision is, in the first instance, the basis of the potential authority of national courts to grant provisional measures in aid of foreign proceedings.\textsuperscript{164}

\textit{Hypothesis 3: Article 35 is a permitted-excluded\textsuperscript{165} base of jurisdiction. The rules of jurisdiction per se are set out by the private international law of the forum}

As it has been demonstrated, Article 35 removes an objection, but it does not confer or confirm international jurisdiction.\textsuperscript{166} Then, the third possibility is to consider that Article 35 has a dual dimension which can be named as a permitted-excluded base of jurisdiction. First, within the boundaries set out by European case law, Article 35 is a permitted jurisdictional base. Indeed, each legal system can decide whether or not

\begin{itemize}
  \item \textsuperscript{159} ibid.
  \item \textsuperscript{160} Under the Brussels Recast, there are no prohibited exorbitant bases of jurisdiction in the Netherlands. On the face of it, it is reasonable to assume that Article 126(3) has been repealed. See Notice from Member States, 2015/C 4/02, List 1.
  \item \textsuperscript{161} \textit{Van Uden} was a dispute where the Brussels Convention was applicable. However, Annex 1 of the Brussels I Regulation also included the prohibition of the exorbitant base of Article 126(3). With respect to the Recast, see the previous footnote.
  \item \textsuperscript{162} Similarly, Article 3 of the Brussels I Regulation prohibited the exorbitant national rules of jurisdiction included in Annex 1.
  \item \textsuperscript{163} Adrian Briggs, \textit{Private International Law in the English Courts} (OUP 2014) 297.
  \item \textsuperscript{164} ibid.
  \item \textsuperscript{165} This alternative is based on the jurisdictional analysis of Ralf Michaels in ‘Some Fundamental Jurisdictional Conceptions’ (n131).
  \item \textsuperscript{166} ibid.
\end{itemize}
to provide competence to its national courts under a connecting factor which must comply with the “real connecting link” requirement. Accordingly, since Article 35 is a permitted base of jurisdiction which does not confirm jurisdiction as such, it is not sufficient to rely on it, but every national court should apply the private international law rules of the forum to assert or decline ancillary jurisdiction.\(^\text{167}\) It follows that the rules of jurisdiction in Article 35 cases are to be found in the private international law provisions of every Member State. In England, for example, jurisdiction in Article 35 cases is found\(^\text{168}\) in the rules governing service of process on the defendant or through the permission of the court for service out of the jurisdiction.\(^\text{169}\) By way of further example, in Spain, Article 22 \textit{sexies} of the Organisation of the Judiciary Act is the rule of jurisdiction which allocates authority to grant provisional measures in Article 35 cases. Secondly, outside the boundaries imposed on a European level (outside the notion of “provisional, including protective, measures” or without the requirement of “real connecting link”) Article 35 is an excluded base of jurisdiction. In these circumstances, ancillary jurisdiction to render provisional relief is not permitted.

Traditionally, it has been assumed that all bases of jurisdiction in international conventions were either required or excluded. However, some scholars such as Michaels have shifted their attention to the concept of permitted base of jurisdiction.\(^\text{170}\) From a doctrinal point of view, the concept of permitted base rests on the idea of open jurisdiction. Ralf Michaels, for example, argues that “in the absence of regulation, all bases of jurisdiction are permitted”.\(^\text{171}\) Two options seem possible under this approach. First, a permitted jurisdictional base may derive from the inexistence of any rules or legislation. This approach is very difficult to accept according to the European perspective, under which every legal power shall have a statutory foundation. Secondly, a permitted base may be founded on a provision with no connecting elements and with no grounds of jurisdiction. Interestingly, this is the

\(^{167}\) Briggs (n163) 297.
\(^{168}\) From 1 January 2021, Art 35 is no longer applicable in England as a consequence of the British departure from the European Jurisdictional Area.
\(^{169}\) Where permission to serve notice out of the jurisdiction is needed, the relevant head of jurisdiction is found in CPR PD 6B (service out of the jurisdiction) para 3.1(5) (claim for interim remedies under s 25 of the Civil Jurisdiction and Judgments Act 1982).
\(^{170}\) Michaels (n131) 2.
\(^{171}\) ibid.
context under which Article 24 had to be interpreted since this provision was originally designed as a rule of open jurisdiction. A crucial point to note about what is now Article 35 of the Recast, is that it offers jurisdiction to all Member States since it does not set out any ground of international jurisdiction. In fact, this provision is anomalous in the sense that it does not pursue the traditional goal of the European approach to international jurisdiction which is the allocation or distribution of adjudicatory powers between the different courts of Member States.

It has been explained how, originally, Article 24 of the Convention was simply a permitted base of jurisdiction built on the principle of open jurisdiction. As long as a court was granted competence, there was no need to satisfy any connecting factor. However, the boundaries imposed by the European Court on what is now Article 35 of the Recast, turned the permitted base of jurisdiction into a permitted-excluded jurisdictional base. The rejection of open jurisdiction through the adoption of the “real connecting link” requirement was a major change to the jurisdictional regime of Article 35. By requiring a “real connecting link”, the Court argued that, under Article 35, national courts are not allowed to exercise ancillary jurisdiction unless a substantial connection is satisfied. In other words, the Court categorised Article 35 as a permitted-prohibited or permitted-excluded base of jurisdiction. First, European legal systems may decide whether or not to provide competence to its national courts on the basis of a connecting factor which must comply with the “real connecting link” requirement (permitted dimension). The relevant rules of ancillary jurisdiction are then found in the internal law of each Member State. This is so for the simple reason that the purpose of Article 35 is not to harmonise jurisdiction. Article 35 does not set out any jurisdictional ground and paradoxically, the “real connecting link” requirement has not been clearly defined by the European Court in the form of a specific connecting factor. Thus, every European legal system may have a different understanding of the “real connecting link” requirement. Secondly, outside the condition of “real connecting link”, ancillary jurisdiction is prohibited (excluded dimension). The purpose of this second dimension is, as noted above, to protect the jurisdictional scheme of the Brussels-Lugano regime. In fact, under the principle of open jurisdiction, national courts with powers to render interim relief in Article 24
cases could have used this provision to trespass upon the authority of the court with jurisdiction on the merits.

In sum, the permitted-excluded jurisdictional dimension of Article 35 is a direct consequence of the interpretative process by which the European Court rejected the principle of open jurisdiction. Whilst it is true, as a majority of scholars have argued, that Article 24 of the Convention has not been modified by a single comma in subsequent versions of the Regulation and the Recast, the legal regime of the said provision has been dramatically shaped by the case law of the European Court into a completely different provision of what it was probably intended by the drafters of the Brussels Convention.

2.1.4. Local sources

One of the main conclusions that can be obtained after the comprehensive analysis of sources conducted in this section is that ancillary jurisdiction remains a matter primarily governed by local law. Even in systems with a strong tradition of integration such as the European Union, ancillary jurisdiction has not been harmonised on a European level. In fact, the framework of Article 35 is basic and rudimentary since it has not been developed to provide a well-thought-out and consistent jurisdictional regime but rather, its raison d'être has been to protect the general jurisdictional framework of the Brussels-Lugano system. It follows then that every legal system has adopted its sui generis approach to ancillary jurisdiction. The following subsection identifies and categorises the different jurisdictional bases adopted by legal systems.

2.2. Jurisdictional bases conferring ancillary jurisdiction to render interim relief

Before turning to the analysis of the different jurisdictional bases, an important issue must be clarified. This subsection examines both international jurisdiction and
competence. As explained in Chapter 2, the question of whether injunctive relief should be available to foreign litigants is not a matter of international jurisdiction. However, in many cases, legal systems have categorised questions related to the subject-matter and the powers of courts as “jurisdictional”. That is, for example, the case of “inherent jurisdiction” which justifies the extension of the competence of courts on the basis of their inherent powers. However, inherent jurisdiction does not per se address the problem of international jurisdiction. This subsection keeps the original terminology adopted by local law even if, it should be recognised that international jurisdiction and competence are, doctrinally, different concepts.

2.2.1. Open jurisdiction

As noted above, the principle of open jurisdiction seems to have been originally adopted in the European Jurisdictional Area. The deficiencies of the Brussels-Lugano system demonstrate that this jurisdictional design may work on a particular legal system but it is not recommended for supranational structures where the law of jurisdiction attempts to distribute adjudicatory powers between the courts of different fora. It is also important to note that this framework is very primitive or rudimentary in the sense that it does not set out any jurisdictional base. An important consequence follows, local courts would have to narrow down this framework through judicial discretion. Otherwise, such courts might be allowed to trespass upon the jurisdiction of national courts of a foreign sovereign State. Indeed, under the principle of open jurisdiction, a court might render, for example, a worldwide freezing injunction or an order for interim payment which may come into conflict with the jurisdiction of a foreign court deciding on the merits.

For these reasons, international conventions and institutions promoting harmonisation or unification should avoid adopting formulae based on the principle of open jurisdiction. These formulae are simply, permissive provisions that add nothing to the regulation of ancillary jurisdiction at a transnational level. Furthermore, rather than clarifying, some of these instruments are often drafted in very obscure terms.

The assessment of competence is, in this context, critical since without competence the issue of international jurisdiction is completely irrelevant.
As a result, different legal systems and academic commentators have interpreted the principle of open jurisdiction in diametrically opposed ways. If the purpose of the provisions incorporating the principle of open jurisdiction is to harmonise or unify the law of ancillary jurisdiction, their effects appear to be in the wrong direction.

2.2.2. Limited ancillary jurisdiction in common law systems

Singaporean law can be used as an example that illustrates the inconsistencies of the traditional common law approach to ancillary jurisdiction. In this context, two recent decisions can be examined.

In Bi Xiaoqing v China Medical Technologies,\textsuperscript{173} one of the main questions was whether Singaporean courts have jurisdiction to grant interim relief in “aid of foreign proceedings”. The use of the expression “aid of foreign proceedings” should be, however, clarified. In this dispute, the pursuers started proceedings on the merits in Hong Kong and Singapore. In Singapore, the plaintiffs made two applications: a domestic Mareva injunction, and a stay of the main proceedings on the basis that Hong Kong was the most appropriate forum for the dispute. The Court of Appeal clarified, in this context, that had the respondent exclusively sought an injunction in Singapore without an action on the merits, then such application could be properly categorised as “in aid of foreign proceedings”.\textsuperscript{174} However, the facts of this case were different. For that reason, the court held that “whether the court has the power to grant Mareva injunctions in those circumstances (properly, in aid of foreign proceedings)\textsuperscript{175} is not the issue before us”.\textsuperscript{176}

Returning to the main discussion, the Court held that Section 4(10) of the Civil Law Act\textsuperscript{177} which includes the power to render interim injunctions, is also applicable to

\textsuperscript{172} [2019] SGCA 50.
\textsuperscript{174} ibid [33].
\textsuperscript{175} In these circumstances, the High Court had already rejected to grant a freezing injunction. See, eg, PT Gunung v Muhammad Jimmy [2018] SGHC 6.
\textsuperscript{176} Bi Xiaoqing (n173) [33].
\textsuperscript{177} Civil Law Act (Chapter 43).
remedies in “aid of foreign proceedings”.178 Yet, two jurisdictional requirements were imposed: first, the court must have in personam jurisdiction over the defendant, and secondly, the claimant must have an “accrued cause of action against the defendant in Singapore”.179 As regards the first requirement, the defendant was domiciled in Singapore and she also submitted to the Singaporean courts. As regards the second condition, the Court explained that a claim is justifiable if “it is one for substantive relief which the court has jurisdiction to grant and is a claim that can be tried by that court”.180 Since the action before the Singaporean courts was itself stayed, the Court of Appeal had to determine whether the second requirement was satisfied. Precisely, the fact that Singaporean courts retained residual jurisdiction over the underlying cause of action – even if the action was stayed – on the basis that the dispute might make its way back to Singapore, was enough to conclude that the High Court had the power to render interlocutory relief.181 The Court then concluded that these remedies granted “in aid of foreign proceedings” are still “premised on, and in support of, proceedings in Singapore”.182

To complicate matters further, a decision delivered by the High Court a year after Bi Xiaoqing demonstrates that there is not a consistent line of case law. In Allenger v Pelletier,183 the Court argued that it could not render a Mareva injunction in similar circumstances to those of Bi Xiaoqing on the basis that the parties accepted that Singapore was forum non conveniens. Yet, the Court did not consider that Pelletier had voluntarily submitted to the Singaporean courts – fact which provided the Court in personam jurisdiction over the defendant.184 What emerges from this case is far from clear. Teo has argued that it is possible to distinguish two scenarios: first Bi Xiaoqing, according to which the presence of the defendant in Singapore confers jurisdiction to render interim relief even if Singapore is forum non conveniens; and secondly Allenger, according to which the submission of a defendant non-domiciled

178 As previously defined by the Court.
179 Citation omitted.
180 Bi Xiaoqing (n173) [21].
181 ibid [104]. See Multi-Code v Toh Chun Toh Gordon [2008] SGHC 193, [79] where the High Court had previously adopted the same view.
182 ibid [111].
184 There was no need to obtain leave of the court to serve the defendant out of the jurisdiction on the basis of section 16(1) of the Supreme Court of Judicature Act.
in Singapore cannot confer jurisdiction unless Singapore is *forum conveniens* even if, in both cases, jurisdiction *in personam* exists.\(^{185}\) Although this approach would explain these cases, the better view is to consider that *Allenger* was simply flawed at law.

One of the most striking aspects of these decisions, and in general, of the traditional position at common law is the requirement of “cause of action” which prevents asserting ancillary jurisdiction to grant provisional remedies as free-standing relief. As already explained, under Singaporean law, a freezing injunction cannot be rendered as a free-standing remedy without a claim for substantive relief.\(^{186}\) Surprisingly, this unfortunate approach built on *The Siskina*\(^{187}\) can still be found in many other legal systems of the common law tradition. The Bahamas Court of Appeal, for example, reached a similar conclusion in *Meespierson v Grupo Torras*\(^{188}\) where it was held that a Mareva injunction cannot be granted to an applicant who has no cause of action against a defendant before the Bahamas courts.\(^{189}\) It should be noted, however, that the appropriateness of this framework of ancillary jurisdiction has even been denounced by the judicature of these legal systems. The Singaporean High Court, for example, argued in *Pelletier* that the traditional approach may allow the “exploitation of the principle of territoriality by perpetrators of international frauds”.\(^{190}\)

That said, it should be noted that the common law requirement of a “cause of action” has been recently rejected by the Privy Council in *Broad Idea v Convoy Collateral*.\(^{191}\) The facts of this case are as follows. In February 2018, Convoy applied to a court of the British Virgin Islands for freezing orders against Broad Idea and Dr Cho – the

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\(^{188}\) [1998] 2 ITLR 29.

\(^{189}\) ibid [48].

\(^{190}\) Bi Xiaoqing (n173) [151].

director of Convoy – in support of proceedings against Dr Cho in Hong Kong. Convoy also sought permission to serve Dr Cho out of the jurisdiction. Shortly thereafter, the court rendered an *ex parte* freezing injunction and gave permission to serve Dr Cho out of the jurisdiction. The freezing orders, however, were set aside in April 2019 on the basis that the court did not have jurisdiction. Convoy made another application for a freezing injunction and, in July 2019, the judge continued the freezing order against Broad Idea indefinitely. Yet, the appeal brought by Broad Idea against the judge’s decision was allowed by the BVI Court of Appeal on the basis of the “cause of action requirement”. Convoy then appealed to the Privy Council. The Privy Council rejected the “cause of action” requirement and concluded that there is no need to establish an existing equitable right justiciable before the courts of BVI. Indeed, it was argued that the wide language of section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act which confers the power to render equitable relief in all cases “in which it appears (…) to be just and convenient” allowed to extend the competence of the courts of BVI.192 The traditional common law position as set out by the House of Lords in *The Siskina* and the Privy Council in *Mercedes Benz AG v Leiduck*193 has been then effectively rejected.

Even though the Privy Council has overruled the effects of *The Siskina*, two observations may be made with respect to the traditional position at common law. First, if a party is considering initiating proceedings in legal systems not implementing the rejection of the “cause of action” requirement, an action on the merits together with the application for interim relief should be filed. If the application relates exclusively to interlocutory relief, the pursuer is likely to obtain a decision denying jurisdiction based on the inexistence of the “substantive cause of action” requirement. Secondly, Singapore is an example that illustrates that it is possible to have different jurisdictional frameworks in place for arbitration and litigation. After an unfortunate judicial decision that denied the power to support a foreign-seated arbitration,194 the Parliament of Singapore amended the local arbitration act.195 Yet, as it has been explained, the transnational litigation scenario is quite different. It is

192 ibid [76].
195 See Section 12A of the International Arbitration Act (Cap 143).
still to be seen, whether, as Ang SJ has suggested, this unfortunate situation is changed by legislation or by interpretation of the Court of Appeal.\textsuperscript{196} Thus, in some legal systems, there may be still a risk of inconsistency between arbitration and litigation since the litigation framework of ancillary jurisdiction has been left behind, particularly due to the preferences of the business community in favour of international arbitration.

\textbf{2.2.3. Judicial discretion in common law systems}

In order to avoid the unfortunate consequences of the traditional approach as set out in \textit{The Siskina}, several systems of the common law tradition have adopted two solutions: first, inherent jurisdiction and, secondly, new legislation which have been passed in order to i) expand the competence of courts and ii) provide discretionary powers to the judiciary in the context of ancillary jurisdiction.

The first of these solutions has been adopted, for example, in Australia. The Australian courts have bypassed the \textit{Siskina} doctrine through the development of the common law on the basis of the existence of “inherent jurisdiction” to protect the integrity of judicial processes.\textsuperscript{197} Interestingly, the basis of such development is centred on the distinction between, on the one side, injunctive relief historically rendered by the Court of Chancery—which cannot be granted unless there is a cause of action—, and on the other hand, freezing orders (previously known as Mareva orders) which are not injunctions.\textsuperscript{198} This distinction between injunctions and orders have permitted Australian courts to assert competence to render interim relief in aid of foreign proceedings without legislative reforms. The approach of the Australian courts, however, has not been widely adopted by other common law systems.\textsuperscript{199} In England, for example, the House of Lords rejected in \textit{The Siskina} the existence of inherent jurisdiction to support foreign proceedings. The only possibility was then, to resort to legislative reforms in order to expand the competence of English courts.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{196} Allenger (n183) [154].
\item \textsuperscript{197} James J Spigelman, ‘Freezing Orders in International Commercial Litigation’ (2010) 22 SAcLJ 490, 497-501.
\item \textsuperscript{198} ibid.
\item \textsuperscript{199} See, however, the previous discussion of Broad Idea International v Convoy Collateral.
\end{itemize}
\end{footnotesize}
In England, competence to render interim relief in aid of foreign proceedings is provided by Section 25 of the Civil Jurisdiction and Judgments Act 1982. The same legal instrument confers competence in Scotland to the Court of Session on the basis of sections 27 and 28. It should be noted that these provisions were subject to strict limitations which were later removed.\(^{200}\) First, from a territorial point of view, the scope was expanded beyond the European Area. Second, from a strict subject-matter point of view, the application of these provisions was extended beyond the notion of civil and commercial matters as defined by the Brussels regime. English and Scots courts\(^{201}\) now have a (nearly) unlimited competence to render injunctive relief in aid of foreign proceedings, subject to very few restrictions.\(^{202}\)

As regards international jurisdiction in England, the relevant passage can be found in Section 25(2) which provides that interim relief may be refused if the fact that the court cannot assert substantive jurisdiction “makes it inexpedient for the court to grant it”.\(^{203}\) This allows a court to decline ancillary jurisdiction in cases where the connection between the parties, their dispute, or the remedy and England is weak. In a majority of cases, English courts have required a substantial connection to avoid trespassing upon the authority of the court with jurisdiction on the merits. In *Credit Suisse*, for example, Lord Bingham CJ argued that a court without substantive jurisdiction “must recognise that its role is subordinate to and must be supportive of that of the primary court”.\(^{204}\) In this context, a comprehensive examination of legal decisions reveals that English courts have applied the location of assets\(^{205}\) and the


\(^{201}\) Another example of this approach can be found in Hong Kong. After *The Siskina* and *Mercedes-Benz AG v Leiduck*, Section 21M(4) of the High Court Ordinance conferred competence to the High Court to render interim remedies in relation to foreign proceedings. Furthermore, ancillary jurisdiction is also based on a discretionary power: the court may refuse an application for interim relief “if, in the opinion of the Court, the fact that the Court has no jurisdiction apart from (ancillary jurisdiction) (...) makes it unjust or inconvenient for the Court to grant the application”.

\(^{202}\) See Ch 2.

\(^{203}\) See also CPR PD 6B, para 3.1(5).

\(^{204}\) [1998] QB 818, 832.

domicile of the defendant\textsuperscript{206} as connecting factors.\textsuperscript{207} Having said that, it is equally true that the expediency test of Section 25 has permitted the assertion of ancillary jurisdiction on the basis of illegitimate connecting factors. In \textit{Royal Bank of Scotland v FAIL Oil},\textsuperscript{208} for example, Gloster J took a very expansive view and granted a worldwide freezing order in a case where there were no assets in England, the defendant was not domiciled in England, and the dispute was before the courts of the United Arab Emirates. The court assumed jurisdiction on the basis of the existence in London of credit facilities and banks accounts related to the transaction. In a similar vein, in \textit{Republic of Haiti v Duvalier},\textsuperscript{209} an English court assumed ancillary jurisdiction based on the fact that the defendant had solicitors in England.\textsuperscript{210} A decision which is, to say the least, very difficult to defend.

\textbf{2.2.4. Rules of jurisdiction incorporating connecting factors}

In contrast to the position at common law, civilian systems have favoured a strict application of hard-and-fast jurisdictional rules. That said, these legal systems have not adopted a single approach to connecting factors in the context of ancillary jurisdiction.

\textit{i) Location of assets, property, and evidence: the rule of forum rei sitae}

This framework of ancillary jurisdiction is the most restrictive of those adopted by civilian systems since it is based on a single connecting factor, that is, on the \textit{forum rei sitae} rule. From the point of view of the common law, a jurisdictional base not founded on the domicile of the defendant is something unusual. That is the result of the traditional approach based on the service of process on the defendant, and therefore, on the presence of a person within the territorial jurisdiction of a court. In civilian systems, however, the traditional connecting element has been the

\textsuperscript{207} See also \textit{Belletti v Morici} [2009] EWHC 2316 (Comm), [2010] 1 All ER (Comm) 412, where it was held that if the defendant had no connection with England and the relevant assets were not located there, it would be rarely, if ever, expedient for the court to assert jurisdiction under Section 25.
\textsuperscript{208} [2012] EWHC 3628 (Comm), [2013] 1 Lloyd’s Rep 327.
\textsuperscript{209} [1990] 1 QB 202.
\textsuperscript{210} See Ch 4, § 5.
nationality of the parties. It is then possible, albeit uncommon, to find a system of ancillary jurisdiction disregarding the domicile of the defendant. An example of this approach might be found in Japanese law. In Japan, Article 11 of the 1989 Civil Provisional Remedies Act provides that “an application for interim relief may be filed only (...) if the property to be provisionally seized or the disputed subject matter is located in Japan”. However, this approach seems very narrow since the habitual residence of a party within the territorial jurisdiction of a Japanese court does not appear to confer ancillary jurisdiction. Yet, it should be noted that this rule was adopted several decades ago, at the early stages of the development of ancillary jurisdiction. Nowadays, it is extremely rare to find a legal system where ancillary jurisdiction is based on the *forum rei sitae* rule alone.

**ii) Forum rei sitae and domicile of the defendant**

In a majority of civilian legal systems, the framework of ancillary jurisdiction incorporates several connecting factors, that is to say, in practice, there will frequently be two or more countries with jurisdiction to render interim relief. This concurrent jurisdictional design reflects the importance of the fundamental right of access to justice. A second potential approach is then to adopt the *forum rei sitae* and the domicile of the defendant as connecting factors. In Argentina, for example, Article 2603 of the Civil and Commercial Code confers ancillary jurisdiction to local courts on the basis of the said connecting factors, or where a foreign court with jurisdiction on the merits requires the cooperation of Argentinian authorities.

**iii) Forum where the remedy is enforceable**

Under this connecting factor, local courts possess ancillary jurisdiction if the remedy to be rendered is enforceable within their territorial jurisdiction. Among the different approaches examined under this subsection, this is certainly, the most complete and sophisticated. This approach not only includes the widely accepted connecting factors in the field of ancillary jurisdiction (domicile of the defendant and *forum rei sitae*), but it also attaches competency norms to each of these connecting factors.

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First, with respect to assets, property, or evidence located within the territorial jurisdiction of the court, only remedies of local effects are permitted. In other words, extraterritorial measures cannot be rendered since national courts would not possess coercive powers to enforce such remedies. Secondly, with respect to the domicile of the defendant, national courts may order measures of worldwide effects since compliance can be ensured through the threat of contempt of court. Switzerland and France, for example, have adopted this approach.\(^{212}\)

iv) Exorbitant bases of jurisdiction

For the sake of completeness, it should be noted that some legal systems have traditionally adopted exorbitant bases of jurisdiction such as the domicile of the applicant. Nevertheless, these connecting factors were, as far as European Member States are concerned, abandoned.\(^{213}\)

2.3. Conclusions and recommendations

The main conclusions of this chapter have been presented in each subsection. These conclusions can be also summarised here.

2.3.1. Recommendations to law and policymakers

Without doubt, the principle of open jurisdiction should be abandoned. Institutions promoting unification or harmonisation should not adopt proposals based on the principle of open jurisdiction since these are simply permissive provisions that create more problems than they solve.

\(^{212}\) Swiss PILA, Art 10(b). Regarding France, see, Nicolò Trocker, ‘Provisional Remedies in Transnational Litigation’ in Rolf Stürner and Masanori Kawano (eds), *Comparative Studies on Enforcement and Provisional Measures* (Mohr Siebeck 2011) 275. See also § 2.1.1. iii) *in fine.*

\(^{213}\) See § 2.1.3.2, Hypothesis 2.
In the European context, the Commission will have to present a report to the European Parliament by early January 2022 on the application of the Brussels Recast. According to Article 79, this report will have to incorporate proposals for amendment. This is then, a good opportunity to repeal Article 35 and to adopt a European rule of jurisdiction which distributes ancillary jurisdiction between the different courts of Member States. The principle of open jurisdiction is anomalous and rudimentary, and does not fit within the European approach to jurisdiction. If the European lawmaker decided to create the first unified provisional measure (the EAPO), one cannot see why ancillary jurisdiction under Article 35 has not been also harmonised. Indeed, this provision should be substituted by a rule which incorporates either i) the forum rei sitae and domicile of the defendant, or ii) the rule that confers jurisdiction to the courts where the remedy is enforceable.

2.3.2. Recommendations to courts of common law systems

As already explained, courts of the common law tradition enjoy a wide discretionary power as regards the assertion of international jurisdiction. This power is based on different standards such as the expediency test or the “just and convenient” test which depend on the particular legal system – the former adopted in England, the latter in Hong Kong. Regardless of the particular standard adopted, national courts should always recognise that their role is ancillary to the proceedings on the merits. For that reason, national courts should not assume jurisdiction in cases of weak connections in order to i) avoid trespassing upon the authority of a court with jurisdiction on the merits, and ii) avoid granting decisions where compliance cannot be guaranteed. Only in very exceptional situations such as cases of international fraud, should national courts assume jurisdiction regardless of the existence of an appropriate connection between the parties or their dispute and the forum state.

2.3.3. Recommendations to litigants

Litigants should carefully examine the potential fora where interim relief is available on the basis of the connecting factors previously explained. One must admit,
however, that this might be a very doctrinal recommendation. In practice, ascertaining the potential fora where interim relief is available might not be possible in situations of urgency, or where the applicant ignores the place of registration of the counterparty or the location of assets. Yet, in most instances, there are always elements that allow the proper identification of the forum or fora where provisional measures are available.

Finally, it should be noted that this thesis only addresses matters related to jurisdiction. However, the parties should have also in mind strategic considerations, such as the issue of enforceability, in order to decide the forum to obtain interim relief.
CHAPTER 4

Jurisdiction and competence of national courts to render provisional and protective measures in support of international commercial arbitration

1. Introduction

Traditionally, a majority of arbitration scholars and practitioners have argued that court intervention undermines the international arbitration process.¹ In practical terms, whether or not national courts interfere with arbitral proceedings depends, of course, on different factors including the specific circumstances of the case or the legal system involved in a given arbitration.² In any event, the exceptional cases of illegitimate court interference have been used by some commentators to reject the traditional role of courts in international arbitration. However, the specialist area of interim protection of rights illustrates that, rather than minimising or obviating court intervention, efforts should be put in ensuring that national courts support international arbitral proceedings. The following categorisation of problems that impact on the authority of arbitral tribunals to render interim relief demonstrates that, in international arbitration, the support of national courts is crucial to effectively protect the rights of the parties. These problems may be classified into the following categories:

² See, eg, Elizabeth Gloster, ‘Symbiosis or Sadomasochism? The relationship between the courts and arbitration’ (2018) 34 Arb Int 321, 339, who argues that the relationship between English courts and arbitration is one of symbiosis.
• Problems on arbitral jurisdiction inherent to arbitration as a dispute resolution method (for example, lack of coercive powers of arbitrators, impossibility to rule on non-parties to the arbitration, or the tribunal unable to act or not constituted in ad hoc proceedings);

• Problems on arbitral jurisdiction inherent to interim relief (for example, ex parte remedies rendered without notice to one of the parties in order to maintain the “surprise effect”);

• Problems inherent to the international nature of the proceedings (for example, the daunting enforcement process of a tribunal-granted remedy in a foreign legal system may be conclusive for the parties to resort to national courts rather than to tribunals or emergency arbitrators).

It is important to note that these are not just theoretical or academic concerns. In practical terms, these problems emerged in the results of the International Arbitration Survey conducted by Queen Mary University of London which is considered the most complete and comprehensive empirical research in the field of international arbitration. The 2015 version of the survey explored what forum respondents preferred when seeking interim relief before the constitution of the tribunal. A surprising 46%, that is, almost half of respondents, opted for domestic courts even if their main preferred method of dispute resolution was international arbitration. The reasons provided in support of their answers were diverse, but the most important factors were, first, concerns about the enforceability of arbitrator-rendered relief, and secondly, the perceived effectiveness of national courts of certain legal systems as compared to the uncertainty of arbitrator-granted relief.

This chapter addresses the subject of judicial jurisdiction to render provisional and protective measures in support of international arbitration. Section 2 analyses the main arbitral connecting factor to render interim relief in aid of arbitral proceedings. Section 3 identifies and examines secondary connecting factors which are based on

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4 ibid 27. See also Ch 6, § 2.
5 Arbitration Survey (n3) 28.
the principles of presence within the territorial jurisdiction and enforceability. Section 4 analyses whether legal systems have preserved exorbitant bases of jurisdiction as available under generally applicable national law. Section 5 examines the judicial practice which uses illegitimate or quasi-legitimate connecting factors in order to support foreign-seated arbitrations. Finally, section 6 concludes.

1.1. Theories of arbitration and their impact on judicial jurisdiction

Before turning to the analysis of judicial jurisdiction in the arbitration setting, some preliminary issues must be clarified. Particularly, it is important to note that the process of ascertaining the different arbitral connecting factors depends on the doctrinal model of arbitration that one may adopt.

1.1.1. Theories of international commercial arbitration: an overview

Three models have been generally used to explain the theoretical or doctrinal basis of international arbitration.6

a) The Territorial Thesis7

As the title of this theory suggests, the principles of territoriality and state sovereignty are the pivotal elements under which this model rests. Indeed, territoriality wins here its particular battle against the principle of party autonomy. According to the territorial thesis, international commercial arbitration finds its effectiveness and legitimacy in a particular system of national law. Mann, the commentator who made the most systematic attempt to define this model argued that “in the legal sense no international commercial arbitration exists. Just as (...) every system of private

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6 These models are not abstract ideas far from the practice of international arbitration. France, for example, rejects the supervisory role of the courts of the seat according to the delocalised theory. Thus, French courts are allowed to systematically disregard setting aside proceedings and enforce awards that were previously annulled by the courts of the seat.

7 The territorial thesis is also known as the seat theory or the jurisdictional thesis.
international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law.”

The general premise acknowledged by the supporters of this theory is that the legal order which confers legitimacy to international commercial arbitration is exclusively that of the state where the arbitration is seated. The seat model, however, does not deny that arbitration is a result of party autonomy. Nor does it negate the importance of the arbitration agreement, the New York Convention, or the powers of arbitrators to adjudicate disputes with international elements. This theory argues that any given state has the option to adopt or not these principles or instruments. International commercial arbitration is then permitted, if and only if, the legal system of the state where the arbitration is seated, first, acknowledges the delegation of adjudicatory powers to arbitrators, and second, accepts the principle of party autonomy. Mann argued, in this context, that:

“No one has ever or anywhere been able to point to any provision or legal principle which would permit individuals to act outside the confines of a system of municipal law; even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects. (...) Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently (...) be called (...) the lex arbitri.”

Two important consequences to the arbitral jurisdictional framework follow. First, arbitrators do have a forum, and that forum is the state where the international arbitration is seated. Arbitrators, like the judiciary, are subject to the law of the seat since they cannot arrogate to themselves rights or powers that are not recognised by the lex arbitri. Secondly, under the seat theory, the only connecting factor is the arbitral seat. The seat thesis is strongly based on the fact that any state must have

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11 ibid 261.
13 ibid 254.
powers to supervise and assist the activities carried out in its territory.\textsuperscript{14} Accordingly, it appears reasonable to conclude that the seat model restricts the powers of third countries to intervene in the arbitral process. Outside the seat, national courts can only decide on the enforcement of foreign arbitral awards. It follows that courts of non-seat countries cannot intervene, either through supervision or support. Simply put, provisional and protective measures granted by courts outside the seat are not admissible. This model, however, does not explain the current framework of international arbitration, much less the jurisdictional structure of interim protection of rights.

b) The Westphalian Thesis\textsuperscript{15}

International commercial arbitration demands the intervention of different legal systems at different stages of the arbitral process. The enforcement of arbitration agreements, the appointment and removal of arbitrators, the annulment proceedings, or the process of enforcement of awards are examples that demonstrate the existence of different roles exercised by different legal systems in different arbitral contexts. Having regard to that fact, the Westphalian thesis emerges to define the legal nature of international arbitration according to a pluralistic approach. Under the Westphalian model, a plurality of national legal orders gives effect and legitimacy to international commercial arbitration.\textsuperscript{16} As Paulsson explained, “it is impossible to deny the plurality of legal orders that may give effect to arbitration agreements and awards. It is not theory. It is simply an observation.”\textsuperscript{17}

The majority of commentators supporting this model consider that every legal system is equally legitimate to give effect – or not – to international arbitration. Nevertheless, according to Reisman and Richardson, the Westphalian thesis is not a plain model since one forum is more important than the rest. These commentators establish a

\textsuperscript{14} Yu (n10) 259.
\textsuperscript{15} The Westphalian thesis is also known as the hybrid model or the pluralistic theory.
\textsuperscript{16} Paulsson (n9) 291.
\textsuperscript{17} ibid 300.
hierarchical system by distinguishing between primary and secondary fora.\textsuperscript{18} The former refers exclusively to the seat of arbitration.\textsuperscript{19} The latter includes any other legal system involved in international arbitration.\textsuperscript{20} At first blush, there is nothing in the New York Convention supporting the said approach in terms of supervisory powers of national courts,\textsuperscript{21} but could that distinction be relevant in the field of provisional and protective measures?\textsuperscript{22}

The Westphalian model is based on the fact that every state legitimately decides its approach to international arbitration. As Gaillard has explained, each state has an equally legitimate title to decide the conditions under which it will consider an arbitration as valid and its award as worthy of enforcement.\textsuperscript{23} Accordingly, although it is not appropriate to make general assumptions about the supportive jurisdiction of national courts, there are expectable consequences that emerge from the adoption of the Westphalian thesis.

The first consequence is the fact that non-seat courts can intervene and support international arbitration. This is particularly relevant in the field of interim relief since the power to grant provisional remedies is not exclusively reserved for the courts of the state where the arbitration is taking or will take place. In addition, it is undeniable that countries accepting plurality would, as a consequence, adopt a careful approach to court intervention. Particularly, the principles of comity and reciprocity, absent in the seat thesis, strongly emerge under the Westphalian model. On the face of it, courts of non-seat countries are likely to take a careful approach to their exercise of jurisdiction in support of foreign-seated arbitration. The second jurisdictional


\textsuperscript{19} ibid.

\textsuperscript{20} ibid.

\textsuperscript{21} Paulsson (n9) 297.

\textsuperscript{22} The supportive powers of courts are not set out by the New York Convention; consequently, a distinction between primary and secondary fora may be of relevance to the field of interim protection of rights.

\textsuperscript{23} Emmanuel Gaillard, ‘International Arbitration as a Transnational System of Justice’ (ICCA Congress Series 16, Kluwer 2011) 66, 68.
consequence is that evidently, a plurality of connecting factors arise under this model.

In practical terms, the Westphalian thesis is adopted by a great majority of legal systems. England,\textsuperscript{24} Germany,\textsuperscript{25} Mexico,\textsuperscript{26} Scotland,\textsuperscript{27} or Spain,\textsuperscript{28} for example, follow this model.\textsuperscript{29} Some institutional rules appear to have adopted a Westphalian approach too.\textsuperscript{30} Furthermore, it is important to note that, out of the three traditional arbitral models, the pluralistic approach is the most appropriate to explain the legal regime of international arbitration as it currently stands.

c) The Delocalisation Thesis

There are as many delocalisation theories as scholars writing about the legal nature of international arbitration. From delocalisation covering all aspects and stages of international arbitration\textsuperscript{31} to an autonomous legal order coexisting with the support and enforcement powers of national courts.\textsuperscript{32} There is not a clear or unique concept of delocalised arbitration. In general terms, the delocalisation model claims that there is an autonomous arbitral order which is distinct from the national legal order of states.\textsuperscript{33} Having said that, arbitration scholars have provided a spectrum of different delocalisation degrees.\textsuperscript{34}

\textsuperscript{24} English Arbitration Act 1996, s 103(2).
\textsuperscript{25} German Code of Civil Procedure, s 1061.
\textsuperscript{26} Mexican Commercial Code, Art 1462(d).
\textsuperscript{27} Scottish Arbitration Act 2010, s 20(3)(d).
\textsuperscript{28} Spanish Arbitration Act 2003, Art 46.
\textsuperscript{29} Compare these provisions with the extinct Art 1717(4) of the \textit{Code Judiciaire} of Belgium.
\textsuperscript{30} Article 18 of the UNCITRAL Arbitration Rules and Article 16 of the LCIA Rules.
\textsuperscript{31} Jie Li, ‘The application of the delocalisation theory in current international commercial arbitration’ (2011) 22 IICLR 383, 385.
\textsuperscript{33} Gaillard (n23) 66.
i) A-national arbitration

In very broad terms, there are two approaches to delocalisation. On one side of the spectrum, delocalisation could cover all stages of the proceedings; from the pre-arbitral phase to the enforcement of arbitral awards, and all aspects of arbitration; from procedure to substance. Under this view, international commercial arbitration would be completely detached from national legal orders. Court involvement of any kind, either through supervision or support would not be accepted. International commercial arbitration would then emerge as a truly independent branch of law that would have successfully escaped from private international law. In its origins, the delocalisation theory seemed to have, as an ultimate and legitimate goal, a complete detachment from national legal systems. It is not clear, however, whether the supporters of this model shifted their proposals to new ideas or clarified the misunderstood concept of delocalisation. In any event, territorial elements were accommodated in order to, first, avoid the strong criticism of important sectors of the arbitration world, and second, adapt it to explain the current international arbitration model.

The main jurisdictional consequence under this sub-model is that connecting factors would not be necessary since it would not be longer required to point to a particular forum. Only the international arbitral forum would exist since “arbitration [would not] work in the context of the ideologies established in (...) private international law”.

The problem of this utopian sub-model is that it does not reflect the current legal framework of international arbitration. The only possibility to completely exclude national courts and domestic legal orders would be through a new international convention. This option could be achieved by designing and adopting a similar

36 Gaillard (n23) 68. Some scholars have revisited the delocalisation model to adapt it to current arbitration practice. See, eg, Jan Paulsson, The Idea of Arbitration (OUP 2013) 45.
38 See, eg, Ralf Michaels, ‘Dreaming law without state: scholarship on autonomous international arbitration as utopian literature’ (2013) 1 LRIL 35.
system to that established by the ICSID Convention\(^3\) in the field of investor-to-state arbitration, where even provisional measures are an exclusive competence of ICSID tribunals.\(^4\)

ii) Delocalised arbitration

On the other side of the spectrum, the great majority of supporters of this model argue that delocalised arbitration still needs, and is compatible with, the support of national legal orders. Scholars supporting delocalisation does not seem to suggest that arbitration should follow the total detachment model previously explained. Gaillard, for example, has clarified that delocalisation does not mean an a-national legal order. Delocalisation, he argues, is not characterised by an opposition to domestic legal systems since international arbitration is anchored in the “collectivity of states”.\(^4\) In contrast to the Westphalian approach, states collectively and not individually, give effect to international arbitration.\(^4\) In similar terms, other scholars have argued that delocalised arbitration welcomes court assistance from any country which is not necessarily the juridical seat.\(^4\) These commentators apparently rely on a terminological distinction between the terms “detached” and “delocalised”. While the former refers to a-national arbitration as explained in the previous section, the latter considers arbitration as a legal order distinct from national legal systems but seeking the cooperation of these systems.\(^4\) This sub-model divides then between acceptable court intervention (supportive powers) and unacceptable interference (supervisory powers). Not surprisingly, this conclusion has attracted criticism from many legal writers. Goode, for example, has argued that:

“at the very moment of its birth, produced by the consensual coupling of the parties in the arbitration process, the award took off and disappeared into the firmament, landing only in those places where enforcement was sought”.\(^4\)

\(^3\) Convention on the Settlement of Investment Disputes between States and Nationals of Other States.


\(^4\) Gaillard (n23) 69.

\(^4\) ibid 68.

\(^4\) Li (n31) 391.

\(^4\) Paulsson (n9) 292.

The main jurisdiction consequence of this sub-model is tangentially opposite to that of a-national arbitration. The delocalisation sub-model simply aims to obtain delocalised arbitral awards, and therefore, it is not incompatible with court assistance. By contrast, a-national arbitration has, as the main goal, a complete detachment of every jurisdictional, procedural, and substantive aspect of international arbitration. Accordingly, under delocalised arbitration, “there are tentacles that descend from the autonomous arbitral order to the national legal arena (...) since the arbitration process itself needs to be given the effective support it may require”. It follows then, that under delocalised arbitration: i) connecting factors are required in order to determine the forum with supportive jurisdiction and ii) non-seat courts are legitimate to support arbitral proceedings seated in a third legal system.

Finally, it is important to note that, as the a-national theory, this sub-model does not explain the current international arbitration framework. In general terms, this theory is more aspirational than descriptive of the law of arbitration as it stands. Although it is true that some legal systems such as France have adopted the delocalised approach, this model does not explain arbitration from an international perspective since delocalisation, in this example, is restricted to the territorial jurisdiction of French courts.

1.1.2. Acknowledgement of the jurisdictional role of the seat by arbitral institutions that have supported and promoted delocalisation

Some arbitral institutions such as the International Chamber of Commerce (ICC) have supported and promoted delocalisation probably on the assumption that court

47 Lew (n32) 203.
48 Belgium, for example, adopted a delocalised approach. Article 1717(4) of the Belgian Code Judiciaire provided that setting aside proceedings were only available if one of the parties was a legal person formed in Belgium or having a branch or operations there. An unofficial translation of the provision can be found in Thomas E Carbonneau, Law and Practice of Arbitration (5th edn, Juris Publishing 2014) 116, footnote 210. This approach was later reversed and now, a delocalised award can only be obtained if the parties reach an exclusion agreement with respect to annulment proceedings.
intervention, widely considered, seeks to derail the international arbitration process.\textsuperscript{49} Irrespectively of the laudable aim and the inappropriateness of any generalisation regarding court intervention, the ICC has nevertheless impliedly recognised the jurisdictional significance of the arbitral seat and its role as a connecting factor.

One particular aspect with unnoticed jurisdictional consequences that has attracted the attention of the ICC Court is the question of whether the seat should be a city or a country. This question may seem of little significance, however, in its answer the Court has implicitly accepted the jurisdictional role of the seat. In the words of the ICC Secretariat, the aforementioned question should be answered in the following terms:

"It is the Court’s longstanding practice to require that the place of arbitration be a city rather than a country. (...) Each city or region within that nation will usually have its own court systems, such that the failure to designate a city as the place of arbitration may create uncertainty as to which courts are competent to hear any issues requiring the involvement of courts."\textsuperscript{50}

Although the ICC has shown strong resistance to the slightest inkling of territoriality, it is also true that the ICC has recognised the role of the seat – or place, in ICC terminology – in the assertion of international jurisdiction by national courts. As it can be seen, the rationale behind this ICC recommendation is purely jurisdictional. The Court is concerned that, in cases of federal or provincial States with more than one legal system, a choice of a state rather than a city may cause problems to identify the relevant court with supportive or supervisory powers.

\textsuperscript{49} See, eg, \textit{Travaux préparatoires} of the New York Convention 1958, ‘Enforcement of international arbitral awards: statement submitted by the International Chamber of Commerce, a non-governmental organization having consultative status in category A’, E/C.2/373, 7. The ICC attached to its statement a Preliminary Draft Convention that defined “international awards” as “completely independent of national laws”.

2. The seat of arbitration as the main arbitral connecting factor

This section aims to examine the main adjudicatory element which confers jurisdiction to national courts in the context of arbitral proceedings. The arbitration agreement is, undoubtedly, the foundational element of international commercial arbitration. Without an arbitration agreement, there is no arbitration. Nevertheless, the agreement to arbitrate is not, in itself, the adjudicatory element conferring international jurisdiction to grant interim measures. Nor are arbitration rules the relevant instruments determining such powers. In the words of a leading academic: “the competent jurisdiction is not, and could not be, determined by arbitration rules. (…) Generally speaking, regulation of the jurisdictional aspects of arbitration remains a matter for unilateral determination by individual States.”

2.1. Introduction: concept, terminological inconsistencies and legal significance of the seat

In its simplest terms, the seat or place of arbitration is the legal system to which an arbitration is “legally attached” and which establishes a relationship between an arbitration and a system of arbitration law both from a procedural and jurisdictional sense. First, an arbitration seated in a given legal system is subject to the mandatory provisions of its arbitration law, and unless the parties made their own arrangements regarding the internal procedure, the default or non-mandatory provisions would apply as well. Secondly, the seat as a connecting factor confers international jurisdiction to supervise and support arbitral proceedings. Even though non-seat courts may become involved at some stage of the arbitral proceedings, the legal system where the arbitration is seated is the natural forum with international jurisdiction to support and supervise that arbitration.

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At first glance, the seat may seem a straightforward concept. Unfortunately, terminology has contributed to the spread of confusion with respect to the legal significance of key terms such as place, seat, or venue. In this context, two problems can be identified. First, terminology is clearly inconsistent in providing a unified term to refer to the juridical home of an arbitration. On the one hand, instruments such as the Model Law\textsuperscript{54} or the ICC Rules\textsuperscript{55} refer to “place of arbitration”. On the other hand, the majority of national arbitral legislation\textsuperscript{56} and some arbitration rules such as the LCIA,\textsuperscript{57} the SIAC\textsuperscript{58} and the HKIAC rules\textsuperscript{59} seem to prefer the terminology “seat of arbitration”. In any case, no substantial or conceptual difference is intended from the usage of different terminology and, therefore, both terms could be conceptualised as referring to the juridical domicile of an arbitration. Secondly, in some legal instruments, there is not a clear terminological distinction between the juridical concept and the physical location, the latter lacking legal significance. As Hill explains, the Model Law uses the term “place” to refer to different concepts.\textsuperscript{60} In the first paragraph of Article 20, the juridical domicile is defined as the place of arbitration. In the second paragraph, however, the Model Law explains that the tribunal may meet at any place it considers appropriate, meaning physical location.\textsuperscript{61} That said, it should be noted that these inconsistencies remain exclusively a linguistic problem. From a legal point of view, the distinction between the arbitral seat and the physical place or venue is well-established.\textsuperscript{62}

Leaving linguistic or terminological infelicities aside, virtually all national arbitration laws, scholars, and institutional rules recognise the fact that the seat is not the

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\textsuperscript{54} Model Law 2006, Art 20.
\textsuperscript{55} ICC Rules, Art 18.
\textsuperscript{56} See, eg, s 3 of the English Arbitration Act 1996, s 3 of the Arbitration (Scotland) Act 2010, and Art 176 of the Swiss PILA.
\textsuperscript{57} LCIA Rules, Art 16.
\textsuperscript{58} SIAC Rules, Rule 21.
\textsuperscript{59} HKIAC Rules, Art 14.
\textsuperscript{60} Hill (n 53) 521.
\textsuperscript{61} A reasonable proposal in order to mitigate the linguistic chaos is to promote the term “seat” to refer to the legal home of an arbitration. This approach has been supported by, for example, the drafters of the 2010 UNCITRAL Rules who agreed that, from a legal point of view, the terminology “seat of arbitration” was the most appropriate. However, they decided not to change the wording of the Rules, which has retained the expression “place of arbitration” in order to avoid a different terminology than that included in the Model Law. See Peter Binder, Analytical Commentary to the UNCITRAL Arbitration Rules (Sweet and Maxwell 2013) paras 1-073, 1-074.
\textsuperscript{62} Fry, Greenberg and Mazza (n50) para 3-670.
physical location of the arbitration but rather, a juridical or legal concept. This distinction is particularly important in the current situation of travel disruption which had led to a very recent development, that is, virtual hearings as the only option to conduct arbitral proceedings. Most arbitrations do not have now a physical place where the hearings are held. This does not mean, however, that arbitral proceedings do not have a juridical domicile or seat. *PT Garuda Indonesia v Birgen Air*[^63] is frequently used as a good illustration to demonstrate the importance of the abovementioned distinction. In this case, the arbitration clause provided that the arbitral seat was Jakarta, Indonesia. However, due to domestic political unrest, the parties agreed that the hearings were to be conducted in Singapore. Once the arbitral proceedings were concluded, the award-debtor sought to have the award set aside by the Singaporean courts. The application was then refused by the Singapore Court of Appeal on the ground that:

“there is a distinction between “place of arbitration” and the place where the arbitral tribunal carries on hearing witnesses, experts or the parties, namely, the “venue of hearing”. (…) The place does not change even though the tribunal may meet to hear witnesses or do any other things in relation to an arbitration at a location other than the place of arbitration.”[^64]

In fact, Jakarta remained the seat throughout the proceedings and, consequently, Indonesian courts had exclusive jurisdiction to set aside the arbitral decision. As it can be seen, the seat does not change just by moving the physical location of the arbitration. This does not mean, however, that the parties cannot modify the arbitral seat. Given that party autonomy is the foundational principle of international arbitration, the parties are permitted to change the location of the seat through a clear designation. Indeed, one of the most remarkable aspects of the concept of arbitral seat is the role of party autonomy. In most instances[^65], the parties select the legal place of arbitration, either explicitly – in their agreement to arbitrate – or implicitly – through the adoption of a set of institutional rules which provides a default

[^64]: ibid [24].
[^65]: In 2019, in the context of ICC arbitration, the parties selected the seat in 90% of the cases. See ICC Dispute Resolution 2019 Statistics, 14 <www.iccwbo.org/publication/icc-dispute-resolution-statistics> accessed 7 April 2021.
seat in the absence of agreement by the parties. If the parties do not designate it expressly or impliedly, the seat should be determined by the tribunal or administering arbitral institution “having regard to the parties’ agreement”. Indeed, if the parties are not satisfied with the designation of the seat by the tribunal or arbitral institution, a consensual agreement in writing can subsequently change its location. In sum, party autonomy is the key element in order to determine the arbitral seat.

Finally, before turning to the analysis of the seat as a connecting factor, it may be appropriate to explain its legal significance and effects. The legal consequences of the arbitral seat have been overwhelmingly recognised by national legislation, international instruments such as the New York Convention, and preeminent scholars. Notwithstanding the above, in recent years some commentators such as Kaufmann-Kohler have argued that, due to the convergence of national arbitration legislation, the importance of the choice of seat has diminished since “[a]s to the control which the local law and local courts exercise over arbitration proceedings, the general trend is clearly towards more autonomy”. However, as pointed out by Born, one should be cautious with the approach adopted by Kaufmann-Kohler due to the wide range of legal effects and consequences which are attached to the concept of arbitral seat.

Through the designation of the seat, the parties are free to determine the arbitral legislation that will apply to the proceedings and the “nationality” of the award for the purposes of its enforcement in a New York Convention State. More importantly in the context of the current research, the parties are allowed to select the courts of the legal system which are to be regarded as the natural forum with supportive and supervisory powers over their arbitration.

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66 See, eg, LCIA Rules, Art 16(2).
67 See, eg, ICC Rules, Art 18.
71 ibid 1541.
To begin with, the arbitral seat impacts on the procedural law applicable to the arbitration, and again, party autonomy is the key element to determine the extent or degree of influence of the seat on the lex arbitri. From a conceptual point of view, the distinction between internal and external procedure appears to be of crucial relevance here. On the one hand, the internal procedure refers to the procedural steps taken by the arbitrator or the tribunal until the rendering of the award. On the other hand, the external procedure includes any aspect of the relationship between an arbitration and the courts of a given legal system. If the parties have agreed on ad hoc arbitration, that is, if they have not included any arbitration rules as part of their agreement, both the internal and external procedure will be governed by the law of the seat. In this case, the seat is a powerful element that determines every aspect of the procedural law applicable to the arbitration. Conversely, if the parties have incorporated institutional rules into their agreement, these rules would determine the internal procedure by replacing the equivalent non-mandatory provisions of the law of the seat. In this case, the law of the seat would have a restricted but essential role since it would govern the external procedure. Notwithstanding the fact that, in theoretical terms, the distinction between internal and external procedure seems to explain the role of the seat in the context of the procedural law applicable to an arbitration, in practical terms, it is an oversimplification. In a majority of legal systems, for example, the power of national courts to grant interim relief in support of arbitration is part of the external procedure but it can be excluded by the parties.\footnote{See, eg, SAR, Rule 46.} In a similar vein, in several legal systems such as Switzerland, setting aside proceedings, which are part of the supervisory powers of the courts of the seat, can be excluded under some circumstances by non-Swiss parties.\footnote{Swiss PILA, Art 192.} Obviously, if the parties are allowed to exclude aspects of the external procedure, the relevant distinction is not between internal-external procedure but mandatory and non-mandatory provisions. In light of the above, it can be concluded that, in institutional arbitration, the institutional rules adopted by the parties override the equivalent non-mandatory provisions of the law of the seat. In general terms, the role of the arbitral seat is restricted, in terms of procedural law, to its mandatory provisions. By contrast, in ad hoc arbitration, the seat determines every aspect of the applicable procedural law since both its mandatory and default provisions would govern the proceedings.
Secondly, the seat of arbitration determines the “nationality” of an award for the purposes of recognition and enforcement under the framework of the New York Convention.\footnote{Fry, Greenberg and Mazza (n50) para 3-675.} Strictly speaking, the New York Convention is a United Nations treaty that imposes on courts of Contracting States the obligation to recognise and enforce arbitral awards made in the territory of another State subject to the exceptions set out in Article V. In this context, it is important to note that a great majority of countries have made reciprocity reservations when ratifying the Convention. The German reservation, for example, provides that “Germany will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State”.\footnote{Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> accessed 15 December 2021.} On this basis, Germany would not enforce an arbitral award rendered, for example, in Namibia\footnote{Namibia is not, as of December 2021, a Contracting State of the New York Convention.} under the New York Convention. One might have assumed then that the “nationality” of arbitral awards is an important element in order to ensure that a given arbitral decision is enforceable under the pro-enforcement regime set out by the Convention. Paradoxically, the “nationality” of awards has limited practical effects since, to date, the New York Convention has 169 Contracting States.\footnote{As of December 2021.} Although the legal significance of the seat in providing a “nationality” to the arbitral award is undoubtedly in decline, there are still exceptional cases in which the said reservations may arise with respect to more than 30 UN member states which have not adopted the New York Convention.

Thirdly, the seat is the main arbitral connecting factor conferring jurisdiction to national courts in order to supervise and support international arbitration. Indeed, the seat attaches an arbitration to a particular legal system and, therefore, to the jurisdiction of the courts of that forum since, in order to be an effective dispute resolution method, arbitration requires the support, and sometimes, minimal supervision of national courts. Of course, the jurisdictional choice of the parties as to the arbitral seat shall be enforced. The New York Convention imposes an obligation on Contracting States to enforce arbitration agreements, and that obligation extends...
to material terms in respect of which there is an agreement in writing.\textsuperscript{78} As explained by Born, an agreement of the parties specifying the seat is clearly within the scope of the aforementioned provision.\textsuperscript{79} It follows that Contracting States shall recognise and enforce agreements on the arbitral seat including its jurisdictional consequences. The choice of the arbitral seat will determine, for example, the forum with jurisdiction to remove or appoint arbitrators, the forum entitled to set aside the final arbitral award, or the forum which has primary jurisdiction to render injunctive relief. If a matter is categorised as “exclusive jurisdiction”,\textsuperscript{80} only the courts of the seat should be allowed to rule on the issue to the exclusion of any other court. A refusal of non-seat courts to decline jurisdiction or stay judicial proceedings in these cases would constitute a failure to honour the arbitration agreement which threatens the framework of the New York Convention.\textsuperscript{81} By contrast, if the matter is non-exclusive, courts of other legal systems would not be prevented from applying any other heads of jurisdiction. Yet, these courts should carefully consider whether the exercise of supportive jurisdiction would interfere with the courts of the seat which are “the most convenient (…) and natural forum in which to concentrate all the actions”\textsuperscript{82} to supervise and, to a lesser extent, support an international arbitration.

2.2. The arbitration’s legal domicile as the main connecting factor for court supervision and support

2.2.1 Introduction

The law of international jurisdiction in the private international law sense aims to identify a sufficiently close connection between a given set of facts and a particular legal system called upon to determine the dispute.\textsuperscript{83} This concept which, in principle,

\begin{itemize}
\item \textsuperscript{78} Emmanuel Gaillard and George A Bermann (eds), \textit{Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards} (Brill 2017) 67.
\item \textsuperscript{79} Born (n70) 1541.
\item \textsuperscript{80} Whether or not a matter is of exclusive jurisdiction is normally determined by national arbitral legislation and, therefore, by each legal system. There is, however, one exception: setting aside proceedings are indirectly reserved by Article V(1)(e) of the New York Convention to the courts of the country in which, or under the law of which, the award was made.
\item \textsuperscript{81} Born (n70) 1541.
\item \textsuperscript{82} Georgios Petrochilos, \textit{Procedural Law in International Arbitration} (OUP 2004) 65.
\item \textsuperscript{83} Francis A Mann, \textit{Studies in International Law} (OUP 1972) 12.
\end{itemize}
seems obsolete to the fast-evolving world of arbitration, describes in general terms, the necessary distribution of supervisory and supportive powers between the different courts of different fora in the context of arbitral proceedings. Indeed, a plurality of legal systems may have a connection with a given arbitration. The purpose of the law of jurisdiction is then to determine the relevant element designating the forum or fora which is to be regarded as the most appropriate to exercise supervision or support over an arbitration. Yet, two elements need to be clarified with respect to the previous concept. First, the jurisdiction of national courts in the context of arbitration is, and must be, strictly restricted to powers of support and very limited supervision since the arbitration agreement confers exclusive powers to the tribunal with respect to the substance of the dispute. Secondly, the element to be connected with a particular legal system is a process as a whole rather than a set of facts. By connecting a process, the set of facts and any particular person involved in the dispute become, in principle, irrelevant in order to discern the appropriate connection. Nevertheless, in exceptional cases, the particular facts of the case or the parties may become relevant factors, and the specialist area of interim relief seems to point to that possibility.

Traditionally, two categories of international jurisdiction have been identified in the context of private international law, namely, consensual jurisdiction and connected jurisdiction. The latter can also be divided into four subcategories: exclusive, general, special and protective jurisdiction. Unsurprisingly, for the purposes of international arbitration, the relevant typology is the former one, that is, consensual jurisdiction. According to the principle of party autonomy, a court has jurisdiction if the parties have voluntarily submitted to that court. As Petrochilos has rightly explained, “the choice of the seat (…) is something more than a choice of procedural law: it imports the jurisdiction of the courts to control and assist the arbitration”.

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84 Petrochilos (n82) 92.
85 ibid.
87 Petrochilos (n82) 69.
Clearly, the concept of arbitral seat follows from private international law or, in the words of Petrochilos, “from litigational considerations, and nothing else”. However, it seems more appropriate to refer to the conflict of laws rather than to litigation or “litigational”. In this context, two premises are essential in order to discern the origin and rationale of the concept of arbitral seat. First, it is beyond any doubt that international arbitration requires the support and limited supervision of national courts. Secondly, international arbitration is a process where several elements may point to more than one forum. The combination of these two premises leads to a further question: which forum or fora should be allowed to support and supervise an arbitration? The seat is, partially, the answer to that question since it has a distribution function that promotes coordination between legal systems. In fact, the seat is the main connecting factor that distributes supportive and supervisory jurisdiction between the courts of different fora.

2.2.2. Superseding the plurality of connecting factors with a unified and stable head of jurisdiction

In historical terms, the arbitral seat is a recent development. Prior to the adoption of a unified connecting factor that would accommodate party autonomy, an international arbitration was subjected to a plurality of elements that could be used to connect the arbitral process to a multiplicity of fora. Indeed, rather than a set of facts, the arbitral connecting elements have to cover arbitration as a whole process; therefore, it should come as no surprise that, in the absence of a unified connecting factor, a plurality of elements connected different legal systems to different stages of the arbitral proceedings. A plurality of connecting factors led then to a plurality of heads of jurisdiction which sacrificed the simplicity often required by users and business community in the arbitration world. This situation was, however, overcome through the adoption of the concept of arbitral seat which was first implemented in statutory form by the Model Law and later refined by the English Arbitration Act.

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88 ibid 92.
89 ibid 18.
90 ibid 92.
91 References to the expression “seat of arbitration” can be found in Scottish jurisprudence of the nineteenth century. The Model Law incorporated the concept of “place of arbitration” in 1985. In England, the concept of
By way of example, in England, prior to the adoption of the 1996 Arbitration Act, it was acknowledged that English law could apply a variety of connecting factors for different purposes in international arbitration. According to Petrochilos, an illustration of that variety of connecting elements can be shown in the attempt of the 1995 Arbitration Bill to codify the common law together with the concept of the seat. Clause 2(2) of the Bill divided between two matters and two connecting factors by providing that the Act would apply:

“(to) matters related to or governed by the arbitration agreement, where the applicable law is the law of England (...) and (to) matters governed by the law applicable to the arbitral proceedings, where the seat of the arbitration is in England”.

As it was previously explained, this provision added a further connecting factor – the seat – to the existing common law position. Unsurprisingly, the DAC Supplementary Report advised against this clause and, as a result, the distinction between two matters and two connecting factors was abandoned. The 1996 Act then embraced simplicity through the adoption of the arbitral seat as the only connecting factor on the basis that the purpose of the new arbitral legislation was to avoid the application of “mechanical geographical tests regardless of the intention of the parties.”

By way of further example, in Scotland, the seat has also superseded the rest of connecting factors that may link an arbitration at its different stages with different legal systems. In 1990, the Model Law was adopted in Scotland in accordance with the Law Reform (Miscellaneous Provisions) (Scotland) Act. Article 1(2) of the 1985 Model Law provides that the said instrument applies if the place, meaning juridical arbitral seat was not unknown as the 1996 DAC Report on the Arbitration Bill explains in paragraph 26. This concept seems to appear in England in the 1960s. See Hill (n53) 522.

93 Petrochilos (n82) 66.
94 Arbitration Bill [HL] (Bill 100) HMSO April 1996, cl 2.
95 Petrochilos (n82) 66.
seat, of arbitration is located in “the territory of this State”. Prior to the unification of connecting factors, the pre-Model Law regime was very fragmented and it was difficult to apply.98 The Arbitration (Scotland) Act 1894, the Arbitration Act 1950 and the Arbitration Act 1975 governed different aspects of the arbitration process and no connecting factors were set out by statute. In fact, it is highly likely that there were, as in England, multiple connecting elements at common law. Nevertheless, the previous assumption is difficult to ascertain due to the great complexity of the pre-Model Law regime and the fact that few arbitrations were conducted in Scotland.

In light of the above, one might have assumed that, due to the advantages offered by the seat in terms of simplicity, every new arbitral instrument would have incorporated it. Yet in 1998, the MERCOSUR Agreement on International Commercial Arbitration99 rejected that approach. In Article 3, under the heading of territorial and subject-matter scope, five different connecting factors were set out, according to which the MERCOSUR Agreement would apply. Remarkably, the arbitral seat is among these elements, but jurisdiction can also be conferred by, for example, the domicile of the parties.100 Having said that, the MERCOSUR Agreement is a rare exception. In fact, the arbitral seat is nowadays the preeminent connecting factor for jurisdictional purposes in international arbitration and, an overwhelming majority of legal systems configure their arbitration models around the concept of the seat.101

2.2.3. Defining characteristics of the seat as a connecting factor

The arbitral seat is a connecting element with *sui generis* features if compared with traditional personal connecting factors. In summary, the seat of arbitration is a consensual, special, functional, stable and territorial connecting factor that is, paradoxically, based on fictional territoriality.

100 ibid Art 3(a).
1. The seat is an “artificial” connecting factor in the sense that it is not a “natural” connection between a set of facts or the parties and a particular legal system. Rather, it is an artificial element selected by or on behalf of the parties. Yet, this is not a *sui generis* characteristic found exclusively in the realm of international arbitration. In international commercial litigation, choice of court agreements are enforced by a great majority of legal systems. In fact, the rationale of forum selection clauses and the arbitral seat is exactly the same, that is, to uphold private agreements that have been freely entered by the parties. On this basis, forum selection clauses and the arbitral seat are examples of consensual jurisdiction as opposed to connected jurisdiction which, in the private international law sense, requires a “natural” connection.

2. The seat is not a personal connecting factor. As Petrochilos explains, the seat is a special head of jurisdiction which relates to a process as a whole, rather than to any particular person involved in it. The choice of arbitration as a dispute resolution system excludes, in principle, traditional personal connecting factors. For example, jurisdiction to decide on an action to recover arbitral fees could have been conferred to the courts of the domicile of each party. However, the development of the concept of arbitral seat has led to the assumption that such an action must be brought before the courts of the seat.

3. The seat is a legal fiction based on territoriality. Clearly, territoriality is behind the design of the seat as the main arbitral connecting factor but, paradoxically, the territorial connection is a legal fiction. For example, in the *Garuda Indonesia* arbitration, the parties selected Jakarta as the seat. However, the hearings were held in Singapore and no arbitral events were conducted in Indonesia. The parties did not travel to Jakarta. Nor did the arbitrators set a foot in the country where the international arbitration was seated. Yet Indonesia remained the seat throughout the arbitral proceedings and, from a legal point of view, the award was rendered in that country. As it can be seen, the seat is a concept

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102 Petrochilos (n82) 92.
103 ibid.
104 ibid 73.
105 *Garuda Indonesia* (n63).
exclusively based on territoriality, however, “there is no (...) relevant territorial nexus between an arbitration and the state in which it physically takes place”.  

4. The seat is a functional connecting element.  

This particular type of jurisdiction refers to the fact that a given state is not exercising jurisdiction in order to protect any interests of its own, but rather, the exercise of jurisdiction derives exclusively from the fact that it is the most convenient and appropriate forum. The functional nature of the arbitral seat is particularly linked to the typology of consensual jurisdiction. In fact, the seat is a functional element since it is not based on a “natural” territorial connection with a given state.

5. The seat is a stable connecting factor that does not change unless the parties expressly decide to do so. As noted above, the seat is independent of the physical location of the arbitral procedural events. This ensures legal certainty and stability in jurisdictional terms from the outset to the rendering of the final arbitral award.

2.3 Conclusions

This section has demonstrated that the seat is the main arbitral connecting element and that it has a crucial role in jurisdictional terms. As it was explained, the concept of the seat is a successful attempt to simplify the traditional rules of jurisdiction by first, superseding a plurality of connecting factors and second, by giving party autonomy the primary role in its determination. International arbitration then has not repudiated the law of international jurisdiction but simplified it. Nevertheless, as it will be explained, the process of adoption of a single connecting factor has not been extended to the realm of interim protection of rights. Indeed, the arbitral seat is not the exclusive connecting factor for court intervention in the context of injunctive relief.

106 Petrochilos (n82) 73.
107 ibid 65.
108 Whilst there are no direct interests in terms of justice, it is possible to argue that some countries aspire to obtain economic benefits by providing judicial support to international arbitration.
109 Petrochilos (n82) 65.
3. The *forum rei sitae* and the domicile of the defendant as the connecting factors of non-seat courts

3.1. Introduction: the distinction between supervisory and supportive jurisdiction

In the words of Hascher, a judge of the *Cour de cassation* or French Supreme Court, “the location of the arbitration constitutes the rule of international jurisdictional competence of the supporting judge at least in a number of legal systems. This rule of jurisdiction is not exclusive as it coexists with other rules of jurisdictional competence; in particular, it loses its relevance in matters concerned with the adoption of provisional and conservatory measures”. On this basis, the distinction between supervisory and supportive jurisdiction seems important. On the one hand, supervisory jurisdiction includes any power exercised by national courts which aims to ensure that an arbitration complies with basic standards of justice and fairness. Examples of supervisory powers are the following: judicial control of arbitral jurisdiction (before, during or after the proceedings), removal of arbitrators on the basis of lack of independence and impartiality, or judicial control of the arbitral proceedings and the final award. On the other hand, supportive jurisdiction includes any power exercised by national courts which aims to assist and give legitimacy to international arbitration proceedings. Examples of supportive powers are the following: enforcement of arbitration agreements, constitution of the tribunal if the appointment procedure agreed by the parties breaks down, or interim protection of rights.

As a general proposition, the law of judicial jurisdiction in the arbitration setting can be summarised in the following terms. First, with respect to supervisory matters, the arbitral seat should be the only permitted connecting factor. This approach can be confirmed by the New York Convention which indirectly reserves the power to set

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aside arbitral awards to the courts of the seat.\textsuperscript{111} Secondly, in cases of supportive jurisdiction, a Westphalian approach should be adopted instead and the arbitral seat may effectively coexist with domestic heads of jurisdiction. On the one hand, the supervisory jurisdiction of the courts of the seat shall be considered exclusive. On the other hand, supportive jurisdiction may be of concurrent nature. Yet, these general principles should be carefully interpreted. There are, indeed, supportive powers that are normally restricted to the courts of the seat such as the power to appoint arbitrators where the appointment procedure selected by the parties breaks down. For that reason, and for the purposes of this chapter, the expression “supportive jurisdiction” should be exclusively understood, hereinafter, as a reference to the power to render interim relief in support of arbitral proceedings.

As just noted, in the context of provisional measures, the jurisdiction of the courts of the seat should be non-exclusive since restricting the intervention of non-seat courts in cases where judicial support is required, would deprive the parties of effective protection and would impact on the conduct of the arbitral proceedings. Indeed, legal and policy considerations dictate that the seat should not be the only forum with jurisdiction to render interim relief. Even though the courts of another legal system may legitimately become involved in a given arbitration, the courts of the seat should be considered as the natural forum in which to concentrate, to the possible extent, all actions. This approach follows from reasons of convenience\textsuperscript{112} and party autonomy. Among other reasons, it is reasonable to assume that the parties, as rational businesspeople, wanted to concentrate all possible actions in a single forum. On the face of it, in the context of interim protection of rights, it seems possible to distinguish between primary and secondary fora. First, the courts of the seat should be acknowledged as the primary forum with powers to render interim measures.\textsuperscript{113} Secondly, in order to ensure an effective framework of interim relief, non-seat courts

\textsuperscript{111} Article V(1)(e) refers to the possibility of refusing enforcement if the award was set aside by a “competent authority of the country in which or under the law of which that award was made”. Courts have consistently interpreted “competent authority” as the courts of the seat. Similarly, the expression “under the law of which” has been construed as referring to the procedural law of the arbitration in rare cases where the parties have severed the link between the seat and the \textit{lex arbitri}.

\textsuperscript{112} See the characteristics that make the arbitral seat the most appropriate connecting factor in § 2.2.3.

\textsuperscript{113} See \textit{Econet Wireless v Vee Networks} [2006] EWHC 1568 (Comm), [2006] 2 All ER (Comm) 989, where it was held that the natural court to grant interim relief is the court of the seat.
should have secondary jurisdiction based on the principles of presence within the territorial jurisdiction and enforceability.\textsuperscript{114} As it can be seen, effectiveness, convenience, fairness, and party autonomy are among the main reasons in support of a system of concurrent jurisdiction with priority in favour of the courts of the seat.

3.2. The \textit{forum rei sitae} and the domicile of the defendant as the connecting factors of the supporting non-seat courts

3.2.1. Introduction: the competency issue

Unsurprisingly, strictly territorial theories exclusively based on the arbitral seat fail to explain the current international arbitration framework. In fact, if a Westphalian approach is adopted, one must admit that every legal system is equally legitimated to give effect to or support an international arbitration. Regardless of the theoretical or doctrinal approaches, in practical terms, there is a prevailing view that accepts the connecting factors of \textit{forum rei sitae} – the place where the evidence, property, or assets are located – and the domicile of the defendant for the purposes of supportive jurisdiction in the context of interim protection of rights. As it was explained above, the arbitral seat is considered to be non-exclusive so, in a majority of legal systems, at least three connecting factors coexist, that is, the arbitral seat, the \textit{forum rei sitae}, and the domicile of the defendant. Back in 1993, when the \textit{Channel Tunnel} case was before the House of Lords, Professor Grosser argued that there was “no decisive reason for attributing jurisdiction to the judge of the place of arbitration alone”.\textsuperscript{115} He proposed two connecting factors, namely; “the domicile or registered office of the defendant party, [and/or] the place where the property is situated.”\textsuperscript{116} Nearly three decades after the \textit{Channel Tunnel}, the adoption of non-seat connecting factors has been acknowledged by an overwhelming majority of legal systems.

\textsuperscript{114} See, eg, \textit{U&M Mining Zambia v Konkola Copper Mines} [2013] EWHC 260 (Comm), [2013] 2 Lloyd's Rep 218, where it was held that the courts of the seat do not have exclusive jurisdiction to render interim relief.


\textsuperscript{116} ibid.
The process of adoption of the *forum rei sitae* rule and the domicile of the defendant started, as in international litigation, with competency reforms that allowed local courts to render injunctive relief in support of foreign-seated arbitrations. In the arbitration setting, however, these legislative reforms are relatively recent. In India, for example, the seat of arbitration was, until recently, the only connecting factor in the context of interim relief. In *Marriott International v Ansal Hotels*, the Delhi High Court ruled that due to the seat being in Malaysia, Indian courts could not render any relief on the basis that section 9, which deals with court-ordered measures, applied only if the arbitral seat was located in India. The decision handed down in 2001 was, however, reversed in 2015 with the amendment of section 9 of the Arbitration and Conciliation Act which now applies even if the seat is located outside India. Yet, India was not an isolated example. In Singapore, an “arbitration-friendly” legal system, the Court of Appeal rejected in 2006 to support a foreign-seated arbitration. The unfortunate decision in *Swift-Fortune* was, however, overturned in 2009 with the reform of section 12 of the Singapore Arbitration Act. Other legal systems have also extended the competence of local courts to support arbitral proceedings conducted in a third legal system. England, for example, faced a similar scenario and modernised accordingly its arbitration legislation by conferring competence to English courts irrespectively of the seat and in cases where no seat has been determined. By way of further example, national courts of legal systems adopting the 2006 version of the Model Law are competent to render provisional remedies as in litigation proceedings, and regardless of the location of the seat. In other words, Article 17J of the Model Law extended the competence of local courts and permitted the application of national heads of jurisdiction other than the arbitral seat.

117 XXVI YB Comm Arb 788.
119 *Marriott* (n117) [34].
120 Indian Arbitration and Conciliation Act 1996, s 2(2).
122 International Arbitration Act of Singapore, Chapter 143A.
123 See *Bank Mellat v Helliniki Techniki SA* (1984) QB 291 (the seat did not constitute an adequate ground for international jurisdiction of English courts) and *Channel Tunnel Group v Balfour Beatty* (1992) QB 656 (English courts had no international jurisdiction unless the seat was located in England).
124 English Arbitration Act 1996, s 2(3).
125 Model Law, Art 17J.
Even though there is a recognisable trend of national law extending the competence of courts in the context of arbitral proceedings, this issue still remains unsettled in several legal systems such as Scotland or the United States. In the United States, the main question has been whether Article II(3) of the New York Convention prevents any court – regardless of the seat – to render interim relief in aid of arbitral proceedings. Whilst decisions such as *McCreary* and *Cooper* have held that court-ordered relief in support of arbitral proceedings circumvents the New York Convention, other lower courts have not followed this interpretation. *Uranex* and *Karaha Bodas* are the authorities traditionally cited in support of this second approach. Unsurprisingly, this chaotic scenario led to legislative reforms in some states. In New York, for example, section 7502 of the Civil Practice Law and Rules was amended to confer local courts competence to render injunctive relief in support of arbitration “conducted inside or outside this state”. However, it is important to note, as Born suggests, that the Civil Practice Law and Rules – state legislation – seems to deal with a matter of federal law, that is, with the interpretation of the New York Convention. In sum, although most lower US courts have not followed the approach adopted in *Cooper* and court-ordered remedies have been granted in aid of foreign-seated arbitrations, the Federal Arbitration Act has not been yet amended. Nor had an upper court clarified this issue.

Similarly, in Scotland, the competence of courts to render interim relief in support of arbitration proceedings is limited by the location of the seat. Unfortunately, Scots law is in this regard an anomaly since the Scottish Arbitration Rules (SAR) contained in Schedule 1 to the Arbitration Act 2010 apply exclusively if the seat is located in Scotland. Even though the SAR appear to be non-mandatory institutional rules,
they are part of the proper Act and include important supportive powers such as the
power of courts to render interim relief which, in principle, is limited to the seat being
located in Scotland.\textsuperscript{134} This unfortunate situation should then be resolved in the
Scottish Parliament since the Court of Session cannot exercise an alleged inherent
power to extend the scope of application of Rule 46.\textsuperscript{135}

3.2.2. Implementing the connecting factors of \textit{forum rei sitae} and domicile of the
defendant

Once legislative reforms have extended the competence of courts to render interim
relief in support of foreign-seated arbitrations, every legal system should determine
the substantive connection according to which its courts are to support arbitral
proceedings conducted in a third legal system. This issue raises a question of
paramount importance considering that the arbitral seat is the widely accepted
connecting factor conferring primary jurisdiction to render interim relief. For that
reason, every legal system should adopt two basic principles. First, the jurisdictional
framework of non-seat connecting factors should be carefully designed in order to
avoid non-seat courts trespassing upon the jurisdiction of the arbitral tribunal and the
courts of the seat. Secondly, legal systems should not offer jurisdiction to render
injunctive remedies in support of arbitrations having little or no link at all with the
forum state.

On the international litigation plane, the rule of \textit{forum rei sitae} may be considered,
together with the domicile of the defendant, as second in importance\textsuperscript{136} after the rule
conferring jurisdiction on the merits. This is equally true in the context of
transnational arbitration, where the framework of supportive jurisdiction has been
developed, in general terms, at a later stage than that of ancillary jurisdiction in
litigation proceedings.\textsuperscript{137} The adoption of the \textit{forum rei sitae} rule and the domicile of
the defendant in the arbitration setting follows from private international law. The

\textsuperscript{134} SAR, Rule 46.
\textsuperscript{135} See § 3.2.2.iii.
\textsuperscript{136} “Importance” here should not be understood in practical terms but from a doctrinal point of view. The
courts with substantive jurisdiction are the natural forum to render provisional measures.
\textsuperscript{137} An exception is, for example, Singapore. See Ch 3, § 2.2.2.
rationale in transnational arbitration is exactly the same as in international litigation, that is, to allow the parties to obtain interim remedies outside the forum with substantive jurisdiction – in international litigation –, and outside the arbitral forum and the forum for primary support – in international arbitration – in order to effectively protect the rights of the parties. In this context, the location of property, evidence or assets, and the domicile of the defendant are seen as substantial connections in both arbitration and litigation.

The potential options to incorporate the rule of *forum rei sitae* and the domicile of the defendant is a matter of legislative technique. The following alternatives have been identified:

i) **Wide and discretionary statutory-authorised power.** English law, for example, has incorporated the *forum rei sitae* and the domicile of the defendant through the discretionary and statutory-authorised power of section 44 of the Arbitration Act. By allowing courts to apply section 44 in cases where the seat is not in England or where no seat has been determined, the Act is extending the competence of English courts and authorising the application of domestic heads of jurisdiction other than the arbitral seat. Before turning to the analysis of these heads of jurisdiction, some issues need to be clarified. The international jurisdiction of English courts to render interim relief in the context of arbitral proceedings is not derived from section 44 of the Arbitration Act. Nor is that jurisdiction included in section 37 of the Senior Courts Act. These provisions run in parallel and establish the power of courts to grant provisional measures. In contrast, the international jurisdiction of English courts is derived from the fact that England is the seat or, in the absence of such a connecting factor, the assertion of international jurisdiction can only be made if, and only if, another significant or substantial connection with England can be established. It follows that:

- Section 2(3) of the Arbitration Act is a provision that expands the competence of English courts and authorises the applicability of a connection other than the seat in order to render interim relief in aid of foreign-seated arbitrations, and

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138 Senior Courts Act 1981.
• Section 44 of the Arbitration Act, along with section 37 of the Senior Courts Act, set out the power of English courts to grant interim relief.

Yet, in disputes with international elements, this cannot be the end of the matter. English courts, like any other courts, shall require a sufficient connection between the arbitration, the parties or the dispute, and their forum in order to exercise supportive powers. It is, in this context, where international jurisdiction arises.

In England, it is important to note that the *forum rei sitae* rule and the domicile of the defendant have been incorporated through the exercise of a wide and discretionary statutory-authorised power.\(^{139}\) Section 2(3) of the Arbitration Act provides that a court may refuse to exercise the power to render interim relief “if, in the opinion of the court, the fact that the seat is outside England (…), or that when designated or determined the seat is likely to be outside England (…), makes it inappropriate to do so”. Thus, the relevant connecting elements which have to be satisfied in cases where the arbitral seat is outside England have been established by case law. These elements were determined in cases like *Econet Wireless*\(^{140}\) and *Mobil Cerro Negro*\(^{141}\) in the form of two conditions of which at least one must be satisfied. That connection may be either the domicile or residence of the defendant in England or the presence of assets in England.\(^{142}\)

More problematic is to determine the jurisdiction of English courts to render extraterritorial remedies. English courts have confirmed their powers to render interim measures of extraterritorial effects in cases where the connection is not the arbitral seat but rather, the location of assets or the domicile of the defendant. Not surprisingly, the presence of the defendant within the jurisdiction is sufficient to grant any remedy of extraterritorial effect. However, whether the location of assets, without the domicile requirement, is sufficient to satisfy a substantial and appropriate

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\(^{139}\) Where permission to serve notice out of the jurisdiction of an arbitration claim (under s 44) is needed, the relevant head of jurisdiction is found in CPR r62.5(1)(b). See Steven Gee, *Commercial Injunctions* (7th edn, Sweet & Maxwell 2020) 6-004.

\(^{140}\) *Econet Wireless* (n113).

\(^{141}\) *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm), [2008] 2 All ER (Comm) 1034.

\(^{142}\) ibid [119] and [136].
connection, is not clear. In fact, this seems to be in a state of development by the courts. Whilst in *Motorola v Uzan (No 2)*, in the litigation context, it was accepted that assets in England is an adequate connection for the purposes of an extraterritorial order, the *Cuban Telecommunications* decision, in the litigation context too, reached the opposite conclusion. In *Motorola v Uzan (No 2)*, the defendants were four members of a Turkish family. Jurisdiction over the second and third defendants was declined on the basis that the defendants were domiciled in Turkey and there were no assets in England. Jurisdiction over the fourth defendant was entirely justified since she had assets in England and she was domiciled there. The problem, however, was the first defendant. He did not reside in England but he did own a house in London. Thus, the question was whether the presence of a valuable house in England could be deemed as a substantial connection to render a worldwide injunction in support of litigation proceedings conducted in New York. The court argued, after applying the “real sanction test” adopted in *Derby & Co v Weldon (Nos 3 & 4)*, that it had means of enforcement if the worldwide order was disobeyed on the basis of the presence of a house worth millions of pounds, and accordingly, the worldwide effects of the injunction were confirmed. It is worth noting that, although cases dealing with extraterritoriality seem to have been formulated by English courts as jurisdictional problems, it seems more appropriate to categorise them as competency issues since the main problem in these cases was to determine the extent of judicial powers. In a similar vein, it is also important to note that these decisions illustrate the interrelationship between international jurisdiction and competence: not every substantial connection can be used to extend the powers of local courts to measures of extraterritorial effects.

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144 See Ch 3, § 2.2.3.
146 ibid [128].
148 ibid [29].
149 *Motorola Credit* (n145) [121].
150 ibid [127].
151 [1990] Ch 65, 81, where it was held that the court would not grant an extraterritorial injunction if “there is doubt about whether the order will be obeyed and if, should that occur, no real sanction would exist”.
152 *Motorola Credit* (n145) [128].
ii) Ordinary heads of jurisdiction under generally applicable national law. A great majority of legal systems have preserved their ordinary heads of jurisdiction in cases of court intervention in aid of foreign-seated arbitrations. In such cases, the domicile of the defendant and the rules of *forum arresti* and *forum patrimonii*\(^{153}\) would be still presumably valid for interim relief purposes in the context of arbitral proceedings.

As regards this legislative technique, two options may arise. First, a legal system may preserve ordinary heads of jurisdiction which would be available under national law in coexistence with the arbitral seat. Secondly, a given legal system may exclusively preserve ordinary heads of jurisdiction to the exclusion of the arbitral seat which would be then irrelevant, even if the courts intervene in the context of arbitral proceedings. The latter option is, without doubt, ill-conceived since the choice by the parties of a forum which concentrates, to the possible extent, supportive actions should be upheld and enforced. It is unclear whether this unfortunate situation is found, for example, in Brazil. However, according to a Brazilian report on interim relief:

“(provisional) measures can be requested to the Brazilian courts regardless of the seat of arbitration, but as long as the Brazilian courts would originally have jurisdiction for deciding the dispute\(^{154}\) if no arbitration clause was agreed to by the parties”\(^{155}\)

This passage follows from the fact that the Brazilian Arbitration Act\(^ {156}\) does not determine the scope of application of its provisions with respect to the concept of arbitral seat. In fact, there is no reference at all to the scope of application in the Act.

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\(^{153}\) The expression *forum patrimonii* is traditionally used, according to Collins, by legal systems in which the presence of assets within their territorial jurisdiction is considered a substantial connection to render relief to an unlimited extent. See Lawrence Collins, *Essays in International Litigation and the Conflict of Laws* (Clarendon Press 1994) 17.

\(^{154}\) The heads of jurisdiction under Brazilian private international law are, among others: the domicile of the defendant, the place of execution of the obligation, or the location of the assets. See Lawrence W Newman and Colin Ong, *Interim Measures in International Arbitration* (Juris Publishing 2014) 97.

\(^{155}\) ibid, 96.

itself. Accordingly, it is not possible to infer, from a plain reading of the Act, whether the seat is the relevant connecting factor for judicial support in Brazil.\footnote{Regardless of the defective legislative design of the Act, arbitral practice in Brazil seems to indicate that indeed, the seat is an element conferring jurisdiction to local courts.}

If a given legal system preserves ordinary heads of jurisdiction to the exclusion of the seat, the following problems may arise. First, the jurisdictional choice of the parties and therefore, party autonomy would be disregarded in the realm of supportive actions. Supportive jurisdiction is, under the current arbitral model, an essential instrument that enforces and gives legitimacy to international arbitration.\footnote{See the problems identified in § 1 of this chapter.} However, by disregarding the seat, the supportive forum would be exclusively determined on the basis of connected, rather than consensual, jurisdiction. By way of example, if the seat is located in a neutral forum with no other connection to the parties or their dispute, the courts of that legal system may end up declining jurisdiction to render interim relief in support of an arbitration seated within its territorial jurisdiction. Secondly, the rejection of the jurisdictional role of the seat may promote conflicts of jurisdictions and may increase the risk of irreconcilable provisional measures. In fact, a legal system adopting the previous approach may not exercise jurisdictional restraint in cases where the seat is not located in its territory. In that situation, these courts may render provisional measures of extraterritorial effects in accordance with their own domestic rules of jurisdiction. Thirdly, the fact that the seat is the natural forum, and the most appropriate, to concentrate supportive actions in aid of arbitration is completely disregarded. Fourthly, the adoption of the seat as the main arbitral connecting factor by a majority of legal systems ensures a minimum jurisdictional and competency harmonisation which promotes the exercise of jurisdictional restraint by non-seat courts. In sum, as it can be seen, there is not a single reason in support of a jurisdictional model which disregards the arbitral seat.

Germany has also been reported as a legal system preserving ordinary heads of jurisdiction.\footnote{Petrochilos (n82) 102.} Section 1033 of the German Civil Procedural Code (ZPO)\footnote{Section 1033 of the German Civil Procedural Code (ZPO) provides}
that an arbitration agreement is not incompatible with the jurisdiction of German courts to render interim measures. Yet, this is merely a permissive provision that does not confer international jurisdiction.\(^{161}\) Further, it should be stressed that Section 1033 applies in cases where the seat is not in Germany or where no seat has been determined.\(^{162}\) Does that mean that German courts are permitted to disregard the arbitral seat by exclusively resorting to litigation-designed heads of jurisdiction in the context of supportive arbitral actions? It is worth noting that Section 1033 is a provision extending the competence of German courts, but it is not about international jurisdiction. Indeed, the distinction between competence and international jurisdiction is, in this context, important. It is one thing to argue that German courts have competence to render interim relief regardless of the seat, but it is another thing to say that German courts determine their international jurisdiction to render provisional measures in support of arbitration proceedings irrespectively of the seat. Section 1033 is a reference to the former option since it provides that the competence of German courts is not limited to cases where the seat is located in Germany. As regards the role of the seat in the context of international jurisdiction, one should not infer, from Section 1033, that German courts approach the issue of international jurisdiction regardless of the seat.\(^{163}\) Indeed, it seems odd and unreasonable to conclude that German courts would assert jurisdiction exclusively on the basis of national heads of jurisdiction and irrespectively of the seat in the context of arbitral proceedings. As explained above, the seat should be acknowledged as the main connecting factor to render interim measures in support of arbitration proceedings. Only if the seat is not located in Germany or if no seat has been determined, should there be a requirement on the claimant to satisfy any heads of jurisdiction pursuant to generally applicable national law. Unsurprisingly, this is the approach currently adopted in Germany.\(^{164}\)

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160 Zivilprozessordnung (ZPO).


162 ZPO, s 1025(2).

163 Simply because Section 1033 is not a rule of international jurisdiction.

164 See, eg, Newman and Ong (n154) 322, and Schaefer (n161) para 4.2.1.1.
The relevant provisions which have preserved in Germany the traditional heads of jurisdiction in the arbitration setting are sections 12 and 23 of the ZPO.\textsuperscript{165} There are rules of domestic or local allocation of jurisdiction in the specific chapter of the ZPO dealing with interim relief.\textsuperscript{166} However, the said chapter does not include any specific bases of jurisdiction for interim relief purposes or any arbitral heads of jurisdiction. The relevant provisions are then, section 12 which sets out the domicile of the defendant as a general base of jurisdiction, and section 23 which confers jurisdiction to German courts if the property or assets are located in Germany.\textsuperscript{167}

iii) Inherent jurisdiction. Hong Kong law can be used as an example to illustrate the incorporation of the rule of \textit{forum rei sitae} on the basis of inherent jurisdiction. Although Hong Kong courts have now both a statutory-authorised power in accordance with section 5.2 of the Arbitration Ordinance\textsuperscript{168} and inherent jurisdiction to render provisional relief in aid of foreign arbitrations, the incorporation of the \textit{forum rei sitae} rule was primarily the result of the recognition of the inherent jurisdiction of Hong Kong courts in \textit{The Lady Muriel}.\textsuperscript{169} The main issue, in this case, was to determine whether the courts of Hong Kong had international jurisdiction and competence to render an order requiring the owner of a vessel to permit charterers its inspection in order to preserve evidence where the charterparty included a London arbitration clause under the London Maritime Arbitrators’ Association Rules.\textsuperscript{170} The arbitration clause provided English law as the law governing the main contract,\textsuperscript{171} and no other connection seemed to point to Hong Kong. The Court of Appeal held that it had inherent jurisdiction – meaning competence – to render provisional measures in aid of foreign-seated arbitrations. Whilst the Court did not

\begin{footnotes}
\item[166] Ss 916-945 ZPO.
\item[168] \textit{Hong Kong Arbitration Ordinance}, Cap 609.
\item[169] \textit{The Owners of the Lady Muriel v Transorient Shipping Ltd} [1995] HKCA 615.
\item[170] ibid [3].
\item[171] ibid.
\end{footnotes}
discuss in depth the issue of international jurisdiction,\textsuperscript{172} the decision was based on the fact that “the vessel, [was] then lying at anchor in Hong Kong”.\textsuperscript{173} Accordingly, it is possible to interpret this decision as confirming the competence of Hong Kongese courts in cases where the crucial piece of evidence, the vessel, is within their territorial jurisdiction. Thus, it can be concluded then that in a single decision the Court of Appeal adopted two important steps: first, it extended its competence to render interim relief in support of foreign-seated arbitrations, and second, it determined that the presence of evidence (and by extensive interpretation, assets or property) within its territorial jurisdiction is a substantial connection in order to support arbitrations conducted outside Hong Kong.

iv) Specific arbitral heads of jurisdiction? One might have thought that a reasonable way of implementing the jurisdictional regime of provisional measures in the arbitration setting would have been to establish specific heads of jurisdiction in national arbitral legislation. Nevertheless, out of the legal systems examined, specific heads of jurisdiction – other than the seat – have not been found. This demonstrates that, in the absence of the arbitral seat as a connecting factor, litigation-designed heads of jurisdiction have been expanded to the arbitration framework of interim relief. Indeed, there is no reason why the same approach should not be adopted in the arbitration setting.

3.3. Potential conflicts of jurisdiction and extraterritorial remedies

The jurisdictional regime of provisional measures in the arbitration setting is of concurrent nature. Indeed, the law of jurisdiction in the specialist area of interim relief has provided for a wide range of suitable connecting factors or forums where provisional measures may be available. The purpose or rationale of this jurisdictional design is to facilitate the fundamental right of access to justice.\textsuperscript{174} However, the

\textsuperscript{172} The application was, however, refused since the case was not of urgency and the parties did not obtain permission from the tribunal (the arbitral proceedings were already pending before a London-seated tribunal).

\textsuperscript{173} Lady Muriel (n169) [1].

\textsuperscript{174} Duncan French and Veronica Ruiz Abou-Nigm, ‘Jurisdiction: Betwixt Unilateralism and Global Coordination’ in Veronica Ruiz Abou-Nigm and others (eds), \textit{Linkages and Boundaries in Private and Public International Law} (Hart Publishing 2018) 86.
implementation of this jurisdictional framework has led to the possibility of conflicts of jurisdiction and irreconcilable decisions on interim relief. It should come as no surprise then the fact that conflicts of jurisdiction may arise between the courts of non-seat countries vis-à-vis the arbitral tribunal and the courts of the seat. In order to mitigate potential situations of conflicts of jurisdiction, three models might be implemented.

First, legal systems may decide to adopt a jurisdictional regime based on the Van Uden decision. In this case, the European Court seemed to suggest that when the defendant is domiciled in a Member State, the jurisdiction of national courts to support an arbitration derives from, what is now, Article 35 of the Brussels I Recast. If interpreted strictly, the effects of this decision in the jurisdictional context are the following: first, courts of Member States cannot render remedies of extraterritorial effects in order to support a foreign-seated arbitration even if the defendant is domiciled within its territorial jurisdiction, and secondly, only remedies which fall within the autonomous categorisation of “provisional, including protective” may be rendered to support foreign arbitral proceedings. This is, however, an overly restricted approach not likely to be adopted anywhere.

Secondly, legal systems may decide to transplant to the arbitration setting, the jurisdictional framework adopted by a majority of legal systems in litigation proceedings. In this case, the principles of presence within the jurisdiction and enforceability would govern the issue of international jurisdiction. In contrast to the previous approach, this legal transplant would not lead to a general prohibition of worldwide orders granted by non-seat courts. Indeed, non-seat courts would not have to restrict their exercise of jurisdiction to locally situated property, evidence or assets if the defendant is domiciled there. Since the principle of enforceability would

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176 Hill and Chong (n143) 360.
178 See Recital 33 of the Brussels Recast which provides that remedies render under Article 35 “should be confined (...) to the territory of that Member State”.
179 See § 3.2.2. ii).
govern this jurisdictional framework, the presence of the defendant within the territorial jurisdiction of the court would ensure that any remedy of domestic or extraterritorial effect can be enforced. By contrast, if the exercise of jurisdiction is exclusively based on the presence of property, evidence or assets, courts adopting this approach would only be allowed to render remedies of domestic effects.

Thirdly, legal systems may adopt an arbitral model of primary and secondary jurisdiction based on judicial discretion. In principle, the power to grant extraterritorial measures would not be restricted even if the connection with the forum state is exclusively the presence of assets within the jurisdiction. Two important advantages have been identified with respect to this jurisdictional framework. To begin with, judicial discretion would ensure minimum interference with the courts of the seat and the arbitral tribunal. However, if judicial discretion is not exercised appropriately, there is a risk of becoming a sort of international police authority without enforcement powers. Furthermore, in cases where the assertion of jurisdiction is exclusively based on the *forum rei sitae* rule, this model would allow local courts to render measures of extraterritorial effects in exceptional circumstances, and if the assets located within the jurisdiction are not sufficient to cover the claim. These exceptional circumstances would include, for example, cases where the courts of the seat are not permitted to render extraterritorial remedies according to their own domestic laws. Consider, by way of further example, a transnational commercial dispute between a claimant, Company A, and a defendant, Company B. Assume that the seat is located in country X, where courts are not particularly fast or efficient in providing interim relief, and where arbitrators cannot render provisional measures. If Company B attempts to dissipate assets from England – these assets being insufficient to cover the request for interim relief of Company A –, it is not unreasonable to allow English courts to render a worldwide freezing injunction, even if the connection between the arbitration and the English courts is exclusively based on the *forum rei sitae* rule. In this example, the fact that there are assets in England which are insufficient to cover the claim of the applicant, the limited availability of provisional measures in the arbitral forum and the courts of the seat, and the

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180 *Motorola Credit Corp* (n145) [89].
181 Hill and Chong (n143) 360.
situation of urgency, may justify a worldwide order rendered by a court with jurisdiction on the basis of the *forum rei sitae* rule. Having said that, in order to minimise conflicts of jurisdiction, one may reasonably expect that, in this example, the freezing order would cease to have effects the date where the courts of country X, the seat, decide on the application for interim relief. As it can be seen, this example demonstrates that, in exceptional cases, judicial discretion might be an important tool to “effectively”

Intuitively, it is possible to conclude that, although the first model is the most appropriate if a legal system wants to minimise conflicts of jurisdiction, the second and third options are likely to be preferred by a majority of legal systems. More importantly, irrespectively of the extraterritorial effects of the remedies, the simple fact of having a concurrent system of jurisdiction in the context of interim relief may lead to conflicts of jurisdiction and irreconcilable provisional measures. For that reason, it is important to remember, as argued by Lord Mustill in *The Channel Tunnel*,

4. Other heads of jurisdiction?

One of the questions that may arise, in particular, with respect to civil law systems that have preserved ordinary heads of jurisdiction, is whether exorbitant bases such as the nationality of the claimant or the nationality of the defendant can be used by national courts to support foreign-seated arbitrations. Indeed, in French-inspired legal traditions, the connecting factor of nationality has been one of the relevant elements allocating jurisdiction to local courts.

Intuitively, in cases where natural persons are involved, the nationality of the defendant seems a reasonable connecting factor in exceptional cases, such as cases of international fraud, where

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182 Enforcement is, of course, a different matter.
184 Ibid 368.
185 See Arts 14 and 15 of the French *Code Civil*. This is a residual jurisdictional ground, only applicable where no other heads of jurisdiction are available.
the defendant frequently moves in order to avoid having a proper domicile where local courts may assert jurisdiction over him. Accordingly, one might have thought that other exorbitant bases have been preserved, particularly, in French-inspired legal systems. However, French law demonstrates that this assumption is not correct. A report prepared for the Hague Conference of Private International Law provides that, under French law, if the debtor is living abroad or if his domicile is unknown, the only option is to obtain remedies in the place where the property, evidence or assets are located. In sum, heads of jurisdiction other than the forum rei sitae and the domicile of the defendant are unlikely to be applicable in civil law systems that have preserved ordinary heads of jurisdiction under generally applicable national law.

5. Illegitimate or quasi-legitimate connecting factors

Exceptionally, national courts have adopted an overly expansive approach to the substantial or appropriate connection required to render interim measures of protection in cases where the arbitral seat is located in a third country. In some instances, jurisdiction has been asserted on the basis of a connection that was, to say the least, too weak. In this context, a further question follows: is this development most frequently found in international arbitration as compared to international litigation?

At first blush, it seems reasonable to argue that the exercise of judicial assistance in cases where there are no substantial connections between an arbitration and the forum State can be explained on the basis of two factors: first, the illegitimate strategies of national courts to protect their own nationals and local interests, or secondly, the “arbitration-friendly” policy adopted by some legal systems which

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187 ibid para 100.

188 In most cases, in the absence of a substantial connection, national courts have declined jurisdiction to render interim relief. See, eg. the following English decisions: Company 1 v Company 2 [2017] EWHC 2319 (QB), [2018] 1 Lloyd’s Rep 115 (defendant in Cyprus, no assets in England, and seat in Switzerland); Mobil Cerro Negro v Petroleos de Venezuela [2008] EWHC 532 (Comm), [2008] 2 All ER (Comm) 1034 (defendant in Venezuela, no assets in England, and seat in New York); and Econet v Vee Networks [2006] EWHC 1568 (Comm), [2006] 2 All ER (Comm) 989 (defendant in Nigeria, no assets in England, and seat in Nigeria).
seeks to attract businesses to arbitrate by publicising an alleged appearance of neutral and supportive local courts. Following this reasoning, one might have expected more frequent illegitimate connections in arbitration than in international litigation. In *Sojitz v Prithvi Information Solutions*,\(^{189}\) for example, a New York court rendered a provisional measure on the basis of a New York-domiciled debtor of the defendant.\(^{190}\) In this case, there was no connection with New York other than the territorial presence of a debtor. In fact, the contract was governed by English law. The seat of arbitration was Singapore. The parties were Indian and Japanese. The defendant did not have bank accounts in New York. Literally, nothing pointed to the fact that US courts would have been involved in the arbitral proceedings. Yet, the Appellate Division of the New York Supreme Court upheld the attachment of the debt owed by a customer of the defendant in the absence of personal jurisdiction. Not surprisingly, the practical effects of this decision illustrate that conferring jurisdiction on the basis of a tenuous connection may be utterly absurd. The effects of *Sojitz* were the following: the claimant applied for a 40-million-dollar *ex parte* attachment in New York. It was ordered by the court to post an undertaking, in the form of a bond, for 2 million dollars.\(^{191}\) Ultimately, the attachment covered only 18,480 dollars.\(^{192}\) No other assets were found in New York, and the remedy was lifted after 90 days.\(^{193}\) In spite of this, there may be an argument for saying that, from a doctrinal point of view, the connection in *Sojitz* is within the limits of what should be considered as appropriate, since the New York courts based their jurisdiction on the presence of intangible assets within their territorial jurisdiction. Following this approach, some courts may assert jurisdiction to support foreign-seated arbitrations exclusively on the basis of the presence of intangible assets such as debts or legal claims within their territory.

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\(^{191}\) *Sojitz* (n189) [4].

\(^{192}\) ibid.

\(^{193}\) ibid [5].
It should be pointed out that the application of illegitimate or quasi-legitimate connecting factors is not a judicial development exclusively found in international arbitration. In the context of international litigation, English courts, for example, went to the limit of what is permissible in Republic of Haiti v Duvalier\textsuperscript{194} since a worldwide freezing injunction was rendered exclusively on the basis that the defendant had solicitors in England. The Court of Appeal explained that the solicitors could be treated as agents of the defendant and that they had relevant information relating to the location of the worldwide assets owned by the defendant.\textsuperscript{195} Even though a disclosure order may have been justified on the basis that the documents were located in England,\textsuperscript{196} the fact that English solicitors held assets for the defendant abroad cannot be conceptualised as a substantial connection for the purposes of a freezing injunction.\textsuperscript{197} Indeed, the reasoning of the Court in Duvalier\textsuperscript{198} may be considered by many as an intellectual aberration based on an overly imperialistic approach of English courts.\textsuperscript{199} In England, the law of jurisdiction at common law has been primarily based on the doctrine of \textit{forum conveniens}. It is then very difficult to accept why English courts should interfere with disputes where the connection is tenuous or non-existent. Clearly, in these cases, England is the \textit{forum non conveniens} to render interim relief.

Three conclusions may be inferred from the previous analysis. First, national courts should not use weak connections in order to assert jurisdiction to assist arbitration proceedings.\textsuperscript{200} In the arbitration setting, the arbitral forum, the courts of the seat, and eventually, the courts where the assets are located or where the defendant is domiciled are available to offer, if appropriate, interim relief. In this context, it is worth noting that the risk of illegitimate interference with foreign proceedings is higher in common law legal systems which have implemented a jurisdictional regime primarily

\textsuperscript{194} [1990] 1 QB 202.  
\textsuperscript{195} Lord Collins of Mapesbury and others, \textit{Dicey, Morris and Collins on the Conflict of Laws} (15th edn, vol 1, Sweet and Maxwell 2012) 275.  
\textsuperscript{196} ibid para 8-040.  
\textsuperscript{197} See Adam Johnson, ‘Interim Injunctions and International Jurisdiction’ (2008) 27 CJQ 433, 440. cf L Collins and others (n195) para 8-040.  
\textsuperscript{198} See Ch 3, § 2.2.3.  
\textsuperscript{200} Unless there is strong evidence of international fraud. Some legal systems may decide not to require a substantial connection in these cases. \textit{See Mobil Cerro Negro} (n141) [86], and Ch 3, 2.3.2.
based on a wide discretionary power. Accordingly, courts of common law traditions should be particularly careful in ascertaining whether or not a particular connection is substantial for the purposes of interim relief. Secondly, national courts exceptionally apply illegitimate connecting factors in international arbitration and international litigation. No particular differences or specific patterns have been found in one dispute resolution system as opposed to the other, and therefore, it is not possible to conclude that the long arm of national courts is displayed with more frequency in the context of arbitration than in litigation proceedings. Thirdly, national courts should avoid a differential treatment between arbitration and litigation when it comes to judicial support since the connecting factors adopted by each dispute resolution system are fundamentally the same.

6. Conclusions

6.1. Conclusions on the jurisdictional frameworks of the supporting courts

In the arbitration setting, the general jurisdictional framework of the supporting courts, and the judicial jurisdictional framework to render interim relief have been developed in the opposite way. Even though there may be some exceptions, a majority of legal systems have modernised their jurisdictional regimes as illustrated by the following figures.

![Diagram](image)

**Figure 4.1. Evolution of arbitral connecting factors in general.** First, legal systems adopted a single connecting factor – the arbitral seat – by superseding a plurality of elements that were previously connecting an arbitration to different legal systems (eg, the domicile of the parties or the place of delivery).
Figure 4.2. Evolution of arbitral connecting factors in the context of interim relief.
Once the seat was established as the exclusive arbitral connecting factor, several legal systems perceived that this jurisdictional framework was inappropriate for provisional measures. Thus, on the plane of interim relief, the law of jurisdiction has been developed in the opposite direction. From a single connecting factor – the seat – legal systems have gradually incorporated a plurality of connecting elements primarily based on the principles of presence within the territorial jurisdiction and enforceability, which now coexist with the seat.

6.2. Conclusions on the potential connecting factors to render interim relief in support of arbitral proceedings

This chapter has demonstrated that the seat, the domicile of the defendant, and the location of assets are the preeminent connecting factors according to which national courts may assert jurisdiction. This chapter has also shown that, as a matter of principle, most legal systems do not adopt exorbitant connecting factors to support foreign-seated arbitrations.

The seat of arbitration is, as it was explained, the most appropriate connecting element which distributes primary jurisdiction to render provisional measures between the courts of different fora. The concept of arbitral seat embodies important principles to the arbitration community such as effectiveness and party autonomy. Furthermore, a jurisdictional framework built around the seat ensures fairness and neutrality. The seat offers, in a majority of cases, a neutral forum where the parties may obtain interim relief. A jurisdictional regime of provisional measures exclusively based on connected heads of jurisdiction may not be entirely independent and impartial in cases where: i) such a legal system is the only available forum and ii) if courts are tempted to protect their nationals and local interests. By contrast, the
arbitral seat ensures the existence of, at least, one neutral forum where the parties can obtain, if appropriate, interim relief.

This chapter has also demonstrated that the *forum rei sitae* and the domicile of the defendant allocate secondary jurisdiction to render provisional relief in support of foreign-seated arbitrations. It is worth noting that, in practical terms, the concepts of domicile and *forum rei sitae* adopted by each legal system may be crucial to the assertion of jurisdiction. As regards the domicile in cases where natural persons are involved, in most cases the local concept will not play an important role. Nevertheless, matters are not so simple if the domicile arises with respect to companies or corporations. In these cases, each legal system will determine what is to be conceptualised as a corporate domicile; a matter which will evidently impact on the assertion of jurisdiction. In the European Area, for example, Article 63 of the Brussels I Recast defines the domicile of companies or legal persons as either: the place where the statutory seat is located, the place of central administration or the location of the principal place of business. Even though this provision does not apply to national courts supporting arbitral proceedings, it illustrates the expansive approach that may be adopted by legal systems. And yet, it is possible to adopt an even more extensive approach. A particular legal system, for example, may consider that a company having secondary or branch offices in its territory is subject to the jurisdiction of local courts to render provisional measures. In principle, there is nothing that prevents legal systems from adopting this view as long as the principle of enforceability can be satisfied and if the non-seat courts exercise jurisdictional restraint in favour of the courts of the seat.

Lastly, as regards the location of assets, it has been explained that some legal systems have conceptualised the *forum rei sitae* rule as including both tangible and intangible assets. That said, national courts should exercise caution with respect to the location of intangible assets as demonstrated by the *Sojitz case*. The location

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201 Although legal systems have adopted different concepts of domicile or habitual residence, in most instances, there will not be differences as to the identification, in practice, of the forum where a given person is domiciled.

202 See § 5.
of debts, unless confirmed in judicial proceedings, may be more complicated to be ascertained than the location of tangible assets by way of disclosure orders against banks. On the face of it, it seems appropriate to restrict the application of the *forum rei sitae* rule with respect to the location of intangible assets to exceptional circumstances.

6.3. Recommendations to arbitration users and lawmakers

6.3.1. Arbitration users

Arbitration users should carefully analyse the different potential connections which may point to different *fora* where injunctive relief is effectively available. Of course, one should admit that the identification of the proper connecting factors may not always be a plausible option. Yet, again, cases such as *Sojitz v Prithvi* and *Company 1 v Company 2* demonstrate the waste of resources, money, and time that can be incurred by a party who does not conduct a proper assessment of the potential substantial connections. In *Company 1 v Company 2*, for example, the parties agreed on arbitration, litigation proceedings were pending in the British Virgin Islands, the disputed funds were located in Switzerland, and the arbitral tribunal – not yet appointed – was to be seated in Switzerland. The only element pointing to England was the domicile of Mr A, the person controlling Company 2. In this case, the reasonable observer would have concluded that BVI and, more importantly, Switzerland as the arbitral seat, were more appropriate *fora* than England.203 One of the possible explanations of cases such as *Sojitz* and *Company 1* is that, in their strategies of forum shopping, arbitration users seem to have been attracted by the worldwide police function exercised in exceptional circumstances by courts of common law systems. However, it should be immediately pointed out that if a party adopt this strategy, two important problems are likely to arise: first, in normal circumstances, courts will decline jurisdiction if the connection is tenuous or non-existent, and secondly, even if a court assert jurisdiction, the applicant should consider whether it is convenient to obtain a remedy which is not likely to be enforceable.

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203 *Company 1* (n188) [88].
Finally, a word of caution is in order regarding the conduct of court proceedings to obtain interim relief. In the context of these proceedings, the applicant must ensure that it does not submit the merits of the dispute to the supportive courts. It seems that, in some legal systems of the Middle East, interim relief already granted by local courts can only be maintained if the applicant pursues the merits of the claim before these courts. If the applicant pursues an action on the merits, its conduct will certainly amount to a breach of the arbitration agreement, even if the purpose of the action is simply to confirm the effects of a provisional measure already granted. Two consequences may follow: first, the applicant may risk an anti-suit injunction, or secondly, if the counterparty appears before the supportive courts, the applicant will effectively waive its right to arbitrate. Two authorities can be used to illustrate these effects. In *SRS Middle East FZE v Chemie Tech DMCC*, 204 for example, the English Commercial Court rendered an anti-suit injunction preventing the applicant from submitting the merits of the claim before the courts of the Emirate of Sharjah (UAE), regardless of the fact that the applicant argued that such step was necessary to maintain a provisional measure already granted in its favour. In this case, the applicant accepted its obligation to arbitrate and pursued accordingly its substantive claim before a London-seated tribunal. 205 However, the Commercial Court held that if under UAE law, a provisional measure can only be maintained through a judgment on the merits, such measure should have never been sought there. 206 In a similar vein, in *Final Award of 2002 in ICC Case 10904*, 207 the arbitral tribunal held that the claimant, in order to confirm a court-ordered remedy, effectively submitted the merits of the dispute to the courts of Jordan. In this case, the remedy and its subsequent confirmation were sought before the constitution of the tribunal. When the applicant realised that it went too far, it sought to stay judicial proceedings on the basis of the existence of an arbitration agreement. The respondent, however, appealed the decision by arguing that the claimant had effectively waived its right to arbitrate. As just noted, when the arbitral proceedings were commenced, the tribunal agreed with the respondent and confirmed that the merits were already submitted to the Jordanian courts.

205 ibid [6].
206 ibid [61].
6.3.2. Lawmakers

As to lawmakers, reference should be made here to the different models of jurisdiction proposed in section 3.2.3.

Further guidance can be offered to the European lawmaker as regards the interface between the Brussels Recast and the powers of courts to support arbitral proceedings in the context of interim relief. The starting point is to acknowledge that the current framework is chaotic and, from a legal point of view, impossible to understand. The arbitration exception of Article 1(2) together with the fact that Article 35 includes an explicit reference to cases where other courts have jurisdiction as to the merits, make the Van Uden decision very difficult to defend. By way of further example, in Van Uden, the European Court held that provisional measures do not concern arbitration as such but the protection of a wide variety of rights.208 This conclusion is very odd and it should be abandoned. Although there are some measures related to the subject-matter of the dispute, there are other remedies linked to the procedural rights of the parties in the arbitration, and doctrinally, provisional measures in the arbitration setting are ancillary to arbitration. The European lawmaker should then implement important reforms.

To begin with, as it has already been suggested by some commentators,209 the arbitration exception of Article 1(2) should be repealed. Therefore, a new provision should confer exclusive supervisory and supportive jurisdiction to the courts of the seat210 – supportive and supervisory powers which should be exercised in accordance with local law. Notwithstanding this general principle, Article 35, if kept as it currently stands, would confirm that non-seat courts may render provisional measures in aid of arbitral proceedings, albeit the effects of such remedies would be

208 Van Uden (n175) [33].
210 Hill (n209). This proposal has been already adopted by the EU Commission in a Green Paper (COM April 21, 2009) which was based on the Heideberg Report. However, the EU Parliament rejected it. See, Filip De Ly, ‘The Interface Between Arbitration and the Brussels Regulation’ (2016) 5 AUBLR 485, 498-499.
confined to the territory of the court acting under Article 35. Even though some commentators have argued that the requirement of “real connecting link” should be removed,211 it does not seem reasonable, as a matter of principle, to allow any local court to render provisional measures without any restriction. Even if one admits that the courts of the seat can discharge measures rendered by courts acting under Article 35, there are no legal or policy reasons in support of abandoning the “real connecting link” requirement. That said, the European lawmaker should clearly provide a concept of what constitutes a “real connecting link” for the purposes of Article 35.

The powers of arbitrators to modify or discharge any remedy rendered by the courts of the seat or non-seat countries would be beyond the scope of the instrument. Arbitrators are generally reluctant to modify or suspend any court-ordered remedy. Accordingly, the role of the courts of the seat might be essential to minimise the effects of potential conflicts of jurisdiction and to ensure the integrity of the arbitration process. Indeed, the Regulation may include that, if the tribunal seeks assistance from the courts of the seat, these courts should be permitted to modify or suspend remedies rendered by non-seat courts – and obviously, their own remedies – in cases where the tribunal considers that the supportive measures are not really supportive. There might be some concerns as to the constitutionality of this proposal but, as Hill argues, it should be noted that the only rationale of conferring powers to non-seat courts is to assist the conduct of an arbitration.212 So, if the tribunal considers that the remedy is obstructive or unhelpful, one cannot see how the power to discharge such measure would impact on the judicial sovereignty of a Member State that can only intervene to assist the conduct of a foreign-seated arbitration.

Finally, it should be pointed out that under this European framework, provisional and protective measures rendered by the courts of the seat would be subject to free

212 Hill (n209).
circulation within the European Area. By contrast, in a great majority of legal systems, interim relief ordered in support of arbitration is not automatically enforceable.

213 Recital 33 and Art 2(a) of the Recast. See also Nigel Blackaby and Constantine Partasides, Redfern and Hunter on International Arbitration (6th edn, OUP 2015) para 5.131.
CHAPTER 5

Jurisdiction and competence of arbitral tribunals to render provisional and protective measures

1. Introduction

The analysis and legal discussion in chapters three and four were primarily focused on adjudicatory jurisdiction. Even though aspects related to the competence of national courts were also analysed, the main interest for private international law as a court-centred discipline is adjudicatory jurisdiction. By contrast, in international arbitration, the study of the powers of arbitrators is a critical undertaking. When arbitration scholars and tribunals use terminology such as “jurisdiction to render interim relief” they do it in a different sense to the meaning usually attached to that expression by the conflict of laws. In most instances, this terminology is used to simply refer to the procedural powers of arbitrators to grant provisional and protective measures.

In its simplest terms, this chapter examines the sources of the procedural powers or competence of arbitral tribunals with jurisdiction on the merits to render interim relief. Where national courts are involved in both arbitration and litigation, there is no need to discuss the identification of the source of judicial powers – this is simply, the lex fori or the lex arbitri. By contrast, in the context of arbitral tribunals, determining the source or sources of arbitral authority is an undertaking of paramount importance. In fact, these sources will dictate whether the tribunal exercising jurisdiction over the merits has also the authority to grant injunctive relief. One of the most striking
differences between tribunals and courts is that where an arbitral tribunal has jurisdiction over the parties and over the subject-matter, it does not follow that the said tribunal has also the authority to render provisional measures, either generally or with respect to a specific type of remedy. Accordingly, the study of the competence or procedural powers of arbitrators\(^1\) is an essential enterprise in the arbitration setting. This does not mean, however, that adjudicatory jurisdiction is not important in the context of the arbitral authority to render interim relief. As a matter of principle, an arbitral tribunal shall have jurisdiction over the parties in order to render provisional and protective measures. Without adjudicatory jurisdiction, the tribunal cannot exercise any power.

This chapter is divided into four sections and two schedules. Section 2 explores the different approaches of commentators on the authority of arbitral tribunals to render provisional and protective measures. Section 3 analyses the conclusions of a study comprising a total of 52 procedural orders and arbitral awards. The aim of this section is twofold: first, to examine how the issue of arbitral authority to render interim relief is addressed, in practice, by arbitral tribunals and, secondly, to compare the results of this study with the approaches adopted by commentators in section 2. The detailed description of every arbitral decision scrutinised as part of this study can be found in Schedule I. Finally, section 4 concludes. As part of these conclusions, Schedule II incorporates a toolkit developed in accordance with the results of this study which aims to provide clarity and guidance to arbitral tribunals when drafting an order or award on interim measures.

2. The approaches of commentators

Classifying scholarly opinion into different theoretical models has been a daunting exercise. The approaches of commentators are sometimes utterly self-contradicting and there seem to be as many approaches as scholars writing on this matter. Furthermore, some of these theoretical models appear to be more aspirational than descriptive of current arbitral practice. Having said that, after a detailed analysis, six

\(^1\) See Ch 2, § 3.
competing approaches based on six different sources to render injunctive relief have been identified. These theoretical models are based on the following sources: inherent and implied powers of arbitrators, international principles or standards, the agreement to arbitrate, the arbitral seat, the agreement and the seat as concurrent sources, and finally, a variation of the concurrent model where priority is put on the arbitration agreement.

2.1. Inherent and implied powers of arbitrators

Several scholars have argued that national law fails to respond to the requirements of international arbitration. Because arbitration is an autonomous system, the element conferring authority to render interim relief can be provided by arbitration itself rather than by national systems of law, even in cases where the parties do not explicitly vest the power to render interim relief in arbitrators. Thus, this theoretical model attempts to justify the power of arbitrators in cases where there are lacunae in the alleged self-sufficient regime created by the arbitration agreement and the applicable institutional rules, and regardless of the concept of arbitral seat.

Within this line of thought, two possible sub-models can be developed on the basis of the distinction between inherent and implied powers. On the one hand, some scholars, international associations and US courts have acknowledged the power of arbitrators to grant interim relief on the basis of an inherent power. In Certain Underwriters at Lloyd’s v Argonau, for example, one of the main issues was to

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2 See Ch 4, § 1.1.1.c).
3 Margaret L Moses, ‘Inherent and Implied Powers of Arbitrators’ in Julio Cesar Betancourt (ed), Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators (OUP 2016) 211.
5 See the Report of the 2014 International Law Association (ILA) Conference on Inherent and Implied Powers, and the ILA Resolution 4/2016. The Report includes on page 8 the following statement without further citation: “tribunals have repeatedly cited their inherent powers to justify grants of interim relief”. Paradoxically, a report on international commercial arbitration explains, under the subheading of “Power to Issue Interim Relief”, the inherent authority of the International Court of Justice, the Iran-US Claims Tribunal (investor-state and state responsibility), and tribunals constituted under the ICSID Rules (investment arbitration). No reference is made under the said subheading to international commercial arbitration.
decide on the authority of arbitrators to require payment into an escrow account to serve as security for the final award. In this case, a US court considered that the said authority “may be (...) derived implicitly from the panel’s power to ensure the parties receive the benefit of their bargain”. In light of the above, it is possible to conclude that the source of the alleged inherent power of arbitrators is not the arbitration agreement but the status of the tribunal as the organ entrusted with the resolution of the dispute. Similarly, in Charles Construction v Derderian, another US court accepted that arbitrators have both inherent and implied powers in the absence of agreement or statute to the contrary. However, there are several practical and conceptual problems regarding this approach. First, the concept of inherent jurisdiction is very controversial in legal systems of the Civilian tradition which may not enforce arbitral decisions based on such powers. In these legal systems, the principle of legality ensures that every exercise of power has a statutory foundation. As it can be seen, the theory of inherent powers is circular since its goal is to avoid the application of national law but, paradoxically, it relies on a common law concept alien to civil law jurisdictions. If international arbitration is to be considered as an autonomous system, one may ask whether it is acceptable to adopt a legal concept that will render arbitration ineffective from a practical point of view, only to ensure theoretical autonomy through delocalisation. Furthermore, Hausmaninger has identified a second problem: from a conceptual point of view, the exercise of powers that have not been conferred by the parties is in contradiction with the contractual nature of arbitration and, therefore, with party autonomy.

On the other hand, it is possible to argue that the arbitration agreement impliedly confers authority to render interim relief. Unlike inherent powers, implied powers are based on the implicit consent of the parties. The concept of implied powers derives then from the assumption that the parties, as rational businesspeople, implicitly

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8 ibid 937.
13 ibid 93.
14 ibid 94.
agree to confer arbitrators all necessary powers to determine their dispute. Whilst several scholars have acknowledged the role of the arbitration agreement as providing implied powers to arbitrators, other commentators such as Hausmaninger and Boog have argued against this development. Hausmaninger, for example, considers that concerns of sovereignty and the consensual nature of arbitration speak against this approach as a general jurisdictional theory. However, these are not solid arguments since implying a power from the arbitration agreement is not necessarily against the consensual nature of arbitration but rather, an attempt to enforce party autonomy. By contrast, the potential rejection of the theory of implied powers seems to rest in practical considerations. Indeed, a majority of legal systems allow tribunals to render interim relief and therefore, resorting to the theory of implied powers would not be necessary. Furthermore, if the law of the seat prohibits arbitrators to grant provisional measures, such a prohibition would be mandatory, and it would override any presumption and the arbitration agreement itself. As it can be seen, the theory of implied powers would have, in practical terms, a very limited application.

In addition, from a conceptual point of view, this theory does not explain the current arbitration model. As already anticipated, this theoretical approach appears to disregard the significant role played by national law as part of the current arbitral framework. In this context, it is important to note that the law of the seat may prohibit or impose limitations on the authority of arbitrators. In fact, these obstacles have been also identified by the supporters of the agreement-based theory. If the law of the seat is silent regarding the authority of arbitrators to grant interim relief, implied powers may be inferred from the arbitration agreement since there are no

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16 Hausmaninger (n12) 94.
17 Christopher Boog, 'The law governing interim measures in international arbitration' in Franco Ferrari and Stefan Kröll (eds), Conflict of Laws in International Arbitration (Sellier European Law Publishers 2010) 413.
18 Hausmaninger (n12) 94.
19 Boog (n17) 414.
20 See, eg, Yesilirmak (n9) 58, and Born (n15) 2459.
21 See Charles Construction (n10).
prohibitions or limitations. By contrast, if the law of the seat prohibits arbitrators to render provisional remedies, can the authority of arbitral tribunals be inferred from the agreement to arbitrate? If arbitrators grant interim relief in these cases, are they ensuring the enforceability of their decisions as required by a great majority of institutional rules?

Although the supporters of this theory have exclusively focused their analysis on the arbitration agreement, implied powers can also be inferred from the relevant applicable legislation. In the context of domestic arbitration, this situation can be illustrated by the decision of the Quebec Court of Appeal in Nearctic Nickel Mine v Canadian Royalties. The Court noted that the Quebec Code of Civil Procedure, which governs domestic arbitration, was silent on the power of arbitrators to order injunctive relief and held:

“it would be hard to believe that arbitrators would need specific authorization from the parties to grant provisional remedies. First, it would seem that the legislature could have explicitly excluded that power if it so desired. Second, section 17 of the UN Model Law (governing international arbitration) specifically allows for such measures. (…) Why should domestic arbitration follow different rules?”

As it can be seen, this is an example of implied powers derived from national law – the Model Law was incorporated into Quebec law – in a case where there was no prohibition or limitation on the authority of arbitrators. However, as just noted, this jurisdictional model relies on the powers implicitly conferred by the parties rather than by national legislation. This is so for the simple reason that the supporters of delocalised arbitration would not accept implied powers emerging from national law.

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22 In practice, this is an unlikely scenario since a majority of legal systems either expressly permit or prohibit tribunal-ordered relief.

23 See ICC Rules, Art 42; LCIA Rules, Art 32.2; HKIAC Rules, Art 13(10); and SIAC Rules, Rule 41(1).

24 Moses (n3) 214.

25 2012 QCCA 385.

26 ibid [52]-[53].
2.2. International standards and general principles of international arbitration law

By emphasising the self-sufficient nature of the international arbitration legal order, certain scholars have suggested that the powers of arbitrators to render provisional measures are not dependent on municipal systems of law. Lew, for example, has argued that tribunals typically do not look to any national law in considering whether they possess the authority to order interim relief. After conducting a detailed analysis of two ICC awards, Lew concludes that arbitrators normally apply international standards to discern whether they have powers to grant injunctive relief. Among the so-called international standards, general principles of international arbitration law are the main source under which this model is based.

However, the award in *ICC Case 7210*, one of the examples used by Lew to illustrate his model, does not support the conclusion that arbitrators apply “international arbitration practice” or general principles to their authority to render injunctive relief. In this case, the main problem was to determine whether the tribunal had the authority to grant two injunctions preventing a state from making any disposition of the mineral rights in any part of the territory covered by five licence concessions granted to the claimants. The tribunal applied the 1988 ICC Rules to conclude that it had “jurisdiction” to render the said remedies. Yet, this set of rules, in contrast to the 1998 Rules, did not expressly confer arbitral authority to render provisional remedies. In this context, it is important to note that the tribunal referred to the fact that the defendant, State X, accepted the jurisdiction of the tribunal in the

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29 Lew (n27) para 43.
30 Some commentators, by failing to distinguish between commercial, investment and state-to-state arbitration, have acknowledged that the authority to order interim measures is a general principle. See, eg, Donald Francis Donovan, ‘Powers of Arbitrators to Issue Procedural Orders, including Interim Measures of Protection, and the Obligation of Parties to Abide by Such Orders’ (1999) 10 ICC Ct Bull 57, [III.A].
31 See (n28).
Terms of Reference, but it is not clear whether that meant personal jurisdiction or the power to render interim relief. If State X submitted to the jurisdiction of the tribunal, it does not follow that the said tribunal had procedural powers or competence to render an interim injunction against a given state. Unfortunately, no reference was made to France – the arbitral seat – to ascertain whether the tribunal had powers, under the \textit{lex arbitri}, to render the particular remedy. On the one hand, the defendant argued that according to the applicable law to the merits, injunctive relief against a state was prohibited. On the other hand, the claimant argued that such relief was possible under principles of international law. The tribunal argued:

"By virtue of the [1988] ICC Rules, the parties have submitted themselves \textit{ipso facto} to ICC rules insofar as this arbitration is concerned. [...] ICC Rules do not restrict the powers of an arbitrator where the granting of conservatory or injunctive relief are concerned."

But what about the \textit{lex arbitri}? Did French law restrict the powers "implicitly" conferred by the 1988 ICC Rules?

Leaving aside the appropriateness of the decision, it is important to note that the tribunal did not apply international standards to the question of its authority. Rather, the tribunal applied principles of arbitration law when deciding on the applicability of the substantive condition of "irreparable harm". Simply put, the tribunal resorted to general principles to decide whether the injunction against State X had to be granted if an award on damages could compensate the irreparable harm suffered by the claimants.

Not surprisingly, the conclusion of Lew has been doubted by several commentators. Born, for example, argues that this model conflates the law governing the powers of arbitrators to grant interim remedies with the applicable law to the substantive standards\textsuperscript{34} which need to be assessed in order to render a particular remedy.\textsuperscript{35} The better view is then to distinguish between, on the one hand, the authority of

\textsuperscript{33} ICC Case 7210 (n28) [28].

\textsuperscript{34} Lew made this unfortunate error in 'Commentary on Interim and Conservatory Measures' (n27) [23]-[24].

\textsuperscript{35} Born (n15) 2459.
arbitrators, and on the one hand, the substantive requirements such as urgency, irreparable harm or *prima facie* case which may be assessed by the tribunal on the basis of international standards. By way of further example, in *Procedural Order No. 5 of ICC Case 11613*, the tribunal appears to apply legal principles such as judicial efficiency, procedural economy and sufficient protective interest in order to decide if it possesses the power to render a remedy in a case where a New York court had previously rejected such an application. Nevertheless, these principles are applied, rather than to the authority of the tribunal, to the assessment of the preclusive effect of a judgment on the admissibility of the application under which injunctive relief was sought. By contrast, the tribunal applied Article 183 PILA to determine that nothing under Swiss law limited its power to render interim relief and, therefore, to assert authority in light of the law of the arbitral situs.

In sum, it is doubtful that the aforementioned principles govern the powers of arbitrators to render provisional measures. International standards may be applied to the substantive conditions or requirements of the remedy sought in the particular circumstances of the case, or to the assessment of the admissibility of an application for injunctive relief. However, as it will be demonstrated, a majority of tribunals do not apply international standards to the question of their authority to render interim measures.

2.3. The arbitration agreement

International arbitration is a consensual method of dispute resolution. One possible starting point in order to ascertain the element conferring arbitral authority to render interim relief is then the principle of party autonomy. In this context, many scholars

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37 In this case, even the tribunal acknowledged that the principles are part of Swiss law rather than arising from the international legal order.
38 See § 3.2.
39 Under this subsection, as well as under § 2.5, “arbitration agreement” should be widely construed as including institutional rules adopted by the parties. *Sensu stricto*, arbitration rules are contractual clauses incorporated by the parties into their agreement.
have held that an arbitral tribunal does not get its “jurisdiction” from national legislation but from the agreement between the parties. Casey, for example, argues that:

“An arbitral tribunal does not need legislation to give it jurisdiction. (…) The arbitrator does not need [national] arbitral law to give him or her either the power to make a decision or the power to craft any remedy that seems appropriate. That jurisdiction comes from the parties.”

At first blush, this model appears to satisfactorily explain the authority of arbitrators as a result of elements such as the arbitration agreement and the institutional rules adopted by the parties. Furthermore, one must admit that this model is intuitively attractive since it is based on the main foundation of international arbitration law. On closer examination, however, it is possible to conclude that this approach is clearly incomplete. To begin with, this theoretical model does not explain the arbitral framework currently in force in legal systems such as China, Italy, or the Czech Republic where the power to grant provisional measures is exclusively vested in courts and, therefore, where any arbitral decision to the contrary could be vacated by the courts of the seat. Logically, if an international arbitration is seated in these legal systems, the agreement of the parties would be irrelevant in delimiting the powers of tribunals to render injunctive relief. The academic and policy debate surrounding the appropriateness of this approach is, of course, a different matter.

40 “Jurisdiction” understood in general terms, as power.
42 Civil Procedure Law of the People’s Republic of China with amendments dated as of 27 June 2017, Art 272, unofficial translation <www.cicc.court.gov.cn/html/1/219/199/200/644.html> accessed 29 April 2021. Under this provision, the arbitral institution registered in China shall submit the application for interim relief to the Intermediate People’s Court of the place where the defendant is domiciled or where the property is located.
43 Codice di procedura civile, Regio Decreto 28 ottobre 1940, n 1443, Art 818 (Italian Code of Civil Procedure). In November 2021, the Italian Parliament has passed enabling legislation in order to amend this provision. Expectedly, arbitrators will soon have the authority to render interim measures in the context of arbitrations seated in Italy. See, Alberto Pomari, ‘The Reform of Italian Arbitration Law’ <www.conflictoflaws.net/2021/the-reform-of-italian-arbitration-law> accessed 1 December 2021.
Furthermore, it is doubtful that the arbitration agreement creates a self-contained and self-executing legal regime conferring every power to arbitral tribunals. In fact, the power to render provisional remedies can be vested in arbitrators exclusively as a result of the operation of the law of the seat. As it will be explained, in *ad hoc* arbitration the authority of arbitrators to grant interim remedies is normally the result of the *lex arbitri* rather than the agreement to arbitrate. Similarly, even if the arbitration agreement or the applicable institutional rules explicitly incorporate the power to render interim relief, doubts may arise as to whether arbitrators have the authority to render a particular type of remedy such as, for example, Mareva-style injunctions or *ex parte* relief. In these cases, other sources may be scrutinised and the *lex arbitri* is, undoubtedly, an appropriate instrument that may be concurrently applied in order to ascertain the powers of arbitrators.

Finally, a related issue to consider under this theoretical model is the adoption by the parties of exclusion agreements which would impact on the procedural powers of arbitrators. Although there seems to be a widely extended presumption that arbitration agreements actively confer arbitral authority to render provisional remedies, that is not always the case. It is well established, however, that an arbitration agreement can either limit or exclude tribunal-rendered relief. Under the expression “unless the parties have otherwise agreed”, exclusion agreements are allowed by most institutional rules and by a great majority of legal systems. In particular, after court decisions such as *Gerald Metals* which has been perceived by some arbitration users and practitioners as an excessive limit to court-ordered relief, parties might be ready to shift towards the exclusion of emergency arbitration and, in general, of tribunal-granted relief in favour of national courts. In fact, in legal systems such as Scotland and England, where court proceedings are seen as a fast and effective way of obtaining and enforcing interim measures, the said development might be already taking place.

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45 See, eg, ICC Rules, Art 28(1); English Arbitration Act, ss 38 and 39; and SAR, Rule 53.
46 [2016] EWHC 2327 (Ch).
2.4. The law of the seat

Several authors such as Poudret and Besson reject the role of the arbitration agreement as the main source of the powers of tribunals, and argue that arbitral authority in the realm of interim protection of rights arises and “depends on the lex arbitrii of the seat”.48 The rationale of this theory is that for these scholars, “jurisdiction to grant provisional measures” is different from the power of arbitrators to decide on procedural matters.49 Since the power to grant injunctive relief is not a matter of procedure but a proper jurisdictional issue, the authority of arbitrators cannot be presumed in the absence of a specific basis in the law of the seat.50 By classifying this matter as jurisdictional, Poudret and Besson seem to ensure the applicability of the territorial theory according to which arbitrators cannot arrogate to themselves, nor can the parties confer any such power unless explicitly authorised by the law of the seat. Only two potential scenarios could arise under this model: either the seat allows arbitral authority or prohibits it. The French legal system was, in this context, used to illustrate their model. Prior to the adoption of Article 1468 of the Code de Procédure Civile which explicitly confers arbitral authority to render provisional measures, France had no statutory provision regarding such powers. In order to avoid this unfortunate lacuna, arbitral authority was justified by preeminent scholars on the basis of implicit jurisdiction.51 Yet, for Poudret and Besson, this assumption was questionable on the basis that the power to render interim relief could not be exercised by arbitrators unless the legislation of the seat explicitly authorised it.52

Whilst this model might explain the jurisdictional framework of legal systems that are not “arbitration-friendly”, certainly, it does not reflect the current status of arbitrators and their powers in a great majority of legal systems. The institution of emergency arbitration can be used as an example to demonstrate that an explicit transfer of

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49 ibid 522.
50 ibid.
51 See Emmanuel Gaillard and John Savage (eds), Fouchard, Gaillard and Goldman on International Commercial Arbitration (Kluwer 1999) [1314].
52 Poudret and Besson (n48) 522.
powers is not always required. To date, only several countries and territories have legislated on the powers of emergency arbitrators to render pre-arbitral relief. In contrast, many legal systems seem to have enforced agreements of the parties with respect to emergency proceedings, although no explicit transfer of powers was implemented by the local arbitration act. India, for example, has recently adopted this approach.

By way of further example, in England, the Gerald Metals decision illustrates how English courts enforce emergency arbitration even if the 1996 Arbitration Act does not make a single reference to pre-arbitral proceedings. Finally, it is important to note that, in many other legal systems such as Canada or the US, to name just a few, practitioners have reported that local courts will probably enforce the powers of emergency arbitrators to render urgent relief regardless of the existence of transfer of powers in the applicable lex arbitri. In sum, the theoretical model based on the arbitral situs as the only source of powers to render interim relief requiring explicit authorisation is simply an outdated approach that does not reflect current arbitration practice.

2.5. The seat and the arbitration agreement as concurrent sources to render interim relief

This concurrent model propounds that the arbitration agreement and the law of the seat determine the powers of arbitral tribunals to render interim measures. This approach has commanded widespread support among legal commentary, national courts and arbitral practice. In the words of a leading scholar:

53 See Ch 6, § 3.3.
54 Amazon.Com NV Investment Holdings v Future Retail Limited, Civil Appeal Nos 4492-4493, 6 August 2021 (SC, India).
56 See Ch 6, § 3.3.3.
57 See (n39).
59 See the authorities cited by Born (n15) 2458, footnote 192.
60 See, eg, Award by Consent in ICC Case 11443, Collection of ICC Arbitral Awards 2001-2007 (Kluwer 2009) 335; Order in A SpA (Italy) v B AG (Germany) Geneva Chamber of Commerce (2001) 19 (4) ASA Bull 745;
“the authority of arbitrators to make interim protection orders may derive either from (...) the law of the place where the arbitration takes place or from the arbitration agreement itself.”

On the one hand, it is not enough to simply refer to the agreement to arbitrate since the law of the seat may, first, limit or exclude the powers otherwise conferred by the parties. Accordingly, the identification of the relevant lex arbitri is of paramount importance to determine whether the legal system where the arbitration is seated has implemented a partial or general prohibition of arbitrator-rendered relief. By way of example, whilst section 593(4) of the Austrian Code of Civil Procedure prohibits ex parte remedies granted by arbitrators, Model Law countries do not incorporate the said restriction. Thus, arbitral tribunals sitting in Model Law systems would possess the authority to issue ex parte measures as defined by Article 17 of the Model Law in its 2016 version. Secondly, in the absence of express agreement by the parties, the lex arbitri may confer arbitral authority to render provisional measures. This situation is particularly prevalent in ad hoc arbitration. As it can be seen, the arbitral seat has two different roles depending on the circumstances of each case: it can either limit the powers of arbitrators regardless of the arbitration agreement and the institutional rules adopted by the parties, or it can confer such powers in cases where the parties have not made any arrangements with respect to tribunal-rendered remedies.

On the other hand, the law of the seat may not be the relevant element to determine or assess whether arbitrators have authority to render provisional remedies – unless, of course, the lex arbitri prohibits any tribunal-ordered relief – since the parties may exclude the non-mandatory or default provisions of the seat which would otherwise


63 See, eg, New Zealand Arbitration Act 1996, s 2(1). This Act incorporates the Model Law with 2006 amendments.

64 These remedies are called “preliminary measures” and may have limited practical importance since they are not judicially enforceable. See 2006 Model Law, Arts 17B and C.

65 In such a case, that would be the end of the matter. cf Born (n15) 2460 and Boog (n17) 418-419.
permit arbitral interim relief. In these cases, the arbitration agreement, rather than the law of the seat, would be the relevant source to examine.

Central to this theoretical model is the observation that, if comprehensive research on the authority of tribunals to render provisional relief is conducted across different legal systems, it is possible to identify, in principle, four different scenarios.

2.5.1. Arbitral authority restricted or prohibited by the law of the seat

Several legal systems such as China or Italy have adopted a general and mandatory prohibition of tribunal-rendered relief.\(^{66}\) Even though legal systems adopting this approach are currently a minority, a comprehensive analysis of arbitral authority must not obviate this potential scenario.\(^{67}\) In principle, if an arbitration is seated in these legal systems, the only option is to seek provisional remedies before national courts, either those of the seat or outside the seat. The lack of arbitral authority is not, of course, something automatic. According to the widely recognised principle of kompetenz-kompetenz, arbitrators have the power to determine and rule on their own jurisdiction. “Jurisdiction” in this context should be widely construed as incorporating jurisdiction over the parties and competence. Therefore, the existence of arbitral authority would, in theory, depend on the decision of the tribunal. In this regard, Petrochilos has explained that:

\(^{66}\) In other legal systems such as Thailand and Israel, there is no explicit prohibition of arbitrator-rendered relief but doubts remain since the respective arbitration acts do not confer arbitrators the power to render interim measures. Section 16 of the Thai Arbitration Act, for example, conversely to what Gary B Born has incorrectly reported in International Commercial Arbitration (3rd edn, Kluwer 2021) 2619, does not prohibit arbitral interim relief, but it confers Thai courts the same powers to render interim measures in arbitration as in litigation proceedings.

\(^{67}\) A great majority of legal systems that have been traditionally used as examples to illustrate this prohibition have already modified their arbitration legislation: Greece, Quebec, and Brazil are no longer prohibiting tribunal-granted remedies. Argentina, incorrectly reported in Nigel Blackaby and others, Redfern and Hunter on International Arbitration (6th edn, OUP 2015) para 7.16 as prohibiting tribunal-rendered relief, did modify its legislation in 2014. However, this amendment is an example of poor legislative technique: Article 1655 of the Civil and Commercial Code explicitly confers arbitral powers to render interim remedies, but Article 753 of the Civil and Commercial Procedural Code which prohibited tribunal-rendered relief, has not been repealed. That said, there is no doubt that, in Argentina, arbitral tribunals have the authority to render provisional measures.
“arbitrators invariably rule that if the law of the seat prohibits them to order interim protection (whether generally or in respect to a specific measure) they have no such jurisdiction.”68

This matter, however, is not entirely settled and, from a practical point of view, a tribunal might render a provisional remedy even if the lex arbitri prevents it from doing so. Indeed, some commentators have questioned whether the approach put forward by Petrochilos is the correct one to take. Born69 and Boog,70 for example, have recommended tribunals to assert authority regardless of the prohibition set out by the lex arbitri.71 However, this proposal creates serious theoretical and practical problems.

To begin with, from a legal point of view, this is a very dangerous approach that would open the possibility to recognise a discretionary power of arbitrators to disregard and reject any mandatory provision of the law of the seat. Secondly, this approach, if followed, is likely to create practical problems such as the possibility of annulment by the courts of the seat.72 As a matter of principle, arbitrators should be reluctant to grant any decision that could be subsequently annulled by the courts of the seat. In fact, it should be pointed out that most institutional rules impose a duty

69 Born (n15) 2460.
70 Boog (n17) 418-419.
71 cf Raymond J Werbicki, ‘Arbitral interim measures: Fact or fiction?’ (2002) 57 (4) Dispute Resolution Journal 62, 68; who argues that whether arbitral interim relief is fact or fiction depends on the procedural law applicable to the arbitration.
72 Whether interim measures can be subject to annulment proceedings depends on the legal system where such remedies are rendered. On one side, many legal systems allow the annulment of arbitrator-rendered provisional measures. In the US, for example, the landmark case is Southern Seas Navigation v Petroleos Mexicanos of Mexico City 606 F Supp 692 (SDNY 1985) where it was held that “if an arbitral award of equitable relief [which finally disposes of an independent claim] (...) is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made”. See also Restatement of the US Law of International Commercial and Investor-State Arbitration, s1.1(a) (2019), Ecopetrol SA v Offshore Exploration 46 F Supp 3d 327 (SDNY 2014), and British Insurance Co of Cayman v Water Street Insurance 93 F Supp 2d 506 (SDNY 2000). Similarly, in Spain, Art 23(2) of the Arbitration Act provides that, whatever their form, interim measures are subject to setting aside proceedings in Spain. See also Art 17(1)(a)(iii) of the 2006 Model Law. By contrast, in other legal systems, provisional measures cannot be annulled. In Ontario, for example, the Court of Appeal rejected to set aside an order for security for costs in Inforica Inc v CGI Information Systems [2009] ONCA 642. Finally, in other legal systems, this issue seems far from settled. See, eg, the following conflicting decisions in France: Judgment of 7 October 2004, Paris Cour d’appeal 2005 Rev arb 737 (an arbitrator-rendered remedy was an award subject to annulment) and Judgment of 6 December 2001, Cour de Cassation civ 2e 2002 Rev arb 697 (an order appointing an expert was not subject to annulment).
on arbitrators to ensure that their decisions are, to the possible extent, enforceable in a court of law;\textsuperscript{73} and paradoxically, disregarding mandatory provisions of the \textit{lex arbitri} is not a contribution towards that duty. Thirdly, the proposal of Born and Boog would not just render arbitral decisions on interim relief ineffective and reliant on cross-border judicial enforcement but would create an unnecessary problem. A general prohibition of arbitrator-rendered relief is traditionally seen as an obstructing development towards arbitration and party autonomy. In most cases then, it is reasonable to assume that arbitration users would avoid the choice of these legal systems as arbitral seats.\textsuperscript{74} Fourthly, this proposal cannot be applied in cases where the applicable institutional rules clearly determine that the mandatory provisions of the seat displace or override the applicable arbitration rules. For example, Article 26(1) of the Rules of the Milan Chamber of Arbitration provides that arbitrators have the power to render interim measures “that are not barred by mandatory provisions applicable to the proceedings”. By way of further example, Section 25(3) of the Rules of the Czech Arbitration Court, vest the power to render provisional measures in arbitrators, “unless the competence to take such measures belongs to a court of law”.\textsuperscript{75} Finally, the proposal of Born and Boog should be assessed in light of the fact that a mandatory and general prohibition of arbitrator-rendered relief is currently in force in a minority of legal systems.

In a similar vein, at the very end of the spectrum, other scholars have obstinately insisted on enforcing the alleged will of the parties at any cost, and irrespectively of the practical or pragmatic consequences that this approach may have to the enforceability of arbitral decisions. Pierre Mayer, for example, has argued in general terms that arbitrators may refuse, “in the name of what they conceive to be international public policy, to apply a mandatory rule of law by reason of its content”.\textsuperscript{76} So, if there is a conflict between the institutional rules adopted by the parties and the arbitration legislation of the seat, some commentators may be ready to support the former over the latter. This line of reasoning may be developed on the

\textsuperscript{73} See (n23).
\textsuperscript{74} Nor will tribunals or administering arbitral institutions designate these legal systems as seats in the absence of agreement by the parties. See § 3.2, Finding 1.
\textsuperscript{75} Not surprisingly, these provisions are normally found in the rules of institutions registered in legal systems where tribunal-granted relief is prohibited or strictly limited.
\textsuperscript{76} Pierre Mayer, ‘Mandatory Rules of Law in International Arbitration’ (1986) 2 Arb Int 274.
basis of the status of arbitrators as “agents” of the parties. Indeed, it might be possible to argue the questionable proposition that arbitrators must give the parties the benefit of their bargain even if that is in contradiction with the mandatory provisions of the arbitral situs. However, it should be remembered that: i) party autonomy can never be absolute, ii) by selecting an arbitral seat, the parties have subjected themselves to the mandatory arbitral provisions of that legal system, and iii) obtaining enforceable orders and awards is the raison d'être of arbitration.

2.5.2. Arbitral authority excluded by the arbitration agreement

Two different situations can be identified under this second scenario. First, where institutional arbitration is agreed, the parties can normally disapply the non-mandatory provisions of the relevant set of institutional rules. Arbitration rules, like national arbitral legislation, incorporate mandatory provisions that cannot be excluded by the parties. If the parties insist to exclude any of these provisions, the given institution will normally cease to administer the proceedings. In this context, it is important to note that the provisions conferring arbitral authority to render interim relief are recognised as non-mandatory by virtually all sets of arbitration rules. Article 28(1) of the ICC Rules, for example, is a non-mandatory provision that incorporates the power of arbitrators to issue interim relief under the formula “unless otherwise agreed by the parties”.

Secondly, in ad hoc arbitration, the parties are normally allowed to exclude the applicable provisions of the law of the seat which would otherwise confer arbitral authority to render provisional relief. In legal systems where some form of arbitrator-rendered relief is permitted, the provisions conferring arbitral powers to issue interim remedies are usually non-mandatory and, therefore, private agreements excluding

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79 Poudret and Besson (n48) 70.
tribunal-rendered relief are deemed acceptable and widely enforced. In practical terms, one might have assumed that these types of agreements are the exception rather than the general rule. In fact, it seems reasonable to assume that if the parties excluded the intervention of national courts by submitting their dispute to arbitration, they intended every aspect of their dispute to be decided in the arbitral forum. However, as already explained, the fast and effective judicial framework of interim relief of some legal systems, together with the perception of arbitration users who may consider that recent judicial decisions are giving priority to the arbitral forum over courts, may contribute towards the development of exclusion clauses.

2.5.3. Arbitral authority actively conferred by the arbitration agreement

International arbitration is primarily a consensual method of dispute resolution, that is to say, there cannot be arbitration without an arbitration agreement. Therefore, it has been rightly observed that the powers of arbitrators to render provisional measures may be conferred by the agreement to arbitrate, either expressly in the form of a clause included within the agreement itself, or through the adoption of institutional rules. From a practical point of view, arbitral authority is, in most cases, conferred by the operation of a given set of institutional rules. Dispute resolution clauses are frequently referred to as “midnight clauses”. After a long and daunting process of pre-contractual negotiation between the parties, little time is usually devoted to negotiations related to the avoidance or resolution of potential disputes. Accordingly, it is reasonable to expect that, in a great majority of cases, arbitration clauses do not include any express reference to the particular powers of arbitrators. Institutional arbitration rules have then emerged, among other reasons, to fill these lacunae.

As discussed above, the arbitration agreement is one of the main sources which actively confers arbitral authority to render interim measures albeit only within the limits permitted by the relevant law. However, as already explained, some commentators have argued against the restrictions imposed by the lex arbitri if such mandatory provisions contradict the agreement of the parties. The better view is, however, to acknowledge that “any excess of power granted over and above that
allowed by the relevant law is invalid even if it is contained in international or institutional rules of arbitration”. Likewise, the same applies to a specific clause or provision inserted by the parties into their arbitration agreement.

2.5.4. Arbitral authority actively conferred by the law of the seat

This last alternative may arise where the parties have adopted *ad hoc* arbitration but no agreement has been reached regarding interim relief. In these cases, without the *lex arbitri*, there would not be an “extension” of powers in favour of arbitral tribunals unless one adopts the theory of inherent and implied arbitral powers which, as it has been shown, is highly controversial. It follows that, in *ad hoc* arbitration, the power of an arbitral tribunal to render interim relief is, in most instances, being actively conferred upon it by the law of the seat.

2.6. The law of the seat as a restriction to the assertion of powers by arbitral tribunals

One distinct theory but based on the previous approach is the model according to which the provisions of the law of the seat on the authority of arbitrators are considered as restrictions or limits to the powers granted by the parties in their arbitration agreement. Rather than a model based on two interconnected sources, the emphasis now shifts to the arbitration agreement as the primary source of arbitral powers. Furthermore, these commentators have acknowledged a limited role of the law of the seat albeit, first, “dressed up” as a choice-of-law problem, and secondly, limited to the inexistence of conflicts with the contractual arrangements adopted by the parties.

Intuitively, one may assume that the choice-of-law approach of this model to the authority of arbitrators derives from the inexistence of arbitral forum. If it is assumed that an arbitral tribunal obtains its authority from the arbitration agreement rather

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80 Blackaby and others (n67) para 5.08.
81 Unless the parties have adopted the UNCITRAL Arbitration Rules.
than from national arbitration law, and that arbitrators do not have a forum, the first matter to determine is the law applicable to the powers of tribunals to grant provisional relief. By contrast, if one is inclined to accept that the seat is the arbitral forum, the potential choice-of-law problem would simply disappear due to the operation of the “forum arbitri”. This model, however, adopts the first alternative by “dressing up” a problem of arbitral authority as a choice-of-law issue. In other words, the focus is set, rather than on the forum arbitri, on the law governing the arbitral authority to render interim relief, which is suggested to be, unsurprisingly, the lex arbitri or law governing the arbitration procedure.

Secondly, Born and Boog, two of the supporters of this theory, limit the role of the arbitral seat if its legislation is in conflict with the agreement of the parties. The aforementioned situation would arise in cases where, first, the parties have agreed on an arbitral seat that prohibits arbitrators to grant provisional remedies and second, where the parties have also explicitly conferred arbitrators the power to render interim relief. If both circumstances are met, Born claims that the law of the seat should be regarded as “violating the New York Convention’s requirement that Contracting States recognize international arbitration agreements, including with regard to the arbitral procedure”. Following this line of reasoning, Born argues that the tribunal should consider itself competent to order provisional measures irrespective of the prohibition of the seat. A distinction is then drawn between cases where the parties have expressly granted powers to arbitrators, and cases where the parties have not expressly made such arrangements. In the former case, the express agreement of the parties would override the mandatory provisions of the law of the seat; in the latter, the inexistence of express arrangements as to arbitral authority would lead to an exclusion of the arbitral power to render interim remedies.

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82 Terminology adopted from Petrochilos (n68) 20.
83 Born (n15) 2460.
84 This scenario would arise, for example, if the parties agree to arbitrate in China or the Czech Republic under the ICC Rules.
85 Born (n15) 2459.
86 Ibid 2460.
87 Ibid.
Yet, this conclusion may have gone too far. First, the arbitral seat is not an imposition that comes from nowhere. The choice of the seat depends almost invariably on party autonomy. A further question then follows: why is an express choice of arbitral seat less important or superseded by an express choice of tribunal-granted relief? Born accommodates his conclusion in accordance with the legal principle that the specific should prevail over the general.\textsuperscript{88} It is questionable, however, whether this principle is appropriate in this context. Furthermore, there is nothing in the New York Convention on how to construe pathological clauses. From a legal point of view, the parties have selected a system of law that does not allow them to vest the power to render interim relief in arbitrators. Secondly, during the course of the proceedings, the parties can still avoid the incompatibility between the seat and the arbitration agreement if they change the location of the juridical domicile of their arbitration. It is true, however, that if the recalcitrant party intends to frustrate any tribunal-rendered remedy, it will simply not agree to any change. Finally, the provisions of the seat prohibiting arbitrators to exercise a particular power are mandatory and, as a result, its inobservance may lead to the annulment of the decision by the courts of the seat. In order to avoid this problem, Born suggests that national courts outside the seat are under a duty to recognise and enforce these decisions on interim measures. But would it not be faster and probably cheaper to apply for court-ordered relief before such courts? Can procedural orders be subject to cross-border enforcement?

The purpose or rationale of this theoretical model is to minimise the effects of a general prohibition of tribunal-granted relief as set out by some legal systems which are not considered to be “arbitration-friendly”. But what if the prohibition to render interim relief imposed on arbitrators is partial? Austria, as opposed to Model Law countries adopting its 2006 version, does not permit arbitral \textit{ex parte} relief.\textsuperscript{89} In the

\textsuperscript{88} Ibid.

\textsuperscript{89} See also, \textit{Judgment No 76 of 25 July 2019}, Bucharest Court of Appeal, where the court argued that Article 585(1) of the Romanian Civil Procedure Code prohibits arbitrators to render pre-arbitral relief. Only if the arbitral proceedings are pending, can arbitrators render provisional measures. See Sorina Olaru and Cristina Badea, ‘Emergency Arbitration in Romania – The Perilous Path Away from Progress’ <www.nndkp.ro/articles/emergency-arbitration-in-romania-the-perilous-path-away-from-progress/> accessed 4 November 2021.
unlikely scenario that the parties expressly vest the authority to render *ex parte* remedies in arbitrators, is also Austrian law violating the New York Convention?

3. Assessment of arbitral awards and procedural orders on the authority to render interim measures of protection

Having examined the opinion of commentators, the next step is to analyse the practice of tribunals with regard to their authority to render injunctive relief. Yet, this analysis and its conclusions should be taken with caution. Scholars sometimes claim universal knowledge of arbitral practice. Probably most of them are involved as arbitrators or counsels in the daily practice of arbitration but confidentiality is a main arbitral feature, and therefore, the lack of publication of arbitral awards is an important element that hinders any attempt to conduct a comprehensive analysis on international arbitration practice. Indeed, it would be inappropriate to draw general conclusions from a sample of 52 awards and procedural orders unless, of course, there are clear and unequivocal patterns.

3.1. Methodology

This study incorporates 52 arbitral awards and procedural orders dealing with applications for interim measures of protection. These resources constitute almost every published award and order in the particular subject-matter of “arbitral authority to render provisional relief” in the English language. This analysis of arbitration practice has attempted to include orders and awards from every type of arbitration and every major arbitral institution. With respect to institutional arbitration, Schedule I includes orders and awards granted under the auspices of the International Chamber of Commerce (ICC), the Swiss Chambers’ Arbitration Institution (SCAI), the Netherlands Arbitration Institute (NAI), the International Centre for Dispute Resolution of the American Arbitration Association (ICDR) and the Arbitration
Institute of the Stockholm Chamber of Commerce (SCC). Why not awards and orders of the Hong Kong International Arbitration Centre (HKIAC), the London Court of International Arbitration (LCIA) and the Singapore International Arbitration Centre (SIAC) – one may ask? Unfortunately, it is not possible to access such resources. The LCIA only publishes decisions related to challenges to arbitrators as to their independence and impartiality. The HKIAC and SIAC have taken a much more restricted approach towards confidentiality since both institutions have a general policy not to publish decisions and arbitral awards. As regards ad hoc arbitration, the lack of an institution administering the proceedings makes the publication of arbitral decisions unlikely unless there is recourse to court supervision or support.

In sum, whilst this study has intended to investigate every available award and order within the subject-matter of arbitral authority to render interim measures, the lack of publication of arbitral decisions has constituted a limit on the range of resources examined. This is, possibly, the furthest one can reach regarding scholarly research on arbitral practice due to confidentiality. Having said that, the apparently low number of resources analysed do not impact on the quality of the findings; in fact, this study reveals some unequivocal and consistent patterns.

3.2. Relevant findings

A detailed analysis of every arbitral decision can be found in Schedule I. In this section some relevant findings are summarised:

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90 The different arbitral institutions are represented in the study in the following proportion: ICC, 45 cases; NAI, 3 cases; SCAI, 2 cases; ICDR, one case and SCC one case.
91 The LCIA Notes for Parties provides that “by virtue of Article 30 of the Rules, the LCIA does not publish Awards, or parts of Awards, even in redacted form”.
Finding 1. Arbitration users do not select, as arbitral seats, states or law districts that impose general prohibitions on arbitral interim relief

This finding is remarkable since it demonstrates that the proposal to disregard the lex arbitri when a general prohibition exists is not only a questionable approach from a legal point of view that comes at a high cost, but also an unnecessary development.\textsuperscript{94} Indeed, out of 52 arbitral awards and procedural orders examined in Schedule I, none of them was seated in a state or law district imposing a general prohibition of arbitral interim relief. Of all awards and orders, Switzerland was the arbitral seat in 18 cases, France in 9, England in 7, New York in 4, the Netherlands in 3, and one each in Austria, Belgium, Cyprus, Florida, Hong Kong, Lithuania, Luxembourg, Ontario, Singapore, Sweden, and Texas. As it can be seen, situations of potential incompatibility between the agreement to arbitrate and institutional rules vis-à-vis the lex arbitri are very unlikely to arise.

Interestingly, only one indirect reference to a legal system imposing a general prohibition of arbitral remedies has been found in an interim award rendered in 2012. In \textit{ICC Case 17191},\textsuperscript{95} the respondent argued unsuccessfully that the seat was Italy and the applicable procedural law was Italian law although the clause clearly designated Luxembourg as the arbitral seat and the arbitration law of Luxembourg was the lex arbitri.\textsuperscript{96} The defendant based its submission on the fact that the parent company of the claimant was an Italian-registered company having its operations in Italy.\textsuperscript{97} The tribunal did not seem to realise or mention it, but it is clear that the defendant tried to resist or sabotage the application for interim relief since Italian law prohibits tribunal-rendered remedies.

\textsuperscript{94} See § 2.6.
\textsuperscript{95} Interim Award in \textit{ICC Case 17191} (2017) XLII YB Comm Arb 82.
\textsuperscript{96} The arbitration clause reads as follows:
18.1 This Agreement is governed by, and shall be construed in accordance with, the laws of the Luxembourg. (…)
18.4 The arbitration proceedings shall take place in Luxembourg and shall be conducted in English. Luxembourg substantive law shall apply,”
\textsuperscript{97} \textit{ICC Case 17191} (n95) [49].
Finding 2. A majority of tribunals apply the agreement to arbitrate and the *lex arbitri* as concurrent sources of their authority to render interim relief.

### A. Sources of arbitral authority to render injunctive relief: the results

The study of 52 procedural orders and awards shows a consistent pattern with respect to the sources of arbitral authority to render interim relief as applied, in practice, by arbitral tribunals. The results demonstrate that, of all theoretical approaches analysed in the previous subsection, there is a particular model which seems to be applied by an overwhelming majority of tribunals. These results are as follows. Out of 52 arbitral decisions, 32 orders and awards made an explicit reference and applied institutional rules and the *lex arbitri* as sources of arbitral authority to render injunctive relief. By contrast, arbitrators applied institutional rules as the exclusive source of their procedural powers in 11 decisions and, in 3 cases, the power to render provisional measures was conferred solely by the *lex arbitri*. Finally, 6 decisions did not refer to the determination of the procedural powers of the tribunal on the basis, among other reasons, that the claim was not admissible or that the tribunal had no jurisdiction over the parties. If one were to translate or convert these figures to percentages in order to facilitate the interpretation of the results, the seat and the arbitration rules as concurrent sources of arbitral authority account for 61.54% of the total decisions examined; institutional rules as an exclusive source of procedural powers represent 21.15 % of the total; the *lex arbitri* as an exclusive source of arbitral authority is found in 5.77% of the total orders and awards and, finally, in 11.54% of the decisions the arbitrators did not ascertain their authority to grant interim remedies. If the decisions which do not make any reference to the determination of the powers of arbitrators are excluded from the total count, the percentage of awards and orders applying the concurrent model would increase up to 69.57% of the decisions examined.

Some might argue that there is an important number of cases – 21.15% of the arbitral decisions included in Schedule I – where tribunals examined the applicable institutional rules but no reference was made to the arbitral seat. These cases should
be taken with caution. In fact, it is reasonable to assume that some tribunals have just obviated the application of the *lex arbitri* due to several reasons. For example, a given tribunal may not refer to the *lex arbitri* due to the fact that arbitral authority is a long-standing accepted practice regarding interim relief in the legal system where the arbitration is seated, or perhaps the main reason is that the parties did not challenge the authority of the tribunal to render provisional relief.\textsuperscript{98} Likewise, the succession of procedural orders typically found in arbitration proceedings is also an important factor to consider. If the tribunal has already clarified in a previous decision that it had the power to render provisional relief either generally or with respect to a particular remedy, it is illogical to readdress the same issue unless the measure sought or the circumstances have changed. It follows that the fact that a tribunal did not concurrently refer to the *lex arbitri* is not enough to conclude that the said tribunal adopted the arbitration agreement as the exclusive source of its authority to render interim relief. And there is some evidence which points to that possibility. In *ICC Case 10973*,\textsuperscript{99} for example, the tribunal did not conduct an assessment of French law in the context of its arbitral authority – the seat was Paris – but there was a reference in the award to French law in the following terms: “the issue is whether the (...) tribunal has the power to grant interim (...) relief in a case (...) where the place of arbitration is in France”.\textsuperscript{100} This award is not an exceptional case. A procedural order in *ICC Case 13359*\textsuperscript{101} also included an implied reference to the *lex arbitri* in similar terms. As it can be seen, these passages seem to suggest that the fact that the arbitration was seated in France had an impact on whether the tribunal had the authority to render the relief sought.

From a quantitative point of view, of 11 decisions where tribunals seemed to exclusively apply institutional rules, 6 orders and awards included implied references to the fact that the seat was a source of arbitral authority. In addition to the examples

\textsuperscript{98} See, eg, Interim Award in *ICC Case 12196* (2011) ICC Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration 56.

\textsuperscript{99} Interim Award in *ICC Case 10973* (2005) XXX YB Comm Arb 77.

\textsuperscript{100} *ibid* [1]. The tribunal did not further examine this issue perhaps on the basis that, under French law, arbitrators enjoy wide powers to render injunctive relief.

mentioned above, the arbitral decisions in ICC cases 11399\textsuperscript{102} and 18724,\textsuperscript{103} and in SCC Case 096/2001\textsuperscript{104} included implicit references to the \textit{lex arbitri} in the assessment of the substantive standards required to render injunctive relief such as urgency, irreparable harm or balance of interests. One may ask what the relationship between substantive standards and arbitral authority is. Put it simply: if arbitral authority to render interim relief is not conferred by the \textit{lex arbitri}, how could the exercise of such authority be governed by the same \textit{lex arbitri} which is supposedly being rejected as a source of arbitral powers? If the decisions that included implied references to the arbitral seat are incorporated into the group of orders and awards that explicitly applied the \textit{lex arbitri} and institutional rules, the applicability of concurrent sources to determine arbitral authority would account for more than 73\% of total cases. By contrast, the decisions purely based on institutional rules would decrease from 24.44\% to just over 10\% of the total.

B. Conclusions on the sources of arbitral authority to render interim relief: less “delocalised theory” and more facts, please

The results provided in the previous subsection allow us to disregard most of the theoretical models put forward by scholars. At first glance, only one of these models would fit under the results of this study, and that is the concurrent model where the arbitration agreement and the \textit{lex arbitri} are interconnected sources of arbitral authority.\textsuperscript{105} As previously explained, the first conclusion of this study partially rejected the model of Born, at least regarding his proposal to dismiss the application of the mandatory provisions of the arbitral situs. Having said that, it may be possible to find some supporters of delocalised arbitration who may argue, basing their reasoning on the model of Born, that tribunals need to assess the \textit{lex arbitri} as a potential restriction or limit to the arbitration agreement. If arbitral tribunals were to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{102} Interim Award in ICC Case 11399 (2011) ICC Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration 36.
\item \textsuperscript{103} Final Award in ICC Case 18724, Travis Coal Restructured Holdings LLC v Essar Global Ltd (unpublished), 7 March 2014, Arbitrator Intelligence Materials.
\item \textsuperscript{104} Award in SCC Case 096/2001 in Sigvard Jarvin, Annette Magnusson (eds), SCC (Stockholm Chamber of Commerce) Arbitral Awards 1999-2003 (JurisNet 2006) 543.
\item \textsuperscript{105} See § 2.5.
\end{itemize}
\end{footnotesize}
adopt this model, rather than a concurrent application of sources, the emphasis would shift to the arbitration agreement as the primary source. By contrast, the *lex arbitri* would be exclusively examined as a potential restriction to the authority conferred by the arrangements of the parties. This model could demonstrate, first, that national law is applied by arbitral tribunals as a limit to party autonomy rather than as a source of their powers, and secondly, that national law is nothing but an unreasonable limit to party autonomy.

In order to ascertain which theoretical model is the most representative of current arbitration practice, the decisions included in Schedule I should be examined once again to answer the following question: is the *lex arbitri* applied by tribunals as a potential limit to the powers otherwise conferred by the parties, or is the *lex arbitri* applied as a concurrent source? Out of 32 awards and orders where arbitrators referred to both sources of arbitral authority, in 22 decisions, the *lex arbitri* was applied as a concurrent source together with institutional rules, and in 9 decisions the *lex arbitri* was deemed as a potential mandatory limit or restriction to the powers otherwise conferred by the arbitration agreement. Surprisingly, an arbitral decision has examined the applicable rules and the agreement to arbitrate as potential limits to the authority explicitly conferred by the *lex arbitri*. In *ICC Case 14020*, the sole arbitrator received an application for security for costs and English arbitration law – England was the seat – was applied to such a request. Pursuant to section 38(3) of the 1996 Arbitration Act, it was then concluded that arbitral authority to order security for costs existed “unless the parties have agreed otherwise”. After analysing whether any limits were impacting on its authority, the arbitrator held that:

“Nothing in this arbitration agreement purports to limit the powers of an arbitrator appointed thereunder to enter an order for security for costs as contemplated in Section 38.3 of the Arbitration Act. (...) It is also appropriate to have regard to [the ICC] rules to ascertain whether anything in such rules limits or prohibits the arbitrator’s power to enter an order for security for costs under Section 38.3 (...). The arbitrator is satisfied that nothing in the ICC Rules limits the

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arbitrator’s powers under (...) the Arbitration Act to issue an order for security for costs.”

Accordingly, the results of this study demonstrate that an overwhelming majority of tribunals apply the concurrent model in which the arbitration agreement and the lex arbitri are conceptualised as concurrent sources to render provisional relief. In general terms, it is not appropriate to conceptualise the provisions of the arbitral situs as potential limits to the arrangements of the parties. In some cases, the lex arbitri may act as a limit or prohibition to the powers otherwise conferred by the parties. In other cases, the lex arbitri may vest authority in arbitrators concurrently with the arbitration agreement. And finally, in some other cases, the lex arbitri may be the only source of arbitral authority. In this context, it seems appropriate to highlight one of the main methodological limitations of this study. In fact, none of the decisions included in Schedule I have been rendered in ad hoc arbitration. Frequently, in this specific type of arbitration, the provisions of the lex arbitri are the only sources actively vesting authority to render interim relief in arbitrators.

To conclude, a majority of tribunals adopt the concurrent model to ascertain their authority to render provisional measures. This model is based on, first, the arbitration agreement widely interpreted as including the explicit arrangements of the parties and the institutional rules incorporated into the said agreement and, secondly, the provisions of the arbitral seat. The lex arbitri and the arbitration agreement are part of a single framework that needs to balance the circumstances and facts of each case – that is, the mandatory nature of the applicable lex arbitri, the type of arbitration, and the arrangements of the parties – to arrive at the proper source or sources of arbitral authority to render interim relief.

107 ibid [3]-[4].
108 See § 3.1.
C. Exceptional and concurrent application of other laws

Exceptionally, some tribunals have applied the laws of other legal systems concurrently with the *lex arbitri* and the arbitration agreement. However, this conclusion does not contradict the previous findings since, first, these decisions are very exceptional, and secondly, arbitrators frequently apply as many sources as they can find in order to reinforce and “protect” their decisions. By way of example, in *ICC Case 14287*, the tribunal concluded that it was authorised to render interim measures in accordance with the ICC Rules and the *lex arbitri*. Interestingly, the tribunal also argued that:

“This competence would also be conferred by Polish [law] (...) as the state where the major part of the dispute is located or a substantial part of the subject of the parties’ principal interest concerning this dispute is located, even though Poland is not the place of arbitration”.

Similarly, in *ICC Case 8879*, the tribunal concurrently applied Mexican law – the law applicable to the merits of the dispute – with the rules adopted by the parties and the law of Ontario as the *lex arbitri*.

Finding 3. Potential *lacunae*: what is the source to render a given remedy if the arbitration agreement, the institutional rules and the *lex arbitri* are silent?

In arbitration, there was a prevalent feature that was common to most institutional rules and local statutes. Traditionally, an important number of these instruments did not provide a concept of interim measures. Nor did they list the remedies that arbitrators were authorised to render. For that reason, arbitrators were commonly faced with the question of determining their authority in cases where, *prima facie*, the arbitration agreement, the applicable institutional rules, and the *lex arbitri* seemed to be silent. These cases have traditionally arisen with respect to “controversial”

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110 ibid [IV.8.1].
provisional measures such as ex parte relief, anti-suit and anti-arbitration injunctions, or security for costs. In fact, this study demonstrates that, in the past, determining arbitral authority to order security for costs was a major source of problems. In this context, if an arbitral tribunal considers that there is a potential lacuna with respect to its power to render a particular remedy, a further question arises: what is the applicable source to ascertain whether the tribunal possesses arbitral authority?

One potential option can be found in a procedural order rendered in ICC Case 12542\textsuperscript{112} where the tribunal noted the following:

“if a point of procedure is not dealt with by a provision in [the lex arbitri], an arbitral tribunal sitting in Switzerland will not without further ado resort to federal or cantonal statute on procedure to fill in any gaps (...). An arbitral tribunal may nevertheless in its discretion take into account provisions of federal or cantonal law in order to decide a particular point of procedure (...) provided that the tribunal finds that there are good reasons to exercise its discretion in favour of the application of such rules to an international arbitration.”\textsuperscript{113}

However, as it will be demonstrated in finding 7, arbitral tribunals have not relied on national procedural law\textsuperscript{114} to fill in gaps. By contrast, a majority of tribunals have held that the answer to a situation of legal lacunae remains the same, that is, the arbitration agreement and the lex arbitri are the elements that need to be examined to determine the procedural powers of arbitrators. However, these elements would now require careful interpretation. The study conducted in Schedule I demonstrates that tribunals have used three elements in order to interpret the applicable institutional rules and the lex arbitri. These three elements are academic sources, previous arbitral practice at the seat, and previous arbitral practice of other tribunals acting under the auspices of the same arbitral institution. Interestingly, there is only one exception. An arbitral tribunal acting under the auspices of the Swiss Chambers’ Arbitration Institution sought to interpret the lex arbitri on the basis of the opinion of

\textsuperscript{112} Procedural Order in ICC Case 12542 (2005) 23 (4) ASA Bulletin 685.
\textsuperscript{113} ibid [32].
\textsuperscript{114} Expressions such as “procedural law of the seat” or “national procedural law” are used in this subsection as an opposed concept to the arbitral legislation of the seat and, therefore, as the procedural rules that were designed for litigation proceedings.
Swiss legal writers and previous arbitral practice in Switzerland, the arbitral seat.\footnote{115} However, the tribunal also referred to previous arbitral practice under a different institution (ICC) and to arbitration legislation not applicable to these proceedings (English arbitration law).\footnote{116}

After a detailed analysis of the decisions included in Schedule I, it is possible to conclude that a majority of tribunals concurrently applied previous arbitral practice at the seat and academic sources to interpret the \textit{lex arbitri} and the applicable institutional rules.\footnote{117} The second most preferred option was the application of academic sources alone.\footnote{118} Yet, this might be a dangerous approach. Legal or academic commentaries often suggest standards that, in the opinion of the particular scholars, represents good practice. Thus, using legal or academic commentary alone to interpret the applicable institutional rules may risk the enforceability of the arbitral decision. The better view is, then, to recommend tribunals in cases like the current one to interpret the \textit{lex arbitri} on the basis of previous arbitral practice at the seat, and the applicable institutional rules\footnote{119} on the basis of academic commentary or previous arbitral practice under the auspices of the same institution. First, with respect to the \textit{lex arbitri}, even though arbitrators are not bound by decisions of other arbitral tribunals, an analysis of previous arbitral practice at the seat is essential to confirm that such remedies are not subject to annulment by the courts of the seat on the basis of lack of arbitral authority. Secondly, arbitrators should also consider applying either legal commentary or previous arbitral practice under the same set of rules to ascertain whether the relevant provisions of the rules adopted by the parties allow them to render a given remedy.

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\begin{itemize}
\item \footnote{115}{A SpA v B AG (n60).}
\item \footnote{116}{Ibid [8].}
\item \footnote{117}{Four arbitral decisions adopted this approach: Interim Award in ICC Case 8307, Procedural Order in ICC Case 15218, Procedural Order 1 in SCAI Case of 19 December 2008, and Order in SCAI Case of 25 September 1997.}
\item \footnote{118}{Three arbitral decisions adopted an interpretation of sources based on legal or academic commentary alone: Interim Award in ICC Case 11399, Procedural Order in ICC Case 13620, and Procedural Order in ICC Case 14993.}
\item \footnote{119}{In ad hoc arbitration, unless the parties adopt the UNCITRAL Arbitration Rules, the only element that could be subject to interpretation is the \textit{lex arbitri}. In that case, arbitrators should apply previous arbitral practice at the seat to ascertain whether national arbitration law allows them to render the given remedy.}
\end{itemize}
Finally, it is important to stress that, in order to avoid uncertainty and facilitate the job of arbitrators, some instruments have been recently amended to determine the specific categories of interim relief which arbitrators are authorised to render. On the one side of the spectrum, some legal instruments have provided a detailed concept of arbitral interim relief. For example, Article 25 of the LCIA Rules provides a list of remedies that an arbitrator is authorised to render under LCIA arbitration. Similarly, the Model Law was amended in 2006 to incorporate a comprehensive concept of arbitral interim relief in Article 17(2). On the other side of the spectrum, some arbitration rules such as those of the ICC and the HKIAC, rather than providing a specific concept, have attempted to simplify the matter by authorising arbitrators to render any interim measures as they deem appropriate.120 One may be tempted to assume, then, that interpreting or determining the applicable source of arbitral powers is an unnecessary task. Indeed, the reforms mentioned above may mitigate the interpretative task of arbitrators. However, identifying and applying the proper source or sources of arbitral authority is still an exercise of critical importance. By way of example, whilst the LCIA rules explicitly prohibit arbitral ex parte remedies,121 the Model Law allows a particular type of ex parte relief.122 If an arbitration is seated, for instance, in a Model Law country adopting its 2006 version and the parties have incorporated the LCIA Rules to their agreement to arbitrate, the arbitrators must concurrently analyse both sources to determine first, whether they possess the authority to render ex parte relief and secondly, whether they should exercise such power. As it can be seen, controversial remedies are precisely named “controversial” since there are divergent views in arbitral statutes and institutional rules as to whether arbitrators should have the power to render them. Accordingly, potential interpretative problems may still arise in the future, and the proposal incorporated above may help tribunals to identify and interpret the proper sources to ascertain their procedural powers.

120 See HKIAC Rules, Art 23; and ICC Rules, Art 28.
121 LCIA Rules, Art 25(1).
122 See Model Law 2006, Art 17B.
Finding 4. Arbitral technique: what comes first, the assessment of arbitral authority or the assessment of the substantive requirements to grant a particular remedy?

The analysis of awards and procedural orders in Schedule I demonstrates a consistent trend with respect to the technique adopted by tribunals to their decisions on interim relief. In all but one case, the tribunals analysed first, whether they possessed the authority to render provisional relief in general or with respect to a particular remedy. In a second step, arbitral tribunals examined the applicable requirements or substantive standards to decide whether or not to grant the given measure. There is only one exception. In one of the procedural orders in ICC Case 12228, the tribunal examined, first, whether the substantive standards to render security for costs were satisfied. Since the applicant did not demonstrate a "change of the risk which [went] beyond reasonable and fair expectations", the tribunal did not examine, in a second stage, its authority to render security for costs. In the words of the tribunal:

"there is no need for the Tribunal to examine whether it has the power to order security for costs and whether, in the affirmative, such power is vested in Art. 183 or rather in an arbitral tribunal's general powers under Art. 182 [Swiss Private International Law Act]."

As it can be seen, the tribunal adopted in this case the route to the fastest dismissal by examining the substantive standards required to render an order for security for costs.

Furthermore, as a consequence of this two-pronged process, a further conclusion can be drawn. Virtually all arbitral tribunals, when deciding whether to grant provisional measures, clearly distinguish between their authority or procedural powers, and the substantive requirements or conditions applicable to the particular remedy. This study has identified only one decision where the said distinction is not

124 ibid [XIV].
125 ibid.
clear. Although in *ICC Case 10973*\(^{126}\) there is a conceptual distinction between arbitral authority and substantive standards, these two matters are not addressed in a clear and systematic manner. In its interim decision, the tribunal analysed the *lex arbitri* as a potential limit to its authority by referring to the mandatory provisions of the arbitral seat. These mandatory provisions were conceptualised in the light of the concept of international public policy. In the words of the tribunal:

“there is no evidence suggesting that French international public policy will be violated if the tribunal grant an award on interim and conservatory measures in the present case”.\(^ {127}\)

Yet, this partial analysis of arbitral authority was not conducted in the context of “jurisdiction” to render interim relief, as it was called by the aforementioned tribunal.\(^ {128}\) Conversely, this analysis – which is clearly a matter of arbitral authority as the previous passage demonstrates – was conducted right in the middle of the assessment of the substantive standard of urgency, specifically, under the heading of “Requirements for Interim and Conservatory Relief”.\(^ {129}\) Indeed, the tribunal seems to have misplaced paragraphs [9] to [11] which deal with arbitral authority, under the wrong part of the award. Although this is only a structural infelicity without conceptual consequences, arbitral tribunals should be clear as to the distinction between their powers and the assessment of the substantive requirements since these are different matters governed by different standards.

**Finding 5. Limits and boundaries to the authority of arbitrators to render interim measures**

The powers of arbitrators are frequently subject to limits or boundaries which may prevent them from asserting authority to render interim relief. It is important to clarify at the very outset that these limits or constraints are conceptually different and must be distinguished from the authority of arbitral tribunals to render injunctive relief. As

\(^{126}\) *ICC Case 10973* (n99).

\(^{127}\) ibid [11].

\(^{128}\) ibid, see heading number 1 of this decision.

\(^{129}\) ibid [9]-[11].
explained in Chapter 2, the authority of arbitrators to render interim relief may be
categorised as a matter of “procedural powers” or “competence” rather than
“jurisdiction”. And yet, these concepts – jurisdiction and competence – may
dramatically impact on whether arbitrators can assert authority to render provisional
measures.

Based on the results obtained from Schedule I, these limits or boundaries have been
classified into two different categories. The criteria that have been considered for this
categorisation are, first, how prevalent or how commonly a particular problem seems
to have impacted on arbitral authority to render injunctive relief and, secondly, the
effects of these limits or restrictions on the procedural powers of arbitrators. Accordingly, these potential restrictions have been classified into main or primary
limits and secondary limits. The former category includes the most prevalent
problems according to the study conducted in Schedule I which are, additionally,
those with the most dramatic effects on the procedural powers of arbitrators. Indeed,
if such limits are established – for example, lack of arbitral jurisdiction or non-
admissibility of the claim – the tribunal will not possess, in any case, authority to
render provisional relief. By contrast, the latter category includes problems that do
not seem very frequent. Furthermore, there is no common agreement as to the
effects of this latter category of issues – for example, whilst some tribunals have
rendered penalties, other tribunals have held that there is no arbitral authority in such
cases on the basis of lack of imperium or enforcement powers.

A. Main or primary limits to the procedural powers of arbitrators: arbitral
jurisdiction and admissibility

1. Arbitral jurisdiction: personal jurisdiction and competence

The foundation of international arbitration is the consent of the parties to submit a
particular universe of disputes to arbitration. In fact, as already explained, arbitral
jurisdiction has two constitutive elements: personal jurisdiction and competence.
1.1. Personal jurisdiction

The study conducted in Schedule I suggests that the most frequent limit or constraint that may impact on the authority of arbitrators to render injunctive relief is personal jurisdiction. It is not surprising to confirm the effects that lack of jurisdiction in personam has on the procedural powers of tribunals. As explained by a US court in *China Minmetals Materials v Chi Mei Corp*, “after all a contract cannot give an arbitral body any power (...) if the parties never entered into it”. In the context of applications for interim relief, this study shows that arbitrators may be confronted with either a *prima facie* assessment of jurisdiction or a final determination on arbitral jurisdiction.

1.1.1. *Prima facie* assessment of jurisdiction

To begin with, personal jurisdiction may arise as a potential limit to the authority of arbitral tribunals in cases where one of the parties challenges the foundational aspect of the arbitral proceedings, that is, consent. Accordingly, challenges as to the existence of the arbitration agreement such as whether the agreement to arbitrate was ever formed, or whether the agreement can be enforced with respect to non-signatories, are traditional examples that may impact on the procedural powers of arbitrators. Likewise, challenges as to the validity of the arbitration agreement, if successfully upheld by the tribunal, will obviously prevent arbitrators to render interim measures. The theory explained here seems fairly easy to follow: if the tribunal finds that there is no arbitration clause or that the arbitration agreement is not materially or formally valid, arbitral jurisdiction has never existed and arbitrators did not have any arbitral power. Yet, this sequence of events is not commonly found in arbitration practice. What arbitral practice suggests is that applications for interim relief are normally received by tribunals at a very early stage, during or even before the case management conference. In these cases, if one of the parties challenges any

130 Potential problems of personal jurisdiction have been found in *SCAI Case of 19 December 2008, ICC Case 9324, ICC Case 10062, ICC Case 10973, ICC Case 12361, ICC Case 13856*, and *ICC Case 18563*.


132 Ibid 288.
consent-related aspects of the arbitration, the jurisdictional issue would be still undecided. Nevertheless, the lack of a final decision on arbitral jurisdiction does not necessarily prevent tribunals to render injunctive relief. Does that mean that jurisdiction has no impact on the procedural powers of tribunals? The short answer is no. The issue of personal jurisdiction would appear, in this context, as one of the requirements or standards that an arbitral tribunal must apply to render the particular measure; that is to say, this issue would emerge as a *prima facie* analysis of arbitral jurisdiction. In this regard, two key questions may follow: first, do arbitral tribunals actually apply this requirement in cases where the issue of arbitral jurisdiction has not been yet decided? And secondly, what do arbitral tribunals understand as *prima facie* jurisdiction?

Of all cases included in Schedule I, only five decisions were granted in the scenario currently discussed. Intuitively, a preliminary analysis leads to conclude that although in two cases – *ICC Case 10973*¹³³ and *ICC Case 13856*¹³⁴ – the tribunals clearly conducted an assessment of *prima facie* jurisdiction, in *ICC Case 12361*,¹³⁵ *ICC Case 18563*,¹³⁶ and *SCAI Case of 19 December 2008*,¹³⁷ the arbitrators did not require the satisfaction of *prima facie* jurisdiction to render interim measures. In *ICC Case 12361*, for example, the tribunal did not conduct a *prima facie* assessment but held that an arbitral tribunal is not precluded from awarding relief “by virtue of any objection to its jurisdiction, although those objections (...) may [be] legitimately take[n into] account in determining how to exercise its discretion under [the ICC rules]”.¹³⁸ More surprising is the second case which seems to reject the analysis of arbitral jurisdiction on a preliminary basis. In *ICC Case 18563*, the respondent argued that the tribunal did not have jurisdiction over one of the claimants, which was also the applicant seeking interim relief. However, the tribunal held that:

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¹³³ *ICC Case 10973* (n99).
¹³⁸ See (n135) [37].
“the in personam jurisdiction is not a precondition for granting an anti-suit injunction. The power of arbitrators to grant such a relief stems from the existence of a valid arbitration agreement and it is the protection of the arbitration agreement’s integrity which must be the rationale to vest the power in the arbitral tribunal.”

The tribunal seemed to suggest, in this case, that the existence and validity of the arbitration agreement are different from its jurisdiction in personam, as if an arbitration agreement came from nothing rather than from the consent of two or more parties to arbitrate. Furthermore, one may legitimately ask whether an arbitration agreement confers the tribunal the power to protect its integrity through an in personam injunction against non-parties or in favour of an allegedly non-party, as in the current case. Finally, it is also important to consider the nature of the measure requested since not every requirement should apply to every type of interim relief. Indeed, it is reasonable to assume that some standards may vary from remedy to remedy and, in the context of anti-suit and anti-arbitration injunctions, the requirement of prima facie jurisdiction seems particularly important. In fact, what is surprising about this case is that the remedy sought was an in personam anti-suit injunction preventing one of the parties from pursuing court proceedings, and the said remedy – which is based on the existence of arbitral jurisdiction – was granted even if a prima facie analysis of jurisdiction over the parties was never conducted.

Previously, it was argued that this decision did not apply the standard of prima facie jurisdiction. On closer examination, however, it is possible to conclude that the tribunal did apply this requirement. Yet, the tribunal rejected to incorporate, under its preliminary assessment, the issue of whether the applicant seeking interim relief was bound by the agreement to arbitrate. That is to say, the tribunal understood in the context of multiparty arbitration, prima facie jurisdiction as a prima facie satisfaction of the existence and validity of an arbitration agreement. It is perhaps useful to pause here and consider the reasons for such arbitral development. Indeed, notwithstanding the logic supporting the criticism of the previous decision, practical considerations and particularly, the urgent nature of interim relief might dictate that the prima facie analysis on arbitral jurisdiction could be limited, in some instances, to

139 See (n136) [11].
a *prima facie* satisfaction of the existence and validity of an arbitration agreement. First, the urgent nature of interim relief prevents arbitrators to make an intricate assessment of their jurisdiction. Secondly, the provisional character of these remedies and the possibility of modifying or revoking such measures at a later stage might allow arbitrators to conceptualise *prima facie* jurisdiction as a partial analysis rather than as an assessment of every jurisdictional aspect challenged or put forward by a party. As Berger rightly observed,

“the tribunal has to strike a difficult balance between the urgency of the measures requested which prohibits a complex investigation into the jurisdictional intricacies of the case and the necessity to verify the jurisdictional basis for its decision and avoid decisions *extra petita*”.¹⁴⁰

However, some recent developments indicate that a partial *prima facie* analysis of jurisdiction as conducted by the tribunal in *ICC Case 18563* is not acceptable. Before turning to that discussion, a preliminary issue regarding the role of the ICC Court should be clarified. In ICC arbitration, the Court decides whether, or to what extent, a request for arbitration can proceed by conducting a *prima facie* analysis of arbitral jurisdiction.¹⁴¹ Even though the decision is purely administrative¹⁴² and the threshold is not very high,¹⁴³ some tribunals may want to rely on that assessment in the context of an application for interim relief. In *ICC Case 10973*,¹⁴⁴ for example, there was a challenge to the jurisdiction of the tribunal in the context of an application for interim relief. The tribunal “conducted” a *prima facie* analysis of jurisdiction by exclusively relying on the findings of the ICC Court, which was satisfied that, in that case, an arbitration agreement under the Rules may have existed. Returning to the analysis of the appropriateness of a partial *prima facie* analysis, it is important to consider the recent amendment of the provision which governs the Court *prima facie* test. Although tribunals are not directly bound by this provision, it is important to stress that this reform clearly dictates what is to be considered as best arbitral

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¹⁴¹ This power is limited since the Court can only exercise it if referred to it by the Secretary General.
¹⁴² The arbitral tribunal, not the Court, determines if arbitral jurisdiction exists. The tribunal cannot rely on the administrative findings of the Court when assessing its jurisdiction on the merits.
¹⁴⁴ *ICC Case 10973* (n99).
practice, and as already explained, some tribunals may want to exclusively rely on the *prima facie* test as conducted by the Court. The relevant provision is Article 6 of the Rules as amended in 2012. The pre-2012 rules exclusively referred to the *prima facie* satisfaction of the existence of an arbitration agreement.\textsuperscript{145} The post-2012 rules, however, determine that such *prima facie* analysis should include, in cases of multiparty arbitration, a preliminary examination of whether the parties are bound by the agreement.\textsuperscript{146} One may infer from this new development that tribunals are not welcome to conduct a partial analysis of arbitral jurisdiction in the context of applications for interim relief particularly, in multiparty arbitration.

In sum, two conclusions can be presented in the context of “*prima facie* jurisdiction”. First, even though the results are insufficient to draw general conclusions on the applicability of “*prima facie* jurisdiction”, it seems reasonable to assume that most tribunals would apply it as a crucial standard. In fact, some arbitral decisions have incorporated references to different sources which confirm the application of *prima facie* jurisdiction by a majority of tribunals.\textsuperscript{147} Likewise, some professional organisations such as the Chartered Institute of Arbitrators have also recommended tribunals to apply this standard.\textsuperscript{148} Secondly, in the context of applications for interim relief, there is a tension between urgency, on one side, and the assessment of the jurisdiction of the tribunal over the parties, on the other side. However, the urgency of the measure cannot be used to conclude that “*prima facie* jurisdiction” is a partial “light touch” that does not incorporate challenges as to whether a party is bound by the arbitration agreement. Undoubtedly, the findings of arbitrators at this early stage can be based on a “light touch”. Yet, arbitral decisions on interim relief should incorporate a complete preliminary assessment of arbitral jurisdiction, taking into account all challenges raised by the parties. By refusing to do so, tribunals would be risking the enforceability of a potential *extra petita* decision which may be subject to either annulment or refusal of recognition.

\textsuperscript{146} ICC Rules 2012, Art 6(4)(i), which is also currently in force in the 2021 Rules.
\textsuperscript{147} See, eg, the analysis into arbitral awards conducted in ICC Case 13856 where there are references to the application of *prima facie* jurisdiction by the International Court of Justice, tribunals in ICSID arbitration, and tribunals in commercial arbitration.
1.1.2. Final and binding assessment of jurisdiction

Problems of personal jurisdiction do not exclusively arise in the context of the general arbitral proceedings and their consent-related aspects. Jurisdiction *in personam* may also emerge in the context of the particular application for interim relief. In this case, the problem is the potential effect of the provisional remedy against a party that is allegedly not bound by the arbitration agreement. Conversely to the previous scenario, the arbitral determination on jurisdiction with respect to the alleged party is not *prima facie* but final and binding. In Schedule I, two decisions have been found where personal jurisdiction has been confirmed as a limit to the authority of arbitrators to render provisional measures. First, in *ICC Case 10062*,\(^\text{149}\) the applicant sought an order preventing the payment of two bills of exchange which were already endorsed and transferred to a Turkish bank, non-party to the arbitration. The tribunal rejected to grant the order on the basis of lack of personal jurisdiction in the following terms:

“the arbitral tribunal realizes the fundamental principle that [in this case] jurisdiction is reserved to state courts. Hence, international arbitration (…) may not be extended to issues which are not defined by the arbitration agreement or to persons which are not bound by it.”\(^\text{150}\)

Secondly, in *ICC Case 9324*,\(^\text{151}\) the claimant applied to extend a court-ordered injunction preventing the payment of a performance guarantee, and to declare null and void the letter of guarantee by which a Turkish bank instructed an Egyptian bank to issue the performance bond. Unsurprisingly, the sole arbitrator argued with respect to the first remedy that,

“the Sole Arbitrator does not have any jurisdiction over [Claimant’s Turkish bank]. If it cannot address an order to [Claimant’s Turkish bank], then it cannot extend an order that the competent court has issued to such bank.”\(^\text{152}\)


\(^{150}\) ibid [13.3].

\(^{151}\) Final Award in *ICC Case 9324* (2000) 11 ICC Ct Bull 103.

\(^{152}\) ibid, under heading 1.
The arbitrator also rejected the second remedy as requested by the claimant on the basis of lack of personal jurisdiction over the Turkish and Egyptian banks which were third parties to the arbitral proceedings.\textsuperscript{153}

\textbf{1.2. The subject-matter dimension of the concept of competence}

Conversely to jurisdiction, this study suggests that competence \textit{ratione materiae} does not have, in practical terms, an important impact on the authority of arbitral tribunals to render interim relief. In any case, there are two reasons which support its classification into the category of “main or primary limits”. First, even though competency problems seem to have a very limited impact according to the results of this study, it is important to stress that the powers of arbitrators beyond their subject-matter jurisdiction may be subject to annulment or refusal of recognition. Secondly, the fact that jurisdiction \textit{ratione materiae} is a constituent element of arbitral jurisdiction together with personal jurisdiction supports its classification under the category of primary limits.

Subject-matter limitations are mentioned by several tribunals\textsuperscript{154} but only one case actually dealt with its practical application. In \textit{ICC Case 8113},\textsuperscript{155} the tribunal considered that there was a subject-matter limitation that prevented it from rendering the conservatory remedy sought by the defendant. The fact that “the claimant relied on the agreement dated 1992 and not on the undated letter promising a 4% commission puts this latter document outside the scope of this arbitration”. The tribunal continued as follows: “the jurisdiction of this tribunal cannot extend to the prevention of a possible misuse by a party of a document which remains outside the scope of this arbitration.” Unfortunately, the rest of the cases which included references to subject-matter limitations did not examine such restrictions. For example, in an \textit{SCAI}

\textsuperscript{153} Ibid.

\textsuperscript{154} See, eg, Procedural Order in \textit{ICC Case 13856}, [4.3] which refers to the “precise scope of jurisdiction \textit{ratione materiae}”.

Case, the tribunal included competence *ratione materiae* among one of the requirements that had to be satisfied by the party requesting security for costs. In other words, the tribunal required the applicant to show that the said measure “related to the matter in dispute”. However, the tribunal did not explain or assess such subject-matter limitation. By way of further example, a decision rendered in ICC Case 10062 explains that an arbitration, in the particular context of interim relief, cannot be extended to issues that are not defined by the arbitration agreement. Nevertheless, the tribunal did not elaborate further than that and no practical implications can be found in this case. Finally, in ICC Case 15634, the arbitrator noted that the *lex arbitri* included a narrower power – “interim measure (…) necessary in respect of the subject matter of the dispute” – than the ICC Rules – “any measure that it deems appropriate”. Yet this subject-matter limitation was not addressed by the arbitrator, nor did it have an impact on the application for interim relief.

2. Admissibility

Admissibility problems are, after personal jurisdiction, the second most frequent restriction on the authority of arbitrators to render provisional relief according to the study conducted in Schedule I. In contrast with jurisdictional or competency problems, the issue under admissibility is not the consent of the parties to arbitrate. As Bermann, Park and Paulsson rightly explain, admissibility addresses the

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156 Claimants 1-2 (n137).
157 ibid [6.3.1].
158 ICC Case 10062 (n149).
159 ibid [13.3].
163 Admissibility problems were not examined in the context of chapters 3 and 4 since national courts are familiar with the concept of admissibility which is, however, named differently in each legal system. By contrast, arbitrators seem to make frequent errors when dealing with admissibility issues. For that reason, chapters 5 and 6 analyse the interplay between “admissibility” and “the power to render interim relief”.
issue of whether an arbitral body having adjudicatory powers over the parties and over the claim should, for some reason, decline the exercise of these powers by dismissing the claim as “inadmissible” due to, for example, the preclusive effect of a decision rendered in another forum, time-barred applications, or estoppel which prevents a party from asserting an arbitration agreement. In other words, in the context of jurisdiction, the main issue is whether an arbitral tribunal has the power to give any ruling at all; in the admissibility context, however, the main issue is whether a tribunal should reject the claims of the parties as inadmissible for some reason other than the assessment of the merits.167

This study has identified the following admissibility problems which may impact on the procedural powers of arbitrators: res judicata in ICC cases 10021168 and 11613;169 escalation clauses in ICC Case 13856;170 and waiver of the arbitration agreement in ICC Case 10904.171 After analysing these decisions, three remarkable conclusions have been found. First, the majority of problems regarding admissibility arise in the context of the main arbitral proceedings rather than in the context of interim relief. That is the case of, for example, escalation clauses, time-barred applications, and waiver of the arbitration agreement. This study demonstrates that res judicata seems to be the only sui generis admissibility problem that may arise in the context of applications for interim relief due to the interface between courts and tribunals. Consider, for example, an international arbitration seated in Switzerland. If a court-ordered measure has been previously rendered and the tribunal finds that the relief requested, the parties and the facts are the same, the application for interim relief may be rejected on the basis that a court has disposed of it by way of a judgment that may be enforced in Switzerland under its Private International Law

167 Bermann (n164) 112.
169 ICC Case 11613 (n36).
170 Procedural Order in ICC Case 13856 (n134).
171 Final Award in ICC Case 10904, Contractor (Germany) v Employer (Jordan) (2006) XXXI YB Comm Arb 95.
Act. Secondly, as in purely jurisdictional problems, tribunals may decide to conduct a *prima facie* analysis of admissibility. This preliminary analysis should be limited to challenges as to the admissibility of the claim on the merits. By contrast, if there is an admissibility problem arising out of the application for interim relief such as, for example, whether a previous court-ordered measure prevents the tribunal to exercise its powers, that challenge should be finally decided in the context of the application for interim relief. Thirdly, an overwhelming majority of tribunals wrongly categorise admissibility problems as “jurisdictional”. The effects of this inappropriate categorisation will be discussed in finding 6.

**B. Secondary limits to the authority of arbitrators to render interim relief**

In addition to the restrictions or boundaries already examined, this study has identified the following secondary limits. First, lack of *imperium* or lack of powers to enforce arbitral decisions. In *SCC Case 096/2001*, for example, the applicant sought to attach the property of the respondent. The tribunal ruled that an order for attachment could not be granted since attachment presupposes a “state enforcement officer who impounds goods or other property”. By contrast, other tribunals have ordered penalties for non-compliance.

Secondly, party autonomy has been considered as another limit to the procedural powers of tribunals in the sense that arbitrators are only permitted to award or reject the measure as requested by the applicant. In *ICC Case 9324*, for example, the final award included the following passage: “[the arbitrator] must take the relief as requested by Claimant and does not have the power to grant another relief than the one that was specifically asked for”. However, in *ICC Case 10021* the tribunal

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172 This is the result of the Swiss Supreme Court decision in the *Fomento* case which upholds the *lis pendens* rule in the context of arbitral proceedings. See *ICC Case 11613* (n36) [17].
173 See checklist 3.1 of Schedule II.
174 *SCC Case 096/2001* (n104).
175 ibid 546.
176 Final Award in *ICC Case 7895* (2000) 11 ICC Ct Bull 64.
177 *ICC Case 9324* (n151).
178 ibid 103.
“reshaped” or “changed” the remedy from an in rem attachment order originally sought by the claimant to an in personam freezing injunction rendered against the respondents. As it can be seen, there is a lack of consensus as to whether or not this is a restriction on the authority of arbitrators, and legal culture may be behind the different approaches of tribunals. The principle of iura novit curia, even though not directly applicable here, may contribute to the understanding of the two different options. In its simplest terms, legal systems of civilian tradition have understood the judicial task of ascertaining the law applicable to a particular dispute as an inquisitorial exercise. By contrast, legal proceedings in common law systems are generally adversarial. If one were to translate these approaches from the context of applicable law to whether tribunals should only render the measure as requested, it is not difficult to see that such decisions may depend on the legal systems in which arbitrators have been immersed.

Finding 6. Terminology used by arbitral tribunals is clearly inconsistent: absence of proper conceptual categorisation

Several arbitral tribunals have indistinctly referred to “competence”, “jurisdiction” and “powers” to render interim relief. Indeed, the terminology used by a majority of tribunals is far from consistent. In ICC Case 12035, for example, the tribunal used these three terms to refer to its authority to award provisional remedies. However, the power of a tribunal to render a given remedy is not the same as its jurisdiction over the parties and over the subject-matter. Arbitral tribunals should then distinguish between concepts such as jurisdiction, admissibility, competence ratione materiae and their powers to render interim relief. At first blush, this may seem a terminological issue with no legal impact, but the categorisation of a tribunal in that regard may impact on the enforceability of its order or award.

179 ICC Case 10021 (n168).
180 See also SCC Case 096/2001 (n104).
181 Iura novit curia is, strictly speaking, only relevant in the context of applicable law but it is a useful principle in order to explain the two approaches of arbitrators.
Whilst *Peterson Farms v C&M*[^1] is not a case dealing with interim relief, it can be used as a good example to illustrate the effects of a wrong categorisation. In this case, C&M claimed, as final relief, losses suffered by C&M itself and losses incurred by the “C&M group” entities even if these entities were not signatories of the arbitration agreement. Unfortunately, the tribunal classified that matter as jurisdictional and “asserted jurisdiction” over the C&M entities by adopting the “group of companies” doctrine. Yet, the issue of a potential implicit or explicit consent of a third-party non-signatory of the agreement, either a C&M-related company or another company unrelated to the signatories, was never at stake. Nor there was an issue of joinder of a subsidiary of C&M. Simply, the problem was not jurisdictional. In fact, the real question was to determine whether the tribunal could and should have rendered damages to the purchaser beyond losses suffered itself by including damages suffered by the companies closely connected to the claimant and to the contractual scheme.[^2] This was simply, an error of law rather than a jurisdictional matter. The problem is that the tribunal dragged the reviewing court into its wrong categorisation with devastating effects on the enforceability of the award.[^3]

Indeed, the English court was ready to vacate the award after the tribunal classified the problem as part of the “group of companies” doctrine since the said doctrine is not recognised in England. But, as already explained, the problem was not jurisdictional. In this context, it should be emphasised that errors of law – the proper categorisation of the *C&M* case – cannot be reviewed by national courts. Two remarkable exceptions allow an appeal on a point of law: Scottish and English courts are permitted to annul arbitral awards on this basis.[^4] Although in the *C&M* case the appeal was in principle possible since the seat was England, a substantive review should have been rejected on the basis that the applicable law to the substance was


[^3]: C&M argued that the problem was jurisdictional, Peterson contended that it was a challenge as to proof of loss. The tribunal adopted the view of C&M by applying the “group of companies” doctrine. The reviewing court from paragraph 1 explains that the application is based on lack of jurisdiction. In paragraph 15, it further took the view, when analysing the issues on the appeal, that the “first substantive issue concerns the approach of the tribunal itself to the issue of jurisdiction”. As it can be seen, the court did not conduct a *de novo* categorisation but followed the classification adopted by the tribunal.

[^4]: SAR, Rule 69; and English Arbitration Act, s 69.
the law of Arkansas.\textsuperscript{187} That is to say, the English court was simply not entitled to review the arbitral decision. And the wrong categorisation of the tribunal played a fundamental part in the annulment of the award.

Could a similar scenario arise in the context of interim relief as a result of a tribunal conflating “jurisdiction” and “procedural powers”? Both are grounds under which the courts of the seat are permitted to vacate an arbitral decision. Does it still matter to make a conceptual and terminological distinction? To begin with, it is important to classify the “procedural powers of arbitrators to render interim relief” within one of the grounds under which national courts are permitted to vacate arbitral decisions. In Scotland and England, an irregularity in the context of the arbitral authority to render interim relief should be classified under “excess of the tribunal’s powers otherwise than by exceeding its substantive jurisdiction” of Rule 68(2)(b) of the Scottish Arbitration Rules and Section 68(2)(b) of the English Arbitration Act. The ground of “excess of non-jurisdictional powers” is part of a wider category named “challenges to the award on the basis of serious irregularity”. On the face of it, the Scottish and English Acts clearly make a distinction between defects on arbitral jurisdiction – Rule and Section 67 – and excess of procedural powers – Rule and Section 68(2)(b). As regards the Model law, an excess of arbitral authority to render injunctive relief must be classified within Article 34(2)(4)(iv): “the arbitral procedure was not in accordance with the agreement of the parties”.

Once the categorisation issue has been clarified, a further question arises: is there a difference in how courts treat defects on jurisdiction and excess of powers? Defects as to serious irregularity are not treated by national courts in a very formalistic way, but rather, they are normally construed in a restrictive manner. Furthermore, this matter will depend on the test adopted by each legal system. These options are either a materiality test (adopted, for example, in England),\textsuperscript{188} a causation test

\textsuperscript{187} English courts can only review an award on the basis of “error of English law” where the applicable law to the merits is, obviously, English law.

\textsuperscript{188} In Vee Networks v Econet [2004] EWHC 2909 (Comm), [2005] 1 All ER (Comm) 303, the English High Court concluded that it should be proved that the error “caused the arbitrator to reach a conclusion unfavourable to the applicant which, but for the irregularity, he might well never have reached”. This is clearly a materiality
(implemented in Germany), or a probability test (as adopted in Sweden). By contrast, a jurisdictional defect normally leads to an automatic annulment or refusal of recognition. Put it simply, a national court reviewing an arbitral decision challenged on the basis of serious irregularity must not treat it as a jurisdictional defect by automatically setting aside the order or award. Rather, the court should assess whether the said irregularity or excess of power is relevant according to the test adopted by its lex fori. The role of the tribunal is, in this context, important. If a tribunal categorises an issue as jurisdictional when the potential problem is the excess of powers to render interim relief, the tribunal risks the standards of the reviewing court. In fact, as in the C&M case, the reviewing court could be dragged into inadequate standards of review if the tribunal does not properly distinguish between procedural powers, jurisdiction, competence ratione materiae, and admissibility from both a terminological and conceptual point of view.

Some commentators might argue that the scenarios posed above are exceptional and unlikely to arise. But why use interchangeable terminology to refer to concepts which doctrinally are different? And more importantly, why risk the enforceability of an arbitral decision, particularly in legal systems which are not “arbitration-friendly”?

Finding 7. National procedural laws designed for litigation proceedings are not applicable to the powers of arbitrators to render interim relief

The rationale of this conclusion is that the parties, by submitting their disputes to arbitration, have excluded court intervention and, therefore, the set of rules

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189 Creditor under the award v Debtor under the award, Oberlandesgericht Karlsruhe, 14 September 2007, 9 Sch 02/07, reported in Emmanuel Gaillard and George A Bermann (eds), Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Brill Nijhoff 2017) 208. The causation test is based on the fact that, without procedural irregularity, the tribunal would have reached a different outcome.

190 Section 34(7) of the Swedish Arbitration Act 1999, as revised in 2019, includes a probability test: “irregularity which probably influenced the outcome”.

191 Another aspect that distinguishes these concepts is the issue of applicable law. Arbitral jurisdiction may be governed by different national laws depending on the nature of the jurisdictional problem (lex causae, lex arbitri, the law of the place of incorporation of a company that is an alleged party to the arbitral proceedings...)

192 By contrast, the arbitral authority to render interim relief is invariably governed by the lex arbitri and/or the applicable institutional rules.
applicable to court proceedings. In *ICC Case 10021*,193 for example, the defendants tried to resist the authority of the tribunal to render interim measures on the basis that the procedural law of the seat194 did not vest such power in arbitrators.195 The tribunal, however, rejected to apply the Lithuanian Code of Civil Procedure – Lithuania was the seat – to determine its authority to order an attachment of assets belonging to the defendants.196 Unsurprisingly, tribunals have consistently held that the seat “will habitually only refer to the applicability of the arbitration law of that place and not to the full set of rules of a procedural nature existing in that place”. 197

Interestingly, there seems to be an exception among the decisions included in Schedule I in which the arbitrator concurrently applied national procedural law together with the *lex arbitri* and the institutional rules. In *ICC Case 14433*,198 the arbitrator argued that:

“English procedural law, although not binding on the Sole Arbitrator, also provides for the granting of security for costs under Part 25 of the Civil Procedure Rules.”199

However, it should be noted that this decision cannot be considered as an exception to the previous finding since the application of national procedural law was meant to reinforce the solution already found under the applicable rules and the *lex arbitri*.

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193 *ICC Case 10021* (n168).
194 See (n114).
195 See (n168) [25].
196 *ibid* [26].
197 *ICC Case 11399* (n102) [7.5]. In this case, the tribunal rejected to apply national procedural law to the applicability of the substantive standards; however, this passage is equally applicable to the authority or procedural powers of arbitrators.
199 *ibid* [40].
4. Conclusions

4.1. Recommendations to arbitrators

Reference should be made here to Schedule II which includes a toolkit developed to assist tribunals on their decisions on interim relief. This toolkit incorporates the conclusions extracted from this chapter – these conclusions or recommendations can be summarised here in the following points:

- Arbitrators should assess their procedural powers to render interim relief either generally or with respect to a particular measure on the basis of a concurrent application of the *lex arbitri*, the applicable institutional rules and the specific arrangements adopted by the parties.

- Arbitrators must carefully analyse if important issues such as jurisdiction, competence *ratione materiae* or admissibility impact on their authority to render interim relief. These concepts are completely independent but strongly interrelated. The fact that a tribunal has jurisdiction over the parties and over the subject-matter is not enough to assert procedural powers to render interim relief, either generally or with respect to a particular remedy. Likewise, the fact that the tribunal possesses procedural powers to render interim measures does not ensure that the said tribunal can exercise such powers if any problem as to jurisdiction, competence or admissibility impact on its authority.

- Arbitrators should distinguish from a conceptual and terminological point of view between jurisdiction, competence *ratione materiae*, procedural powers and admissibility to avoid dragging the courts of the seat into wrong standards of review. These concepts can be defined as:
  - Personal jurisdiction: adjudicatory authority of the tribunal over the parties on the basis of the existence of consent and a valid arbitration agreement.
  - Competence:
    - Competence *ratione materiae*: adjudicatory authority of the tribunal over matters that have been submitted to arbitration.
• Procedural powers: powers that can be exercised by arbitrators during the course of the proceedings, including the power to render provisional measures.
  o Admissibility: potential rejection of the claim or application for interim relief for reasons other than the merits of the request.

As Park has argued, “in the real world, an alleged problem sometimes involves a combination of factors, or represents shades of grey on a jurisdictional continuum”. Nevertheless, arbitrators must be ready to make a clear distinction between these concepts on a case-by-case basis. There may indeed be a twilight zone, “but only a fool would argue that the existence of a twilight zone is proof that day and night do not exist”.

• Arbitrators should conduct a full *prima facie* analysis of jurisdiction if so required, before deciding on the application for interim relief. The adoption of the vertical concept of adjudicatory jurisdiction as understood in private international law would help arbitrators to focus on the determination of their adjudicatory powers over the parties. If this concept is adopted, there is no need to reform arbitration rules to include that, in multiparty arbitration, jurisdiction also includes the issue of whether a non-signatory is a party to the proceedings. Therefore, if tribunals adopt this concept, they will ensure that their powers to render interim relief do not extend to third parties, albeit in most cases this analysis would be limited to a *prima facie* examination of jurisdiction.

4.2. Recommendations to arbitration users

In the contractual negotiation stage, even if most parties do not normally consider issues arising out of future potential disputes, much less interim relief, the following recommendations can be provided:

• If the parties want to vest the authority to render provisional measures in arbitrators, they must avoid selecting a seat that imposes a general prohibition of

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200 Park (n165) 97.
201 Paulsson (n166) 603.
interim relief. Similarly, this recommendation can be extended to particular remedies which are only available in specific legal systems. For example, if the parties wish to benefit from the arbitral power to attach penalties for non-compliance in the context of interim measures, they should select a *lex arbitri* explicitly allowing the exercise of such power.

- If the parties wish to exclude the authority of arbitrators to render provisional measures, they should: i) identify a legal system with a fast and efficient judicial framework of interim relief, ii) select their seat accordingly, and iii) include an exclusion agreement within their arbitration clause which would vest authority exclusively in courts.

- If the parties want to keep any option open as to the forum in which to obtain provisional measures, they should choose a seat where courts and tribunals have concurrent powers. In this case, the parties would be able to apply to one or another forum without the need to obtain permission from the tribunal or the counterparty.

Once a dispute has arisen, the applicant must carefully analyse the different applicable sources to determine whether the remedy sought is available in the arbitral forum. If the particular measure cannot be rendered by arbitrators, the applicant should consider whether it is possible to change or reshape the application into a remedy that may be effectively granted in the arbitral forum. Finally, if this option is not a possible alternative, the pursuer should consider submitting its application to the relevant courts.

**4.3. Recommendations to lawmakers**

First, legal systems currently prohibiting tribunal-rendered relief should consider the implications of this framework and the legal and policy reasons, if any, supporting such development. In fact, there are strong reasons in support of arbitral interim relief such as i) the availability of a neutral and unbiased forum in addition to the
courts of the seat, ii) the concentration of all actions, to the possible extent, before the tribunal, or iii) the same language used in the arbitral proceedings, which may be different to that of the seat or non-seat courts. Concerns of arbitral corruption and public policy, which seem to be the preeminent reasons to prohibit arbitral interim relief in legal systems such as China, should be easily disregarded.

Secondly, although this chapter has not analysed the allocation of competence between tribunals and courts, lawmakers should consider whether to implement a concurrent system or a framework where priority is put on arbitrators.\textsuperscript{202} A free concurrent regime of competence to render interim relief would allow the parties to apply either to the relevant courts or to the arbitrators. A framework of priority in favour of tribunals will restrict the access of the parties to courts since, if the arbitration has begun, the pursuer will have to obtain the permission of the tribunal\textsuperscript{203} or of the counterparty.\textsuperscript{204} This framework, however, should keep the door open of courts in cases of urgency and where the requested remedy cannot be granted by arbitrators. Lastly, it is important to note that although this competency framework appears to be designed with utmost legislative precision, it may be interpreted by courts in ways that arbitration users may find as unreasonably restricting their options to obtain court-ordered relief, particularly in legal systems with fast and effective judicial frameworks of provisional measures.\textsuperscript{205}

\begin{footnotesize}
\begin{enumerate}
\item On the potential effects of a competency framework with priority in favour of arbitrators, see § 2.3.
\item SAR, Rule 46(2).
\item English Arbitration Act, s 44.
\item See (n47).
\end{enumerate}
\end{footnotesize}
CHAPTER 6

Jurisdiction and competence of emergency arbitrators to render pre-arbitral interim relief

1. Introduction

Traditionally, in international commercial arbitration, the authority of arbitrators to render provisional and protective measures has been conditional on the existence of arbitral jurisdiction on the merits. Without jurisdiction in the main action, arbitrators lacked the authority to render any provisional remedy. Yet the situation where jurisdiction on the merits was seen as a precondition on the powers of arbitrators to render interim relief seems to have changed recently with the adoption of the institution of “emergency arbitration”. Emergency arbitrators are now able to assert authority to render urgent relief even if they will not possess jurisdiction on the merits.

The development of the emergency arbitrator procedure has raised important doctrinal and practical questions. Whilst a great majority of scholars have focused their attention on the judicial enforcement of pre-arbitral decisions,¹ relatively little attention has been devoted to the question of the legal status of emergency arbitrators and the impact of such status on their authority to render provisional relief. This chapter analyses from both a doctrinal and practical point of view, the legal status of emergency arbitrators, their authority to render pre-arbitral emergency relief, and finally, the sources of their powers. To begin with, section 2 provides an overview of the emergency arbitrator procedure. Section 3 examines whether the

authority of emergency arbitrators is based on a contractual or a jurisdictional power. Section 4 presents the conclusions of a study comprising 13 emergency decisions and the reports on emergency arbitration published by several arbitral institutions. A detailed description of every emergency decision can be found in Schedule III. This chapter also incorporates a correlation table in Schedule IV which facilitates comparison between the research findings of Chapter 5 (arbitral tribunals) and Chapter 6 (emergency arbitrators). Finally, section 5 concludes.

2. The emergency arbitrator procedure: an overview

The emergency arbitrator procedure was first adopted by the International Centre for Dispute Resolution of the American Arbitration Association in 2006, although it is widely acknowledged that the origins of this institution can be traced to the unsuccessful ICC pre-arbitral referee procedure in force since 1990. In the last decade, this new arbitral mechanism has been gradually adopted by nearly every major arbitration centre. Indeed, emergency arbitrator provisions have been incorporated into the SIAC Arbitration Rules and the SCC Arbitration Rules in 2010, the ICC Arbitration Rules in 2012, the HKIAC Arbitration Rules in 2013, and the LCIA Arbitration Rules in 2014. The reasons behind the apparent success of these proceedings are not simple. Baigel, for example, argues that the popularity of emergency proceedings demonstrates the increasing and general dissatisfaction with having to obtain court-ordered relief. One may ask, however, whether there is evidence in support of such an extreme conclusion. The International Arbitration

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2 The ICDR adopted in 1999 an opt-in version of emergency arbitration similar to the ICC pre-arbitral referee. However, in 2006, emergency arbitration proceedings were implemented in its current opt-out form.

3 This procedure was hardly embraced by users since it was designed as an opt-in option requiring the parties to adopt a separate agreement in writing. Only 14 cases were filled in 24 years of existence of the ICC pre-arbitral referee provisions. See Andrea Carlevaris and Jose Ricardo Feris, ‘Running the ICC Emergency Arbitrator Rules: The First Ten Cases’ (2014) 25 ICC Ct Bull 25, 27.


5 SCC Rules 2010, Appendix II.

6 ICC Rules 2012, Art 29 and Appendix V.

7 HKIAC Rules 2013, Art 23 and Schedule IV.

8 LCIA Rules 2014, Art 9B.

Survey\textsuperscript{10} conducted by Queen Mary University in 2015 seems to point to a different conclusion than that suggested by Baigel. In its sixth edition, the survey included the following question:

“If you need to seek urgent relief before the constitution of the arbitral tribunal, which of the following options would generally be your preferred course (assuming that the same relief will be available in each case)?”\textsuperscript{11}

To this question, 46\% of respondents answered that they preferred national courts and only 29\% showed a preference for emergency arbitration.\textsuperscript{12} Although it is possible to argue that in 2015 emergency arbitration was in its infancy, it is not entirely clear whether there is a general dissatisfaction with the supportive role of national courts in the pre-arbitral stage. Even if one were to concede that some degree of dissatisfaction does exist, it cannot be claimed, as a general proposition, that arbitration users categorically reject the support of national courts. The effectiveness of the judicial framework of interim relief depends on the legal systems involved in a given request for provisional measures. In England\textsuperscript{13} and Austria,\textsuperscript{14} for example, arbitration users are aware of the fact that court-ordered measures can be obtained with much greater speed than pre-arbitral relief rendered under the emergency arbitrator procedure. In any event, the development of pre-arbitral emergency procedures reveals, first, the inability of international arbitration to provide a comprehensive framework of interim relief, and second, the dynamic attempts of arbitral institutions to minimise court intervention and to provide an efficient out-of-court system where arbitration users can obtain urgent pre-arbitral relief.\textsuperscript{15}

\textsuperscript{10} International Arbitration Survey 2015: Improvements and Innovations in International Arbitration, School of International Arbitration, Queen Mary University of London <www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf> accessed 27 August 2020.
\textsuperscript{11} Ibid 27.
\textsuperscript{12} Ibid.
\textsuperscript{14} Lisa Beisteiner, ‘Chapter III: The Award and the Courts, To Be or Not to Be an Arbitrator – On the Nature of Emergency Arbitration’ [2020] Austrian YB Int Arb 289.
\textsuperscript{15} George A Bermann, International Arbitration and Private International Law (Brill Nijhoff 2017) 441.

233
Undoubtedly, the adoption of emergency proceedings provides many advantages to the parties such as confidentiality\(^\text{16}\) or not having to rely on national procedural law which would govern an application for court-ordered relief. Additionally, emergency arbitration may be the only realistic option in some circumstances. For example, if an arbitration is seated in a legal system where local courts are not independent and impartial, or if such courts are not particularly fast and effective in providing urgent relief, the emergency arbitrator procedure may be the only practical option to obtain pre-arbitral remedies.

Enforcement is, however, one of the main disadvantages that the parties may wish to consider in deciding whether or not to adopt emergency arbitration.\(^\text{17}\) In fact, several legal systems which are considered to be “arbitration-friendly” specifically reject the possibility of judicial enforcement of emergency relief. In Sweden, for example, decisions on interim measures rendered by emergency arbitrators cannot be enforced by state courts.\(^\text{18}\) And enforcement is not the only major disadvantage of pre-arbitral proceedings. The emergency arbitrator procedure does not – and cannot – exclude court intervention, not even in the pre-arbitral stage. Even if emergency arbitrator provisions are applicable in a particular case, recourse to national courts may be crucial if the applicant seeks, for example, *ex parte* relief or a remedy against third parties.\(^\text{19}\) Arbitrators users may then consider whether such proceedings are useful if eventually, recourse to court proceedings might be necessary. Finally, there is another disadvantage which is hardly ever mentioned. Whilst court proceedings offer predictability with respect to the applicable law and the interpretation of the substantive standards required to obtain a court-ordered remedy, arbitral proceedings are very difficult to predict. In other words, local courts are required to apply their own procedural law to the existence and assessment of the substantive

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\(^{16}\) See, eg, SIAC Rules, Rule 39(1); and HKIAC Rules, Art 45, which expand confidentiality to emergency arbitrators and pre-arbitral proceedings.

\(^{17}\) Even though it has been reported that voluntary compliance of arbitral decisions is high, enforcement may be an important factor in particular cases. Similarly, the perception of arbitration users as to the lack of enforceability may be an important element that may impact on the adoption of emergency proceedings.

\(^{18}\) ICC Report (n13) 79.

\(^{19}\) See, eg, s 44(5) of the English Arbitration Act.
standards. By contrast, arbitrators have not taken a consistent approach to the applicability and interpretation of such standards.\(^{20}\)

As regards its legal regime, it should be noted that the emergency arbitrator procedure is not a harmonised or unified institution. There are as many emergency procedures as there are arbitral institutions. Accordingly, it is possible to find elements that are common to virtually every set of rules, as well as features that are distinctive of specific arbitration centres.\(^{21}\) One of the most remarkable differences between institutional rules is the form of the decision of the emergency arbitrator. On the one hand, some institutions such as the ICC provide that a decision in pre-arbitral proceedings shall take the form of an order.\(^{22}\) On the other hand, other institutions such as the SCC\(^{23}\) and the LCIA\(^{24}\) confer emergency arbitrators a discretionary power to decide the form of their decisions. Another source of major disagreement between institutions is the possibility to obtain \textit{ex parte} relief in emergency arbitration. Whilst it is true that a majority of arbitration centres prohibit such remedies, other institutions such as the Swiss Chambers’ Arbitration Institution\(^{25}\) explicitly provide in their rules that \textit{ex parte} relief is permitted in the form of preliminary orders.\(^{26}\) In SCAI arbitration, out of eleven cases filed under the emergency procedure from 2012 to 2020, three were \textit{ex parte} applications.\(^{27}\) By contrast, the ICC emergency procedure does not allow \textit{ex parte} relief as the ICC Task Force on Emergency Arbitration has confirmed.\(^{28}\)

Notwithstanding the lack of consensus with respect to some issues, other features are common to most, if not all, arbitration rules. To begin with, in every set of rules

\(^{20}\) See Schedule I.

\(^{21}\) Only selected features are discussed here. The comparative analysis between institutional rules attempts to demonstrate that the emergency procedure is not a unified institution.

\(^{22}\) ICC Rules, Appendix V, Art 6(1).

\(^{23}\) SCC Rules, Appendix II, Art 1(2).

\(^{24}\) LCIA Rules, Art 9(8).

\(^{25}\) SCAI has been recently renamed as Swiss Arbitration Centre (SAC).

\(^{26}\) SAC-SCAI Rules, Arts 29(3) and 43(1).


\(^{28}\) ICC Report (n13) 5.
the mandate of the emergency arbitrator is subject to a double limitation: first, emergency arbitrators are restricted to rule on applications for urgent relief, and secondly, their powers are limited to a specific period, that is to say, their authority ceases once the tribunal with jurisdiction on the merits is constituted.\textsuperscript{29} Secondly, the decisions rendered by emergency arbitrators do not bind tribunals with jurisdiction on the merits which have then the power to \textit{de novo} re-examine the application for urgent relief as they consider appropriate, and regardless of the emergency decision. In other words, the tribunal with jurisdiction on the merits may confirm, modify, suspend or terminate the emergency order or award. Thirdly, virtually every set of rules dictates that emergency proceedings are contingent on arbitral proceedings on the merits. As a result, if the applicant fails to submit a request for arbitration within the time limit set out by the applicable arbitration rules, the emergency proceedings would be terminated.\textsuperscript{30} Finally, the majority of institutional rules seem to agree on the fact that emergency arbitrators cannot form part of the tribunal subsequently constituted to determine the merits of the dispute,\textsuperscript{31} albeit some rules accept such appointments if explicitly agreed by the parties.\textsuperscript{32}

3. The legal status and powers of emergency arbitrators to render pre-arbitral relief

3.1. Framing the scope of the discussion

The question of the legal nature of the emergency arbitrator procedure has received almost every conceivable answer. Whilst some scholars have held that emergency arbitration is a “jurisdictional mechanism akin to a full-fledged arbitration”,\textsuperscript{33} other commentators have taken the view that the emergency procedure is a purely non-arbitral and contractual method that aims to complement arbitration prior to the

\textsuperscript{29} See, however, ICC Rules, Appendix V, Art 2(2).
\textsuperscript{30} See, eg, ICC Rules, Appendix V, Art 1(6).
\textsuperscript{31} ICC Rules, Appendix V, Art 2(6).
\textsuperscript{32} SCC Rules, Appendix II, Art 4(4).
\textsuperscript{33} Fabio G Santacroce, "The emergency arbitrator: a full-fledged arbitrator rendering an enforceable decision?" (2015) 31 Arb Int 283, 297.
The debate regarding the contractual-jurisdictional dichotomy of the emergency procedure has its origin in a decision of the Paris Court of Appeal in the context of the 1990 ICC pre-arbitral referee procedure. In Société Nationale des Petroles de Congo and Republique du Congo v TEP, the respondent sought to set aside an order rendered by a “referee” under the ICC Pre-Arbitral Referee Rules. The Paris Court of Appeal held that a pre-arbitral referee is not an arbitrator and that an emergency decision has only contractual value. The Court reasoned as follows:

“the order (…) rendered according to a contractual mechanism founded on the cooperation of the parties, has, despite its designation, a contractual nature in the sense that it derives its authority from the agreement, and that, consequently, an appeal for annulment filed against an award is inadmissible”.

Two factors played a fundamental role in this decision. First, the fact that terminology such as “arbitration” and “arbitrator” was carefully avoided in the ICC Referee Rules which only includes the term “referee”. Secondly, the authority of the decision-maker that was solely derived from the agreement of the parties, and whose order could not have more binding effect than any other contractual provision.

In this context, an important question arises: what is the difference between contractual and jurisdictional powers? To begin with, the power or authority of a body is contractual if the decision-maker acts on behalf of the parties to create new contractual terms which bind these parties. By contrast, the power of a body is jurisdictional if the decision-maker has an adjudicatory power over the parties and their dispute to render decisions that are presumptively enforceable like an arbitral award or a judgment.

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34 See § 3.2.2.
35 Judgment of 29 April 2003, Court of Appeal of Paris, First Chamber, section C.
38 Ibid.
As already explained in the introduction, the policy and academic debate surrounding the contractual or jurisdictional status of emergency arbitrators has been almost exclusively examined through the prism of enforcement. Santacroce, for example, has illustrated the interrelationship between the status of emergency arbitrators and enforcement in the following terms: “if the emergency arbitrator were to be defined as an arbitrator (…) his decisions would be subject to the same means of enforcement designed for decisions on interim relief by an arbitral tribunal”. Yet, ascertaining the potential jurisdictional or contractual authority of emergency arbitrators is also crucial in order to determine the extent of their powers. If the authority of an emergency arbitrator is contractual, arbitration legislation cannot be applied to any of their powers and duties. Obviously, national arbitral legislation applies only to arbitration and not to other methods of dispute avoidance or dispute resolution of contractual nature which do not qualify as arbitration. By contrast, if the authority of an emergency arbitrator is based on the existence of an adjudicatory power over the parties, these decision-makers may assert authority to render any remedy as provided by the applicable arbitration rules and the lex arbitri. Under French law, for example, tribunals have the authority to impose penalties on parties that fail to comply with arbitral decisions on interim measures. Thus, a further question arises: are emergency arbitrators seated in France empowered to act under Article 1468 of the French Code of Civil Procedure by attaching penalties to their pre-arbitral decisions? By way of further example, in England, section 41 of the Arbitration Act allows arbitrators to make peremptory orders and section 42 confers English courts the power to enforce such orders. Is then an emergency arbitrator seated in England empowered under the Arbitration Act to render a peremptory order and have it enforced by English courts? As it can be seen, discerning the legal nature of emergency proceedings – and therefore, the status of emergency arbitrators – is a precondition to determine their authority and the extent of their powers.

39 Santacroce (n33) 290.
3.2. The scholarly debate on the contractual or jurisdictional nature of the emergency arbitrator procedure

Legal writers have adopted two radically opposed views to the question of the legal status of emergency arbitrators. This subsection compiles the main arguments advanced by both opponents of the thesis that emergency arbitrators are full arbitrators and supporters of the said hypothesis. Interestingly, scholars have used the same features and arguments to arrive at tangentially different conclusions.

3.2.1. Arguments in support of classifying emergency arbitrators as arbitrators

3.2.1.1. The seat of the emergency arbitration procedure

The seat of the emergency proceedings is one of the factors which have been used by many commentators in support of the classification of emergency arbitrators as full arbitrators. If emergency arbitration is simply a contractual mechanism, there is no need to refer to the legal system of the contractual decision-making process. The seat is only relevant if the authority of the emergency arbitrator is jurisdictional, and therefore, if it emerges from a particular legal system rather than from a contract. Thus, it has been argued that the seat or place of the proceedings “presents the biggest conceptual challenge” to the view that emergency arbitration is a contractual method. Other commentators, however, have claimed that an emergency arbitrator is not an arbitrator by virtue of the seat but by virtue of its powers. Beisteiner, for example, argues that this challenge is not insurmountable since the place of the emergency proceedings can “retain its meaning” and might be then interpreted as the law governing the substantive requirements of the application for emergency relief. One may legitimately question why and how a choice of seat – a procedural aspect – should be deemed as determining the law applicable to the substantive standards. Furthermore, as Schedule I demonstrates with respect to arbitral tribunals, arbitrators have not adopted the view that the choice of the arbitral

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40 Baigel (n9) 16.
41 ibid.
42 ibid.
43 Beisteiner (n14) 320.
seat determines the law applicable to the substantive standards. Even if one were to assume that emergency arbitrators are not arbitrators, it is difficult to see why they should adopt a different approach than that of arbitral tribunals. In contrast to the view of Beisteiner, Moser and Bao, for example, have argued that in HKIAC arbitration the seat determines the nationality of the emergency decision and the applicable procedural law in the emergency proceedings.\textsuperscript{44} This conclusion transplants the legal effects of the arbitral seat to the seat of the emergency proceedings and it is, \textit{prima facie}, the most reasonable approach from a logic and policy point of view.

3.2.1.2. The principle of \textit{kompetenz-kompetenz}

The emergency arbitrator has the power to consider and rule on his own “jurisdiction”.\textsuperscript{45} This cornerstone principle of the law of international arbitration may be used in support of the classification of emergency arbitrators as proper arbitrators. Santacroce, for example, argues that this principle applies where the arbitration agreement is defective, and therefore, this doctrine must be “grounded in the jurisdictional nature of an arbitrator’s mandate”.\textsuperscript{46} Nevertheless, what Santacroce did not consider is that this doctrine is a legal fiction of counterfactual nature\textsuperscript{47} which was adopted to serve an important purpose, that is, to avoid the prior approval of national courts as a prerequisite to the exercise of arbitral jurisdiction.\textsuperscript{48} Accordingly, as a legal fiction, the source of this principle is not something obvious or entirely clear. Whilst in the United States, the basis of this doctrine is considered to be in the arbitration agreement itself, in France this principle is deemed to be established by law.\textsuperscript{49} Furthermore, as Beisteiner rightly explained, contractual methods of dispute resolution have also incorporated the principle of competence-competence while

\textsuperscript{44} Michael J Moser and Chiann Bao, \textit{A Guide to the HKIAC Rules} (OUP 2017) para 8.48.
\textsuperscript{45} See, eg, LCIA Rules, Art 9(14).
\textsuperscript{46} Santacroce (n33) 294.
\textsuperscript{47} If an arbitrator rules that he does not have jurisdiction, then he did not have the authority to make any ruling at all, including any determination as to his jurisdiction.
\textsuperscript{48} Bermann (n15) 94.
remaining non-jurisdictional mechanisms. 50 Dispute adjudication boards, which are particularly prevalent in construction disputes, demonstrate that the principle of competence-competence does not necessarily qualify a dispute resolution system as a jurisdictional mechanism. In the context of FIDIC Dispute Avoidance and Adjudication Boards, for example, the DAAB Procedural Rules provide in Rule 5.1(c) that “the parties empower the DAAB to decide on the DAAB’s own jurisdiction”. 51

3.2.1.3. The emergency proceedings and the arbitral proceedings on the merits as part of a single arbitration

There is a good argument for saying that both proceedings are part of a single arbitration. The opt-out nature of the emergency provisions, the requirement imposed on the applicant to file a request for arbitration on the merits, and the fact that both mechanisms are governed by the same set of rules may support this line of reasoning. Beisteiner has argued, however, that in ICC arbitration the emergency provisions are contained in a different set of procedural rules, that is, in Appendix V. 52 Nevertheless, this is a very textual interpretation that can be easily disregarded. Even if one were to admit that emergency arbitration is contained in a different part of the rules than the proceedings on the merits, Article 8(3) of Appendix V explains that in matters not explicitly addressed in the Appendix, emergency proceedings must be conducted “in the spirit of the Rules” 53 and this Appendix”. As it can be seen, this clearly points to a single and unified legal regime. Similarly, the argument put forward by Beisteiner does not explain the fact that other institutional rules deal with emergency arbitration in the main part of their rules. 54

Having said that, it is true that there are other aspects of the emergency arbitration procedure which may impact on the potential holistic approach to emergency arbitration and arbitration on the merits. First, the location of the seat of the emergency proceedings may be different to the seat of the proceedings on the

50 Beisteiner (n14) 321.
52 Beisteiner (n14) 324.
53 Emphasis added.
54 See, eg, LCIA Rules, Article 9B.
merits. Secondly, in theory, potential “conflicts” may arise under some institutional rules between the emergency arbitrator and the tribunal with jurisdiction on the merits if the emergency decision has not been rendered before the constitution of the tribunal. If these two systems are to be conceptualised as a single arbitration, one may question why two different bodies have adjudicatory powers with respect to applications for interim relief within the same time frame. Even if these two scenarios are likely to arise in very exceptional cases, it is true that from a doctrinal point of view, this issue appears to effectively impact on the unified approach towards emergency arbitration and the proceedings on the merits.

3.2.1.4. The intention of the parties

Some commentators have argued that the intention of the parties is to obtain an enforceable emergency decision just as an ordinary arbitral interim measure. In a similar vein, Valasek and Wilson have explained that “the more the procedure adopted resembles a judicial process, the likelier it is that the parties intended the process to be an arbitration”. The main question in this context is whether the intention of the parties to obtain an enforceable decision through a process where the emergency arbitrator uses impartial adjudicatory procedures is enough to confer jurisdictional authority to this non-governmental decision-maker. Although it is true that some legal systems seem to have accepted the jurisdictional authority of emergency arbitrators on the basis of the intention of the parties and an implied power derived from national arbitration legislation, other legal systems require an express transfer of powers from the lex arbitri to the emergency arbitrator.

55 See, eg, SIAC Rules, Schedule 1, Rule 4.
57 Beistener (n14) 323.
59 See also, Christopher Boog and Bertrand Stoffel, ‘Preliminary Orders and the Emergency Arbitrator: Urgent Interim Relief by an Arbitral Decision Maker in Exceptional Circumstances’ in Nathalie Voser (ed), 10 Years of Swiss Rules of International Arbitration (ASA Special Series 44, JurisNet 2014) 78, who argue that the “judicial” role of the emergency arbitrator demonstrates that its authority is jurisdictional.
3.2.2. Arguments in support of classifying emergency arbitrators as contractual decision-makers

3.2.2.1. There cannot be two different arbitrators for the same matter

Jarroson, a preeminent French scholar, concluded in the context of the ICC pre-arbitral referee procedure that “arbitrage sur arbitrage ne vaut”, that is, arbitration on arbitration does not work. Some scholars have adopted the same line of reasoning by arguing that there cannot be two different arbitrators with the same powers. Baigel, for example, has claimed that “the parties would not have intended to entrust two separate bodies with an identical jurisdiction to order interim measures”. One may argue, however, that the purpose and functions of emergency arbitrators and arbitral tribunals are not the same since, evidently, an arbitral tribunal cannot render any remedy before it is constituted. Nevertheless, this argument does not seem to be enough for Baigel who goes on to say that “the fact that these bodies do not coexist in time is not material”. If both bodies were arbitrators, it is argued, both bodies would have equal status and national courts would not know which decision prevails. Again, one may question this view on the basis that the emergency procedure establishes a clear priority in favour of the tribunal with jurisdiction on the merits which may modify, suspend or terminate any emergency decision.

3.2.2.2. No right to appoint the emergency arbitrator

Several scholars have used the fact that the parties cannot select their emergency arbitrator as an element that supports the contractual nature of the emergency proceedings. If the parties cannot select their decision-maker, it is claimed, emergency arbitration cannot be categorised as arbitration. Other commentators, however, have rejected this argument on the basis that the institution appointing the

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60 Santacroce (n33) 299. This issue was also identified in the context of the pre-arbitral referee procedure: see Klaus Peter Berger, ‘Pre-Arbitral Referees: Arbitrators, Quasi-Arbitrators, Hybrids or Creatures of Contract Law?’ in Gerald Aksen and others (eds), Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner (ICC Publishing 2005) 82.
62 Baigel (n9) 10.
63 Ibid.
64 Beisteiner (n14) 315.
emergency arbitrator do so on behalf of the parties, in the same way as appointing authorities select arbitrators with jurisdiction on the merits.65 It is also important to note that some institutional rules do allow the parties to appoint their emergency arbitrator.66

3.2.2.3. The mandate of an arbitrator cannot be limited to provisional measures

This is probably one of the biggest challenges to the jurisdictional role of emergency arbitrators since, from a practical point of view, their powers eventually depend on the concept of “arbitration” and “arbitral tribunal” as adopted by each legal system. According to some commentators, in legal systems such as Austria, the concept of arbitrator is strictly limited to a non-governmental decision-maker who renders a final and binding decision to the exclusion of national courts. Thus, according to Beisteiner, under Austrian law, an emergency arbitrator only serves “a supporting function which is essentially dedicated to protecting the final decision”.67 This conclusion is based on: i) Section 581 of the Austrian Code of Civil Procedure which appears to categorise arbitrators as decision-makers who finally determine the dispute between the parties and ii) the fact that emergency arbitrators do not exclude national courts with respect to decisions on the merits. It is also argued, in this context, that whilst an emergency arbitrator cannot exclude the power of courts to render interim relief, arbitral tribunals do effectively exclude recourse to national courts at least in some circumstances.68 This argument is, however, absurd. The allocation of powers between courts and arbitrators changes dramatically depending on the legal system acting as the arbitral seat and the institutional rules adopted by the parties. In many legal systems such as England, the refusal of an emergency arbitrator to render interim measures effectively excludes the power of national courts to rule on the same application for interim relief.69 If emergency arbitrators were to be considered as contractual decision-makers, it is doubtful whether such

65 Santacroce (n33) 301.
66 NAI Rules, Art 36(4).
67 Beisteiner (n14) 303.
68 Ibid 312.
69 Gerald Metals v Timis [2016] EWHC 2327 (Ch). See also Cygne BV v Cofco Coöperatief UA, Amsterdam District Court, judgment of 12 January 2017, where the judge on interim relief proceedings (kort geding) declined to exercise his power to render provisional measures in view of the pendency of ICC emergency proceedings.
effects could be imposed on national courts. This discussion then leads to an important conclusion: what the analysis of Beisteiner suggests is that emergency arbitrators might not possess adjudicatory powers in Austria by reason of the concepts adopted by Austrian law. Generalisations are clearly inappropriate and, from a policy point of view, there does not appear to be any logical reason preventing emergency arbitrators to be categorised as proper arbitrators by way of legislative reforms.

3.2.2.4. Lack of “finality” of the emergency decision

Several commentators such as Ghaffari and Walters have explained that “an emergency arbitrator’s decision is not a final decision in the everyday sense”.\textsuperscript{70} In a similar vein, it has been held that “the EA measure lacks the finality otherwise attached to arbitral interim measures”.\textsuperscript{71} Even though the terminology used by these commentators does not seem appropriate since evidently, all interim measures are by definition provisional, it is possible to argue that emergency decisions were designed to be easily removable and are then inherently provisional.\textsuperscript{72} Thus, according to these scholars, the legal effects of emergency decisions demonstrate that the emergency arbitrator is a contractual decision-maker. This conclusion is based on two findings.

First, arbitral tribunals may decide on an emergency application \textit{de novo}, as they consider appropriate and without being subject to certain prerequisites. In other words, the decision of the emergency arbitrator does not bind the tribunal with jurisdiction on the merits. By contrast, arbitral tribunals cannot \textit{de novo} re-examine their own previous orders on interim measures unless certain prerequisites are satisfied such as a change of circumstances or new evidence available.\textsuperscript{73} This seems to point to the conclusion that emergency decisions are “inferior to an interim measure [rendered by a tribunal]” or “more provisional than ordinary [interim]


\textsuperscript{71} Beisteiner (n14) 311.

\textsuperscript{72} ibid.

\textsuperscript{73} ibid 306.
Yet, this line of reasoning is not particularly convincing. Indeed, one might argue that the arbitral tribunal may *de novo* re-examine a court-ordered remedy that was rendered *in support of* the proceedings on the merits. Obviously, this arbitral power does not turn the decision of the court into a contractual ruling. Whilst it is true that emergency orders and awards are “inferior” in the sense that such decisions do not bind the tribunal with jurisdiction on the merits, this does not demonstrate or support the view that emergency arbitrators are contractual decision-makers. The lack of binding effects of emergency decisions on arbitral tribunals is inherent to the supportive role of emergency proceedings and has nothing to do with the jurisdictional or contractual power of emergency arbitrators.

Secondly, these commentators have explained that the effects of emergency decisions are set to automatically lapse under certain circumstances. In ICC arbitration, for example, the decision of the emergency arbitrator ceases to be binding on the parties upon the acceptance by the ICC Court of a challenge against the emergency arbitrator. By contrast, if a challenge is accepted against an arbitrator in the context of the main proceedings, there does not appear to be an automatic lapse of the decisions adopted by the prior tribunal. Indeed, pursuant to Article 15(4), the reconstituted tribunal will determine if or to what extent prior proceedings shall be repeated. However, it is important to note that there is no consensus among institutional rules in this regard. The 2018 HKIAC Rules, for example, provide that if the emergency arbitrator is replaced, the proceedings will resume at the stage where the emergency arbitrator was ceased, unless the new substitute arbitrator decides otherwise. Leaving aside the lack of consensus among arbitral institutions, it is important to note that there are other circumstances common to most arbitration rules under which emergency decisions cease to have effects. By way of example, in ICC arbitration, an emergency decision ceases to have binding effects if the applicant does not file a request for arbitration within 10 days of the

74 ibid.
76 Beisteiner (n14) 308.
77 ICC Rules, Appendix V, Art 6(6).
78 HKIAC Rules, Schedule 4, Art 8.
reception by the ICC Secretariat of the emergency application.\textsuperscript{79} Most institutional rules include similar provisions.\textsuperscript{80} Accordingly, the fact that emergency decisions are easily removable in circumstances that are unrelated to the substance of the application for interim relief and the protection of the rights of the parties might point to the conclusion that the authority of emergency arbitrators is not jurisdictional.

\subsection*{3.2.2.5. Emergency decisions limited to procedural orders}

If emergency arbitrators cannot decide the form of their decisions, it is possible to argue that they cannot be regarded as proper arbitrators since their powers would be narrower than those of arbitral tribunals. In ICC arbitration, pursuant to Article 29(2), the decision of the emergency arbitrator shall take the form of an order. Voser, a member of the Drafting Sub-Committee for the revision of the rules, has explained that the rationale of this provision is to distinguish the decision of emergency arbitrators from the award rendered by arbitral tribunals and to erase any doubts as to the need for scrutiny by the Court\textsuperscript{81} of any emergency decision.\textsuperscript{82} Yet it is important to note that, unlike the ICC rules, the majority of institutional rules do not impose on emergency arbitrators the form of their decisions. Under LCIA arbitration, for example, “the Emergency Arbitrator may make any order or award which the Arbitral Tribunal could make under the Arbitration Agreement”.\textsuperscript{83} Likewise, the institutional rules of the SIAC,\textsuperscript{84} HKIAC,\textsuperscript{85} SCC\textsuperscript{86} and ICDR\textsuperscript{87} recognise the discretionary power of emergency arbitrators to decide the form of their decisions.

\textsuperscript{79} ICC Rules, Appendix V, Arts 1(6) and 6(6).
\textsuperscript{80} See, eg, SIAC Rules, Schedule 1, Rule 10. cf NAI Summary Arbitral Proceedings which do not require the applicant to start proceedings on the merits unless Article 36(9) of the NAI Rules is applicable.
\textsuperscript{81} The ICC Court cannot scrutinise emergency decisions since this prerogative arises only with respect to arbitral awards. See ICC Rules, Art 34.
\textsuperscript{83} LCIA Rules, Art 9(8).
\textsuperscript{84} SIAC Rules, Schedule 1, Rule 8.
\textsuperscript{85} HKIAC Rules, Schedule 4, Art 12.
\textsuperscript{86} SCC Rules, Art 37(3) and Appendix II, Art 1(2).
\textsuperscript{87} ICDR Rules, Art 7(4).
3.2.2.6. The undertaking to be bound by the emergency decision: breach of contract as a consequence of non-compliance?88

In virtually every set of institutional rules, there is a provision establishing that the parties undertake to comply with any emergency decision. One might argue that if emergency arbitration is a jurisdictional mechanism, such provisions would not have any meaning or purpose at all. Article 29(2) of the ICC Rules, for example, determines that the parties are bound by any decision rendered by the emergency arbitrator. However, similar provisions can also be found in the ICC rules with respect to procedural orders – Article 22(5) – and awards – Article 35(6) – rendered by tribunals with jurisdiction on the merits. In order to minimise or obviate the effects of these provisions on her discussion, Beisteiner conducts again a purely textual analysis to conclude that the undertaking to be bound by the emergency decision of Article 29(2) “is a verbatim copy of the language used in Article 22(5)” which deals with procedural orders alone.89 Even if this aspect is not conclusive, it is argued, it indicates that emergency decisions are contractually binding upon the parties rather than inherently jurisdictional. On closer examination, however, this interpretation seems flawed at law. These provisions do not qualify a particular arbitral mechanism as jurisdictional or contractual. Rather, these provisions were designed as a last resort, to ensure the enforceability of awards and orders in legal systems where arbitral decisions are not presumptively enforceable.

3.2.3. Conclusions on the scholarly debate

The main conclusion that can be inferred from this section is that there is no uniquely correct answer to the question of the legal status of emergency arbitrators. The legal framework of emergency arbitration in, for example, Germany is not the same as that in force in Singapore. Two issues should be clarified with respect to the approaches of commentators. First, in terms of methodology, most commentators have assessed the status of emergency arbitrators by equating emergency arbitration to the arbitral proceedings on the merits, as if they were the same or even similar aspects of the

89 Beisteiner (n14) 319.
arbitral process. Equating emergency arbitration to arbitration on the merits requires then an analysis of the concept of arbitration in force in each legal system, and obviously, legal systems have adopted different concepts of arbitration. It is also important to note that most national laws have not included a definition of “arbitration” or “arbitral tribunal” so these concepts are still open to debate.90 This explains the disparity of approaches with respect to emergency proceedings and the existence of a solid corpus of academic opinion that rejects the jurisdictional role of emergency arbitrators. Secondly, most commentators have usually taken a particular view in terms of *lex ferenda* rather than *lex lata*. In other words, many scholars, when discussing whether or not emergency arbitrators are arbitrators, have sought to provide an answer in terms of policy (what the law ought to be) rather than law (what the law actually is).91 In France, for example, a majority of scholars seem to have taken the view that a pre-arbitral referee, and therefore an emergency arbitrator, should have a jurisdictional role,92 however, as case law stands the legal nature of emergency arbitration appears to be contractual. For that reason, this chapter now turns to the analysis of national arbitration legislation and institutional rules to discern the law as it stands.

3.3. National arbitration legislation on the legal status and powers of emergency arbitrators

3.3.1. An Emergency Arbitrator is an arbitrator

Only a small number of legal systems have so far incorporated explicit references to the powers of emergency arbitrators in their respective arbitration legislation.93 In arbitrations seated in New Zealand, for example, emergency arbitrators and arbitral tribunals have the power to grant interim measures even on an *ex parte* basis due to

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91 The same argument was put forward by Hill with respect to arbitral tribunals: see Jonathan Hill, ‘Is an Interim Measure of Protection Ordered by an Arbitral Tribunal an Arbitral Award’ (2018) 9 JIDS 1, 15.
93 The first country adopting this approach was Singapore in 2012.
the operation of section 2(1) of the Arbitration Act\textsuperscript{94} which equates emergency arbitration to “arbitrations” for the purposes of the said Act. Likewise, in Singapore, the International Arbitration Act\textsuperscript{95} adopts a similar approach in section 2(1) by including emergency arbitrators as part of the concept of arbitral tribunal. It is clear then that in these legal systems an emergency arbitrator is an arbitrator who can assert any power as set out by the local arbitration act. Other legal systems such as Fiji,\textsuperscript{96} Malaysia,\textsuperscript{97} The Netherlands,\textsuperscript{98} and Tonga\textsuperscript{99} have also adopted this legal framework and several other countries might follow soon.\textsuperscript{100}

3.3.2. An Emergency Arbitrator is an arbitral body, different from arbitrators, who possesses adjudicatory powers

Hong Kong law,\textsuperscript{101} for example, differs from the previous model since it does not explicitly recognise the powers of emergency arbitrators, but rather, it includes a reference to the enforceability of pre-arbitral decisions. In Hong Kong, emergency arbitrators do not have the same powers as arbitral tribunals. In fact, the powers of tribunals to grant provisional remedies as set out by Part 6 of the Arbitration Ordinance are not applicable to emergency arbitrators\textsuperscript{102} and the Ordinance does not include any other provision dealing with the powers of emergency arbitrators.

As it can be seen, there are two potential approaches to the implementation of the emergency arbitration procedure.\textsuperscript{103} First, legal systems may want to adopt a

\textsuperscript{94} Arbitration Act 1996 (New Zealand).
\textsuperscript{95} International Arbitration Act, Chapter 143A (Singapore).
\textsuperscript{96} International Arbitration Act 2017 (Fiji), s 2.
\textsuperscript{97} The Arbitration (Amendment) (No 2) Act 2018 (Malaysia), s 2.
\textsuperscript{98} Dutch Code of Civil Procedure, Arts 1043(b) 1 and 2, unofficial translation <www.nai-nl.org/en/documents/dutch_arbitration_act> which confers emergency arbitrators and arbitral tribunals the same powers: to render provisional relief other than conservatory measures set out in the Fourth Title of the Third Book.
\textsuperscript{99} International Arbitration Act 2020 (Tonga), s2(1).
\textsuperscript{100} See, eg, International Commercial Arbitration Bill 2018 (The Bahamas), s 2(1). However, in other legal systems such as India, the attempts to adopt this approach has been so far unsuccessful. The recommendations included in the 246th Report of the Indian Law Commission which equated “arbitral tribunal” and “emergency arbitrator” have not been yet incorporated into the local arbitration act.
\textsuperscript{101} Arbitration Ordinance, Cap 609 (Hong Kong).
\textsuperscript{102} ICC Report (n13) 57.
\textsuperscript{103} Cameron Sim has reported in Emergency Arbitration (OUP 2021) para 10.51 that Bolivia is an example of a legal system implementing emergency arbitration. See also, Philippe Cavalieros and Janet Kim, 'Emergency
framework based on jurisdiction which equates emergency arbitrators to arbitral tribunals. This was the approach adopted in Singapore, New Zealand or Malaysia. Secondly, legal systems may want to adopt a system exclusively based on enforcement that does not deal with the powers of emergency arbitrators. There are, of course, important differences between these alternatives. The former option provides comprehensive regulation of the emergency arbitrator procedure since it covers the authority of emergency arbitrators, and additionally, it provides for the enforcement of their decisions in the same way as decisions of arbitral tribunals. The latter option, however, configures the power of emergency arbitrators as jurisdictional – since their decisions are enforceable as an award or a judgment – but it does not equate their powers to those of tribunals. In the latter case, the emergency arbitrator should be conceptualised as an arbitral body, different from arbitrators, but with adjudicatory authority over the parties. This is, precisely, the solution adopted in Hong Kong. Under Hong Kong law, emergency arbitrators cannot be properly categorised as arbitrators since they do not possess the same powers as tribunals with jurisdiction on the merits. Accordingly, Hong Kong law conceptualises the emergency arbitrator as a different arbitral body with enforceable (adjudicatory) powers.

3.3.3. An Emergency Arbitrator may or may not be an arbitrator: uncertainty in a great majority of legal systems

The legal regime of the emergency arbitrator procedure is still intensely debated and unsettled in a great majority of legal systems. Not surprisingly, the contractual-jurisdictional debate of emergency proceedings primarily takes place in this category of legal systems and it is the result of the absence of specific legislation dealing with emergency arbitration.

Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations’ (2018) 35 JIA 275, 289. This is, however, debatable for two reasons. According to Article 67 of the Conciliation and Arbitration Act 2015: i) the parties shall expressly adopt emergency arbitration in their arbitration agreement (opt-in), and ii) the powers of the “emergency arbitrator” are limited to those explicitly conferred upon it by the parties in the arbitration agreement; otherwise, the role of the “emergency arbitrator” is simply to transmit the request to the competent court. Accordingly, the Bolivian model resembles the pre-arbitral referee procedure and shall not be used as an example of legislative implementation of emergency arbitration.
Two scenarios may arise under this model. First, there are countries where emergency arbitrators are not likely to be considered proper arbitrators. In Germany and Austria, for example, there seem to be doubts as to whether emergency arbitration can be categorised as a form of arbitration. Remarkably, the rules of the main arbitral institutions registered in these legal systems have not incorporated provisions on emergency arbitration due to potential doubts as to the legal status of this institution. Indeed, the 2018 DIS Rules of the German Arbitration Institute and the 2018 Rules of the Vienna Arbitration Centre have obviated, for now, the emergency arbitration procedure. The case of the DIS Rules is particularly interesting since, as reported by Cavalcante and Bickmann, the German Arbitration Institute decided not to anticipate the legal regime of emergency arbitration and wait for the reform of the ZPO which was thought to be imminent. However, as of May 2021, a draft bill extending section 1041 ZPO to emergency arbitrators, expected in 2018, remains unpublished. By way of further example, France has been reported as a legal system adopting this approach. As case law currently stands, emergency arbitrators seated in France might only have contractual power over the parties. Perhaps it is useful to pause here to examine the practical impact of the contractual and jurisdictional authority of emergency arbitrators. From a theoretical point of view, the jurisdictional-contractual issue will primarily impact on how emergency decisions are enforced. However, if most parties voluntarily comply with the decisions of emergency arbitrators and if they do not resort to the coercive powers of national courts, the jurisdictional-contractual debate may not be as important as it might, at first glance, appear. By contrast, the important question in practical terms is the extent of the powers of emergency arbitrators to render pre-arbitral relief either i) under the lex arbitri and the institutional rules jointly considered as a result of an alleged jurisdictional power or ii) under the applicable rules alone on the basis of a contractual power.

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104 Beisteiner (n14) 296-298 and 326. cf, as regards Germany, Jakob Horn, Der Emergency Arbitrator und die ZPO (Mohr Siebeck 2019).
106 ICC Report (n13) 55.
107 ibid 54.
Secondly, in other legal systems such as the United States, emergency arbitration is treated as a proper arbitration and local courts have recognised and enforced the jurisdictional authority of emergency arbitrators.\textsuperscript{108} It should be noted that this approach is adopted even though the local arbitration statute does not address the institution of emergency arbitration. Accordingly, the authority of emergency arbitrators may be the result of an implied power derived from arbitral legislation allowing tribunals to render interim relief. Indeed, it is possible to argue that the emergency proceedings and the proceedings on the merits are part of a single arbitration conducted under the auspices of the same arbitral institution and under the same set of rules, and therefore, that the provisions of national law designed for arbitral tribunals are equally applicable to emergency arbitrators.

3.3.4. An Emergency Arbitrator is not an arbitrator

In theory, in legal systems such as China or Italy, by extension of the general prohibition of tribunal-rendered relief, emergency arbitrators do not have the power to render pre-arbitral relief, not even in the form of decisions of contractual nature. The mandatory provisions of the \textit{lex arbitri} effectively exclude any contractual arrangements adopted by the parties. In other words, in these legal systems, emergency arbitrators do not possess either jurisdictional or contractual authority to render pre-arbitral interim remedies.\textsuperscript{109}

The following figure summarises each of the models explained in this subsection:

\textsuperscript{108} ibid 86.

\textsuperscript{109} However, in 2017 the Beijing Arbitration Commission administered the first emergency proceedings in Mainland China. The decision has not been reported so it is not possible to ascertain if Chinese law was the \textit{lex arbitri}. It should be noted that, under the 2015 BAC Rules, the appointment of an emergency arbitrator should be made in accordance with \textit{the applicable law} (emphasis added). See Wei Sun, ‘First Emergency Arbitrator Proceeding in Mainland China: Reflections on How to conduct an EA Proceedings from Procedural and Substantive Perspectives’ \<www.arbitrationblog.kluwerarbitration.com/2018/09/01/first-ea-proceeding-mainland-china-reflections-conduct-ea-proceeding-procedural-substantive-perspectives/> accessed 21 July 2021.
Emergency Arbitrators are not arbitrators

1) Emergency Arbitrators possess the same powers to render emergency measures as arbitral tribunals
2) Presumptively enforceable decisions as arbitral awards or judgments

Emergency Arbitrators possess jurisdictional authority

1) Powers of Emergency Arbitrators different from those of arbitral tribunals
2) Presumptively enforceable decisions as arbitral awards or judgments

Emergency Arbitrators possess contractual authority

1) Arbitral legislation not applicable to the powers of Emergency Arbitrators. Institutional rules are then crucial
2) Enforceable as decisions of contractual nature

Emergency Arbitrators do not possess any authority

Figure 6.1. Implementing the Emergency Arbitrator Procedure. From left to right, the first option has been adopted, for example, in Singapore and New Zealand. The second alternative has been implemented in Hong Kong. A majority of legal systems like France and Austria seem to remain under the third alternative. Finally, in legal systems where tribunals are not allowed to render provisional measures, emergency arbitrators will not possess the authority to render emergency relief.

3.4. Institutional rules on the legal status and powers of emergency arbitrators

The legal status of the emergency arbitrator not only depends on the particular legal systems involved in the emergency proceedings. The institutional rules adopted by the parties may also play an important role. In this context, it should be remembered that the emergency arbitrator procedure is not a unified legal institution. Indeed, the authority of an emergency arbitrator is not the same under the ICC Rules as under the SIAC or the HKIAC rules. Interestingly, a comprehensive analysis of the different set of rules reveals that under the ICC Rules there seem to be several features of strong contractual nature not found in, for example, the ICDR, LCIA and SIAC rules. The following aspects of ICC arbitration which are not generally found in other institutional rules might be interpreted as pointing to a contractual power of ICC emergency arbitrators:

110 Under Art 2(8) of the HKIAC Rules, for example, it seems clear that an emergency arbitrator is not an arbitrator.
i) The powers of ICC emergency arbitrators. Article 29(1) of the ICC Rules confers emergency arbitrators the power to render “urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal (Emergency Measures)”. Although the Rules do not provide a concept or definition of what constitutes “emergency measures”, the powers of ICC emergency arbitrators seem narrower than those of: i) ICC arbitral tribunals and ii) emergency arbitrators acting under the auspices of other arbitral institutions. First, according to Article 28 of the ICC Rules, the power of an arbitral tribunal extends to “any interim or conservatory measure it deems appropriate”. Accordingly, it seems reasonable to conclude that the powers of ICC emergency arbitrators, unlike arbitral tribunals, do not extend to any measure that they deem appropriate but only to “emergency measures” as set out by Article 29. Secondly, the authority of ICC emergency arbitrators can be compared with the powers of equivalent arbitrators acting under other institutional rules. By way of example, the SIAC Rules provide that the emergency arbitrator possesses “the power to order or award any interim relief that he deems necessary”.¹¹¹ By way of further example, the LCIA Rules equate in Article 9(8) the powers of emergency arbitrators and arbitral tribunals in the following terms: “the Emergency Arbitrator may make any order or award which the Arbitral Tribunal could make under the Arbitration Agreement”.

ii) Potential coexistence of arbitral tribunals and emergency arbitrators. Pursuant to Article 2(2) of Appendix V, an emergency arbitrator appointed prior to the transmission of the file to the arbitral tribunal retains the power to render an emergency decision even if the arbitral tribunal has been already constituted. Obviously, the emergency arbitrator can only exercise this power within the time limit established by the rules;¹¹² time limit which may be extended by the President of the ICC Court in appropriate circumstances. As it can be seen, the possibility of coexistence of the emergency arbitrator and the arbitral tribunal may hinder, from a doctrinal point of view,¹¹³ any attempt to conceptualise both proceedings as part of a

¹¹¹ SIAC Rules, Schedule I, Rule 8.
¹¹² ICC Rules, Appendix V, Art 6(4): 15 days from the date on which the emergency arbitrator received the file.
¹¹³ From a practical point of view, the risk of conflicting decisions is nearly inexistent.
single arbitration.\textsuperscript{114} By contrast, under the SIAC rules, for example, Rule 10 of Schedule 1 provides that “the Emergency Arbitrator shall have no power to act after the Tribunal is constituted”. Other rules have incorporated similar provisions.\textsuperscript{115}

\textbf{iii) Emergency decisions in the form of orders.} Of all major sets of institutional rules, only the ICC rules require the emergency decision to be in the form of an order. The rules of the HKIAC, ICDR, LCIA, SCC and SIAC provide that emergency arbitrators have a discretionary power to decide the form of their decisions.\textsuperscript{116}

\textbf{iv) Binding effect of the emergency decision ceases if a challenge against the emergency arbitrator is accepted.} In ICC arbitration, the emergency decision automatically ceases to be binding if a challenge against the emergency arbitrator is successful. This feature cannot be found in other sets of rules such as, for example, the SIAC and HKIAC rules.\textsuperscript{117}

Two points may be made in the context of the current discussion. First, Voser and Boog have argued that “the drafters \cite{VoserBoog} wished to vest the same judicial or adjudicative powers in the emergency arbitrator as are vested in an arbitral tribunal granting interim relief under the ICC Rules”.\textsuperscript{118} Yet, as it has been demonstrated, a detailed examination of the rules does not allow to appreciate such intention. The ICC may want then to reform the emergency arbitrator provisions to amend the four issues identified above, and therefore, to reaffirm the jurisdictional nature of emergency arbitration. Secondly, this analysis also exposes several risks in legal systems not adopting a clear approach to the authority of emergency arbitrators. As just noted, this subsection has demonstrated that there are some rules with stronger contractual features – such as the ICC Rules

\begin{flushleft}
\textsuperscript{114} See \S\ 3.2.1.3.

\textsuperscript{115} See, eg, ICDR Rules, Art 7(5); and SCC Rules, Appendix II, Art 1(2). cf HKIAC Rules, Schedule 4, Art 13.

\textsuperscript{116} See \S\ 3.2.2.5.

\textsuperscript{117} See \S\ 3.2.2.4.

\end{flushleft}
– than other institutional rules – such as the LCIA or the SIAC rules. It is then possible that national courts involved in annulment or enforcement proceedings,\(^\text{119}\) may adopt different views as to the contractual or jurisdictional authority of emergency arbitrators – and therefore, to the extent of their powers – depending on the institutional rules adopted by the parties. A unified and clear approach to emergency arbitration either through legislative reforms or case law will ensure legal certainty and uniformity.

4. Assessment of emergency awards and orders on the authority to render pre-arbitral interim relief

4.1. Methodology

This section scrutinises a total of 13 emergency decisions rendered under the auspices of several arbitral institutions.\(^\text{120}\) A detailed description of each order or award is provided in Schedule III. One may possibly argue that the range of sources analysed is not wide enough to present clear conclusions. Indeed, confidentiality and the relatively recent adoption of emergency proceedings clearly impact on the publication of emergency decisions which is, to date, scarce. For that reason, this section also examines pre-arbitral orders and awards as “compiled” by the official reports of some arbitration institutions. Three main sources are analysed in this context. First, the Report of the ICC Commission on Arbitration and ADR on Emergency Arbitrator Proceedings\(^\text{121}\), published in 2019, which evaluates the first eighty emergency arbitrator applications under the ICC Rules; secondly, the SCC Practice Notes on Emergency Arbitrator Decisions rendered from 2010 to 2018\(^\text{122}\) and finally, the 2020 SCAI Report on Emergency Relief under the Swiss Rules.\(^\text{123}\)

Yet a word of caution is needed here. Neither the ICC Report, the SCAI Report, nor

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\(^\text{120}\) In this study, the following institutions are represented in the following proportion: ICC and ICDR in 5 decisions, and HKIAC, SCAI and SCC in one each.

\(^\text{121}\) ICC Report (n13).


\(^\text{123}\) SCAI Report (n27).
the SCC Practice Notes reproduce, in whole or in part, pre-arbitral orders or awards. In the ICC Report, the Task Force on EA Proceedings examines the first eighty applications and presents its conclusions accordingly. In the SCC Notes, each pre-arbitral order or award is summarised in the form of a “case analysis” and, therefore, these practice notes do not include any extract of the proper decisions. Similarly, the SCAI Report includes concise references to some cases in order to explain the main features of SCAI emergency proceedings. Unfortunately, this is the furthest one can reach regarding the assessment, in practical terms, of emergency arbitrator decisions.  

4.2. Relevant findings

Finding 1. A majority of emergency arbitrators consider themselves jurisdictional decision-makers

This finding is based on: i) explicit references in emergency decisions to the fact that the powers of emergency arbitrators are governed by the arbitration legislation of the seat (and therefore, that the provisions designed for arbitral tribunals are also applicable to emergency arbitrators) and ii) the type of relief granted in emergency proceedings. If emergency arbitrators render remedies such as penalties or anti-suit and anti-arbitration injunction, one may legitimately conclude that their authority is jurisdictional. By way of example, with respect to anti-suit and anti-arbitration injunctions, it is doubtful whether a contractual decision-maker can prevent a party to exercise its “legitimate” right to initiate court or arbitration proceedings. More importantly, contractual decision-makers do not possess the authority to render anti-suit or anti-arbitration injunctions since contractual dispute resolution methods were not designed to substitute proper adjudicatory procedures such as litigation or arbitration.

124 Some important arbitral institutions are not represented in this study. By way of example, the ‘LCIA Notes on Emergency Procedures’ include four examples or “case studies”. However, these case studies do not provide any information on how LCIA emergency arbitrators consider the issue of their powers to render urgent pre-arbitral relief.
The majority of decisions included in Schedule III adopt the view that emergency arbitrators possess adjudicatory powers. In seven decisions, emergency arbitrators considered that their authority was jurisdictional. In six decisions there are no clear indications of the nature of arbitral authority. Finally, none of the decisions points to an alleged contractual power of emergency arbitrators. Out of seven decisions where the power of emergency arbitrators was deemed jurisdictional, in six decisions emergency arbitrators argued that the arbitral legislation of the seat was applicable in order to determine their authority to render interim relief either generally, or with respect to a particular remedy. In *Luzar Trading v Tradiverse*, for example, the emergency arbitrator argued that she had “the general power to award security under the [US] Federal Arbitration Act”, and appropriate case law of the *lex arbitri urgenti* such as *British Insurance Company of Cayman v Water Street* was used in support of such finding. Remarkably, *British Insurance* was not a case where an emergency arbitrator was involved. By contrast, this dispute concerned the authority of the arbitral tribunal to render interim relief and the possibility to subject this decision to annulment proceedings. Finally, in one decision examined in Schedule III, the emergency arbitrator rendered an anti-suit injunction. As already noted, this remedy can be hardly reconciled with an alleged contractual power of emergency arbitrators.

As regards the institutional reports on emergency arbitration, out of 80 applications examined in the ICC Report, in six cases the remedy requested was an anti-suit injunction, and in an undetermined number of cases, the applicants sought to impose *astreintes* or penalties on the counterparty. Unfortunately, it was not possible to obtain access to these decisions in order to ascertain whether the emergency arbitrators asserted powers to render such remedies.

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125 These decisions are ICC Case 19764; ICC Case 20325; ICDR Case 01-14-0001-4742; SCAI Case 300347ER-2015; ICDR Case 01-18-0003-0504; HKIAC Case A18176; and ICC Case 24738. See Schedule III.

126 ICDR Case 01-18-0003-0504, Emergency Interim Award, 29 August 2018.

127 93 F Supp 2d 506 (SDNY 2000).

128 ICDR Case 01-14-0001-4742, Opinion on Request for Emergency Measures and Award of Interim Injunctive Relief, 5 February 2016.

129 ICC Report (n13) 41.

130 ibid 29.
Finding 2. Arbitration users do not select, as seats in emergency proceedings, states or law districts that impose general prohibitions on arbitrator-rendered relief

According to most institutional rules, if the parties have agreed on the location of the seat for the proceedings on the merits, such seat shall be the seat for the emergency proceedings too. In Chapter 5, it was demonstrated that, in practice, arbitration users avoid selecting legal systems that impose general prohibitions on arbitral interim relief. Since in a majority of cases the parties will select the seat of the emergency proceedings through the selection of the seat of the proceedings on the merits, the conclusion of Chapter 5 can also be extended to emergency arbitration. In cases where the parties do not select the arbitral seat, institutional rules provide two different solutions. On the one side, a majority of rules set out a default seat for emergency proceedings which is the city where the arbitral centre is located. On the other side, several rules confer to their own administering bodies the power to determine the seat of the emergency proceedings. Expectedly, the seat in default cases is not likely to be located in a law district imposing a general prohibition on arbitral interim relief. Arbitration institutions will obviously consider the legal regime of emergency arbitration in force in the potential legal systems which may be selected as seats. In an ICC case, for example, the President of the ICC Court confirmed the Netherlands as the seat of emergency proceedings on the basis, among other reasons, of the favourable approach of Dutch courts towards the enforcement of pre-arbitral decisions. Similarly, the issue of the authority of emergency arbitrators under the *lex arbitri urgenti* is a factor that the administering bodies are likely to take into account.

From a practical point of view, none of the emergency proceedings examined in Schedule III was seated in legal systems which prohibit arbitral interim measures.

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131 See, eg, SIAC Rules, Schedule 1, Rule 4.
132 For a correlation table between the findings of chapters 5 and 6, see Schedule IV.
133 In the first 80 ICC EA applications, the parties selected the seat in 73 cases. See (n13) 37.
134 See, eg, HKIAC Rules, Schedule 4, Art 9.
135 See, eg, SAC-SCAI Rules, Art 43(5).
136 ICC Report (n13) 38.
137 New York was the seat in five cases, London in two, and one each in Georgia (US), Geneva, Stockholm, Texas and Zurich.
In a similar vein, all cases analysed by the ICC Report were seated in legal systems which do not impose general prohibitions on arbitral injunctive relief.\(^{138}\) There was, however, one exception. One of the emergency proceedings had the juridical domicile in Tel Aviv. Israeli arbitration law does not explicitly recognise the power of arbitral tribunals to render provisional measures, and some lower courts have interpreted the lack of provision in that regard as a prohibition on arbitral interim relief.\(^{139}\) In 2021, however, the Ministry of Justice has published a draft of a new International Commercial Arbitration Act which explicitly confers arbitrators the power to render interim measures.\(^{140}\) Regrettably, it was not possible to access the abovementioned decision to analyse how the emergency arbitrator dealt with the application of the *lex arbitri urgendi*.

**Finding 3. Sources of jurisdiction and sources of authority of emergency arbitrators**

In emergency arbitration, the jurisdiction of the emergency arbitrator over the parties and his competence or authority\(^ {141}\) to render pre-arbitral relief, either generally or with respect to a particular measure, are important aspects to consider.

**A. Jurisdiction of the emergency arbitrator over the parties**

To begin with, emergency arbitrators should ensure that they have jurisdiction over the parties on the basis of a valid arbitration agreement providing for emergency

\(^{138}\) According to the ICC Report, the emergency proceedings were seated in: Paris, Geneva, London, Amsterdam, Zurich, Madrid, Vienna, Basel, Istanbul (Europe); New York, Houston, Miami, Dallas (North America); Sao Paulo, Mexico City, Bogota, Medellin, Santiago de Chile (Latin America); Singapore, Hong Kong, Doha, Manama, Tel Aviv and Maui (Asia). See (n13) 37.


\(^{141}\) In international arbitration, the term “authority” seems to be preferred over “competence”. That said, it should be clarified that these terms refer to the same concept. See, eg, LCIA Rules, Art 23, which distinguishes between “jurisdiction” and “authority”.

261
arbitration. The consent of the parties to submit pre-arbitral urgent applications on
interim relief to arbitration is the relevant element conferring jurisdiction *in personam*
on emergency arbitrators.

1. *Prima facie* jurisdiction of the emergency arbitrator

1.1. Concept and main findings

As just noted, a valid arbitration agreement incorporating emergency provisions is
normally, the adjudicatory element according to which emergency arbitrators assert
jurisdiction over the parties. Without an arbitration agreement, there is no arbitration.
Accordingly, without an agreement to arbitrate there cannot be emergency
arbitration. Indeed, the arbitration agreement is the element that, first, embodies the
agreement of the parties to arbitrate the merits of their dispute, and secondly,
incorporate the emergency arbitrator provisions. Obviously, if an alleged party is
challenging the existence, validity or scope of an arbitration agreement, both
emergency arbitration and arbitration on the merits would be subject to jurisdictional
challenges. By contrast, other challenges may exclusively target the emergency
arbitrator alone. In an ICC case, for example, one of the parties argued that the
emergency arbitrator lacked jurisdiction on the basis that the parties agreed on a
FIDIC Dispute Adjudication Board.¹⁴² Indeed, under Article 29(6) of the ICC Rules,
the parties effectively excluded ICC emergency arbitration through the adoption of
another pre-arbitral procedure where “conservatory, interim or similar measures”
were available.¹⁴³ As it can be seen, there appear to be two types of jurisdictional
challenges that may impact on emergency arbitrators: first, challenges that embody or
include any consent-related aspect to arbitrate, and secondly, challenges that are
limited to the consent of the parties to submit pre-arbitral requests to emergency
arbitration.

¹⁴² ICC Report (n13) para 87.
¹⁴³ Unsurprisingly, the emergency arbitrator confirmed that it lacked jurisdiction.
Interestingly, the assessment of the jurisdiction of the emergency arbitrator does not always appear to be limited to a *prima facie* analysis. On the one side of the spectrum, if a party raises a challenge with respect to the existence, validity or applicability of the arbitration agreement, the emergency arbitrator, who frequently works under short time limits, may not have sufficient time to conduct a full review on the complex issue of arbitral jurisdiction. In *SVM Holdings v Nexus*,\(^{144}\) for example, the emergency arbitrator held that “an extension of the Arbitration Agreement’s personal scope to Mr Shumilin, [a non-signatory,] cannot be properly established within the short time frame of these emergency relief proceedings, therefore, (…) [this matter] shall be reserved for the Sole Arbitrator [with jurisdiction on the merits]”.\(^{145}\) As it can be seen, the emergency arbitrator was not satisfied that *prima facie* jurisdiction over a non-signatory existed due to time constraints and explained that the same issue could be raised before the tribunal with jurisdiction on the merits.

On the other side of the spectrum, if the challenge is exclusively based on an alleged lack of consent with respect to the emergency proceedings, the emergency arbitrator shall necessarily conduct a detailed review of the issue. This type of challenge needs to be fully decided since its determination cannot be deferred to the subsequent proceedings on the merits when the emergency arbitrator would cease to exist. Challenges as to whether the parties have agreed to opt-out of the emergency provisions, or whether they have adopted a different pre-arbitral procedure are examples of jurisdictional issues which should be comprehensively examined by the emergency arbitrator.

After a detailed analysis of the decisions included in Schedule III and the institutional reports on emergency arbitration, the main findings on jurisdiction *in personam* have been summarised in the following table:

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\(^{144}\) SCAI Case 300347ER-2015, Interim Award, 2 September 2015.

\(^{145}\) ibid para 54. See also *Anoto and Livescribe v Leapfrog Enterprises*, SCC Case EA2016/142, Order on Emergency Decision on Interim Measures, 3 October 2016.
Table 6.2. Findings as to the assessment of jurisdiction in personam by emergency arbitrators. In the third column from the left side: options A and B are particularly prevalent in ICC arbitration since the ICC Rules impose on emergency arbitrators the obligation to decide on their jurisdiction regardless of the existence of challenges. By contrast, option C is normally found in institutions that do not impose this requirement such as the ICDR.

1.2. Sources of the jurisdiction in personam of the emergency arbitrator

The decisions examined in Schedule III illustrate that, in a great majority of cases, emergency arbitrators apply and interpret the arbitration agreement and the institutional rules adopted by the parties in order to assert jurisdiction in personam. Interestingly, none of the decisions included in Schedule III applied national law to

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146 Such a party being properly notified before or after the remedy is rendered (the latter only if ex parte relief is permitted under the applicable set of rules and the lex arbitri urgenti).
the jurisdictional issue. However, it should be immediately pointed out that the application of these sources is not the result of an alleged contractual authority of emergency arbitrators who cannot assert jurisdiction on the basis of the *lex arbitri urgenti* or the *lex causae*. Nor it is based on the fact that emergency proceedings are part of a delocalised and autonomous arbitral discipline. Simply, emergency arbitrators cannot apply any other sources. As already explained, a great majority of legal systems have not yet legislated on emergency arbitration.\(^{147}\) So, unless there are challenges to general consent-related aspects, emergency arbitrators are not likely to apply national law. Furthermore, it should be noted that in the context of jurisdiction *in personam*, unlike arbitral authority to render interim relief which is invariably governed by the *lex arbitri/lex arbitri urgenti*, different laws may come into play. Indeed, in order to assert jurisdiction over the parties, emergency arbitrators may apply, for example, the *lex causae* or the *lex arbitri* depending on: i) the particular issue being subject to challenge and ii) the legal approach adopted by the emergency arbitrator to the issue of applicable law.\(^{148}\)

### 1.3. *Prima facie* jurisdiction: emergency arbitrators and arbitral tribunals compared

One of the main problems identified in Chapter 5 was the refusal of some arbitral tribunals to conduct a full *prima facie* analysis of jurisdiction on the basis that jurisdiction *in personam* is not a prerequisite to their authority to render interim relief.\(^{149}\) Some arbitral institutions, however, seem to have strongly reacted against this development at least in the area of emergency arbitration. The ICC emergency provisions, for example, have imposed on emergency arbitrators the assessment of *prima facie* jurisdiction over the parties regardless of the existence of jurisdictional challenges. Article 6(2) of Appendix V provides that the order of the emergency arbitrator shall determine whether it has jurisdiction to render emergency measures. According to Article 29(5) of the Rules, this jurisdictional test should include an analysis of whether “the parties are either signatories of the arbitration agreement under the Rules (…) or successors to such signatories”. In *Robert Bosch v* 

\(^{147}\) See § 3.3.3.  
\(^{148}\) See ICC EA Cases 6 and 23 as renamed by the ICC Report (n13) para 90.  
\(^{149}\) See Ch 5, Finding 5, § 1.1.1.
Samsung,\textsuperscript{150} for example, the emergency arbitrator noted that the President of the ICC Court already conducted a \textit{prima facie} assessment, and since there was no dispute that Applicant 1 and Respondent were signatories, and Applicant 2 was a legal successor of a signatory, the emergency arbitrator limited itself to confirming jurisdiction \textit{ratione personae}.\textsuperscript{151} By contrast, the legal framework currently in force with respect to ICC tribunals does not impose a review of arbitral jurisdiction on a \textit{prima facie} basis. That said, the recent developments adopted in ICC emergency arbitration might be interpreted as a renovated attempt to put an end to the unfortunate cases where arbitral tribunals have rejected to conduct a \textit{prima facie} analysis of personal jurisdiction.

2. Jurisdiction and the “applicability test” conducted by emergency arbitrators

The applicability of the relevant emergency arbitrator provisions is important to the question of the jurisdiction of emergency arbitrators. If the emergency provisions are not applicable, then the parties did not agree on emergency arbitration, and accordingly, the emergency arbitrator would not possess jurisdiction. Several points may be made with respect to the concepts of applicability and jurisdiction.

First, problems related to the applicability of the emergency arbitrator provisions do not arise under every arbitral institution. In fact, this problem appears to be a \textit{sui generis} feature of ICC arbitration. This is so for the simple reason that the ICC Rules inexplicably adopted two different dates: on the one side, the date when the arbitration agreement was concluded in order to determine the applicability of the emergency provisions, and on the other side, the date when the case is registered with the ICC in order to determine the general applicability of the Rules. By contrast, the HKIAC, SCAI and SIAC, for example, have adopted a single date for the applicability of their rules, including their emergency provisions. In the latter case,

\textsuperscript{150} ICC Case 20325/GFG, Order, 12 July 2014.
\textsuperscript{151} ibid para 58.
problems related to applicability are unlikely to arise. In fact, out of 13 emergency orders and awards examined in Schedule III, only five decisions analysed the applicability of the emergency provisions, and unsurprisingly, these decisions were rendered under the auspices of the ICC.

Secondly, the applicability of the relevant emergency provisions should be understood in the context of the jurisdiction of the emergency arbitrator. In other words, even if this matter is frequently named as “applicability test” or “applicability requirement”, applicability in this context seems a jurisdictional issue rather than a matter of strict application of norms or rules. In RSM Production Corporation v Gaz du Cameroun, for example, the emergency arbitrator had to decide on the “potentially problematic” scenario where the emergency provisions were, prima facie, not applicable. In this case, the arbitration agreement was concluded in 2005. The ICC Rules 2012, applicable to this dispute, established in Article 29(6) that the emergency provisions applied if the agreement under the Rules was concluded on or after 1 January 2012. The applicability test was simply not satisfied. The parties, however, insisted that the emergency provisions applied to their dispute. The emergency arbitrator eventually concluded that, as regards emergency arbitration, a consensual agreement between the parties existed, and accordingly, he asserted jurisdiction. Intuitively, this approach seems to be the correct one to take. The main rationale of the “applicability requirement” is to ensure that, from a particular date, the opt-out approach of the emergency provisions protects the authority of the emergency arbitrator against groundless jurisdictional challenges. Accordingly, the applicability of the emergency provisions should not be strictly understood as an applicability test of norms or rules, but rather, it should be examined and interpreted from a jurisdictional point of view. Consent is the basis of the jurisdiction of emergency arbitrators. The parties should then be able to consensually agree on

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152 In an SCAI case, the jurisdiction of the emergency arbitrator was challenged on the basis that the agreement was concluded in 2004 when the emergency provisions were not in force. The emergency arbitrator dismissed the argument since the applicability of the SAC-SCAI Rules is determined with respect to “the date when the notice of arbitration is submitted”. See SCAI Report (n27) 1. In SCC Case EA 2016/067, as reported in the SCC Practice Note 2015-2016, the emergency arbitrator argued that it is generally accepted that the parties submit to arbitration under the version of the rules in force at the time of commencement of the proceedings.


154 ibid para 25.
emergency arbitration even in cases where the emergency provisions are, *prima facie*, not applicable.

Thirdly, the concept of applicability as implemented by the ICC Rules is not something easy to grasp or categorise. Article 29(6) provides that the emergency provisions shall not apply if the arbitration agreement was concluded before 1 January 2012, if the parties have agreed to opt-out of the emergency provisions, or if the parties have agreed to another pre-arbitral procedure. All these conditions, even if formulated in terms of applicability, are clearly jurisdictional or jurisdiction-related matters. In the ICC Report, it has been argued that, in Article 29(6), jurisdiction and applicability may overlap and, indeed, this terminological confusion has reached emergency arbitrators. The decisions included in Schedule III confirm that the conditions imposed by Article 29(6) have been assessed by emergency arbitrators as part of their analysis on jurisdiction, applicability, and even admissibility. The ICC Report has also confirmed this conclusion. Remarkably, the Task Force set up to write the ICC Report has suggested that when the conditions of Article 29(6) are analysed by emergency arbitrators, these are part of a jurisdictional analysis, but when the same conditions are examined by the President of the ICC Court in order to pre-screen emergency applications, the test is one of applicability of the emergency provisions. This analysis leads to a further and final conclusion which will be confirmed in subsequent findings: the ICC has implemented a *sui generis* regime of jurisdiction and applicability which does not seem to rest on proper juridical concepts. Indeed, one may pertinently ask why calling it “applicability” when the President of the Court is simply pre-screening the jurisdiction of emergency arbitrators. The answer is perhaps based on practical considerations. Using different terminology prevents confusion and provides the false impression that only the emergency arbitrator is entitled to consider or assess his own jurisdiction.

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156 See ICC Case 19764/AGF, Order of Emergency Arbitrator, 31 October 2013, where the emergency arbitrator wrongly analysed this issue under the heading of “admissibility”.
157 ICC Report (n13) para 64.
158 Under the ICC Rules, the President of the Court also conducts an “applicability test” before the request is transmitted to the emergency arbitrator. See ICC Rules, Appendix V, Art 1(5). However, the President has used the power to reject emergency applications in very rare cases. See (n13) para 71.
3. Jurisdiction and admissibility of the request for emergency relief

As already explained in this thesis, jurisdiction and admissibility are clearly distinguishable concepts.\(^{159}\) Whilst jurisdiction is related to the power of an arbitral body to render any ruling at all, admissibility deals with the potential refusal of a certain request for reasons other than the assessment of the merits. Simply put, if the application for emergency relief is not admissible, the jurisdiction and arbitral authority of the emergency arbitrator remain intact.

3.1. Specific admissibility requirement in emergency arbitration

In ICC arbitration, Article 6(2) of Appendix V imposes on emergency arbitrators the obligation to determine whether the emergency request is admissible pursuant to Article 29(1) of the Rules. This admissibility test is defined in Article 29 as an analysis of whether the measure “cannot await the constitution of an arbitral tribunal”. As it can be seen, the admissibility requirement has attempted to incorporate the raison d’être or conceptual basis of emergency arbitration: that emergency relief cannot await the constitution of the tribunal with jurisdiction on the merits. From a doctrinal point of view, this notion of admissibility does not seem particularly difficult. In practice, however, no other aspect has generated as much confusion and tangentially opposite views, outside the assessment of the merits of the emergency request, as the issue of admissibility.

To begin with, emergency arbitrators and commentators do not agree on whether the admissibility requirement and the substantive standard of urgency require two separate analyses at two different stages.\(^{160}\) At the very end of the spectrum, several emergency arbitrators have equated “urgency” with “not being able to await the constitution of the tribunal”.\(^{161}\) At the other end of the spectrum, some emergency arbitrators and the ICC Task Force have argued that the urgency test applicable in

\(^{159}\) See Ch 5, Finding 5, § 2.
\(^{160}\) ICC Report (n13) para 84.
\(^{161}\) Ibid.
the context of the merits of the emergency request is different from, and not to be measured by whether the particular remedy cannot await the constitution of the tribunal. In *Robert Bosch v Samsung*, for example, the emergency arbitrator clearly distinguished between admissibility and urgency. According to the emergency arbitrator, admissibility as implemented by the ICC Rules requires an analysis of two issues: first, the earliest point in time when the arbitral tribunal might render interim relief, and secondly, whether the specific remedy would be rendered “moot” if the applicant were to await the constitution of the tribunal.\(^{162}\) In light of the above, the emergency arbitrator argued that no tribunal-
rendered relief could be obtained before September 2014 at the earliest. Remarkably, this date was distinguished from the date where the potential “irreparable harm” stemming from an action of the counterparty would arise – matter which was deemed to be relevant to the assessment of urgency rather than to admissibility. Eventually, the emergency arbitrator concluded that: i) the request was partially admissible insofar it related to July-August 2014 where no tribunal would have been in place to render interim relief, but ii) it declared inadmissible the request which sought to establish penalties for non-performance related to deliveries due to occur after August when the tribunal was likely to be constituted.\(^{163}\)

The legal analysis conducted by this emergency arbitrator is clearly sophisticated and persuasive. One might then propose the adoption of this development regardless of the institutional rules adopted by the parties. However, it should be remembered that the ICC Rules impose on emergency arbitrators this analysis of admissibility. It is then pertinent to ask, at this point, whether the “cannot await the constitution of the tribunal” requirement needs to be necessarily assessed in every emergency arbitration. In fact, non-ICC emergency arbitrators do not usually conduct this admissibility test. Not surprisingly, the answer to the abovementioned question can be found in the substantive requirement of urgency. Urgency is, without doubt, a more stringent standard than the “cannot await the constitution of the tribunal” requirement. If the emergency arbitrator is satisfied that urgency exists in the sense that, without the remedy, the applicant would suffer imminent harm, then the

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\(^{162}\) ICC Case 20325/GFG (n151) paras 83-92.

\(^{163}\) Citations omitted.
admissibility requirement would be satisfied and it would not require of separate analysis. In a similar vein, if the emergency arbitrator considers that urgency has not been proved, then the emergency request will be denied, and again, there is no need to entertain the question of admissibility. Accordingly, the admissibility test as implemented by the ICC Rules seems to be a requirement of conceptual or doctrinal nature with little or no practical impact. Emergency arbitrators should be able to decide on whether to conduct the “cannot await the constitution of the tribunal” test separately from the assessment of urgency unless, of course, they are required to do so by the applicable institutional rules.

3.2. Admissibility in general

As already explained in Chapter 5, problems of admissibility may include, among others, escalation clauses, res judicata, or waiver of the arbitration agreement. In the particular context of emergency arbitration, it is important to distinguish between escalation clauses applicable prior to the arbitral proceedings, and clauses excluding a particular type of emergency arbitration by reference to another pre-arbitral mechanism which are true jurisdictional problems.

As in the assessment of arbitral jurisdiction, emergency arbitrators may decide to conduct a prima facie analysis of admissibility. That said, it should be noted that some admissibility issues are not as complex as problems related to arbitral jurisdiction. For that reason, in some cases, emergency arbitrators have conducted a detailed and complete analysis of admissibility. In Iberdrola Energy v Footprint Power, one of the main issues was to determine whether a Dispute Review Board provision inserted into the contract prevented the emergency arbitrator to assert “jurisdiction” over the parties. Even though the respondent and the emergency arbitrator categorised the issue as jurisdictional, the problem here was one of admissibility. In any event, the emergency arbitrator conducted a detailed analysis,

164 Or any other substantive standard.
165 cf Sim (n103) para 7.71.
166 ICDR Case 01-18-001-6009, Interim Emergency Order, 14 May 2018.
and after explaining that the DRB only applied while the project was being constructed, he concluded that “when the Respondent terminated the Claimant and removed it from the Project, that termination ended the Contractor’s Work. It also inevitably ended the DRB process between them, and triggered the Claimant’s immediate right to arbitrate disputes between them.”

B. Authority of the emergency arbitrator to render pre-arbitral relief

Out of 13 emergency decisions analysed in Schedule III, only five cases dealt with issues related to the authority of emergency arbitrators to render interim relief either generally or with respect to a particular type of measure. In three cases, emergency arbitrators jointly applied the *lex arbitri urgenti* and the arbitration agreement – including the institutional rules adopted by the parties – in order to assert the authority to render penalties, *ex parte* relief, and pre-arbitral security. By contrast, two decisions exclusively referred to the arbitration agreement. That said, in one of these decisions, the emergency arbitrator applied the *lex arbitri urgenti* to the assessment of the substantive standards. As explained in Chapter 5, if an emergency arbitrator believes that the *lex arbitri urgenti* has no role with respect to its authority to render interim remedies, it is unlikely that he will apply the law of the arbitral situs to the request for emergency relief. In sum, out of five decisions, four orders and awards appear to apply either explicitly or implicitly the *lex arbitri urgenti* to the question of the authority of emergency arbitrators. These results seem to confirm the finding of Chapter 5 which demonstrated that a majority of tribunals concurrently applied the *lex arbitri* and the arbitration agreement. Yet, it is obvious that the limited range of sources examined does not allow to categorically infer any conclusion.

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167 ibid para 17.
168 These cases are respectively: *ICC Case 20325; SCAI Case 300347ER-2015; and ICDR Case 01-18-0003-0504.*
169 *ICDR Case 01-10-0001-4742; and SCC Case EA 2016/142.*
170 *SCC Case EA 2016/142.*
171 See Ch 5, Finding 2, A.
172 See Schedule IV.
In this context, one may resort to the ICC Report. The problem with the Report is, first, that it does not clearly distinguish between the jurisdiction of the emergency arbitrator and its authority or competence and, secondly, at times it seems to conflate “jurisdiction and authority” with the “substantive standards applicable to the emergency request”. Under the heading of “law applicable to the EA’s consideration of threshold issues [applicability, jurisdiction and admissibility]”, the Task Force argues that, only in a few cases, emergency arbitrators held that they are subject to the lex arbitri. After this conclusion, the Report quotes Born who argued that international sources should be applied to the substantive standards.\textsuperscript{173} As it can be seen, it is not possible to discern in what sense the lex arbitri was irrelevant. That said, in the same part of the Report, the Task Force provides a figure which is relevant to the current discussion: in at least 10 cases, emergency arbitrators applied national law to conclude that the lex arbitri urgenti was not “inconsistent with the EA proceedings or the specific relief sought”.\textsuperscript{174} Obviously, this is not enough to arrive at a proper conclusion on the role of the lex arbitri urgenti as a source of the authority of emergency arbitrators to render urgent relief.

Finding 4. Emergency arbitrators distinguish between jurisdiction/authority and the substantive requirements applicable to the request for emergency relief

In a majority of cases emergency arbitrators have distinguished between, on one side, their jurisdiction and authority, and on the other side, the substantive standards or criteria applicable to a request for pre-arbitral relief. However, an important exception can be found. The admissibility requirement of “not being able to await the constitution of the tribunal” imposed by some arbitration rules have generated confusion on emergency arbitrators with respect to the abovementioned distinction. As already explained, several decisions have equated this admissibility requirement to the substantive criteria of urgency. In at least five cases reported by the ICC Task Force, emergency arbitrators examined this admissibility issue together with the assessment of the substantive criteria or standards required to render emergency

\textsuperscript{173} Emphasis added.  
\textsuperscript{174} ICC Report (n13) para 91.
relief. More importantly, at least one ICC emergency arbitrator concluded that the issue of whether the request “cannot await the constitution of an arbitral tribunal” is not a jurisdictional or admissibility requirement but rather, part of the criteria to be used when deciding on the merits of the emergency request.

Finally, a further conclusion can be presented in the context of the substantive criteria or requirements: emergency arbitrators, like arbitral tribunals, use adjudicatory procedures and apply national law, institutional rules, and international standards to the requests for emergency relief. This conclusion supports the abovementioned finding according to which, in practice, emergency arbitrators see themselves as proper arbitrators, and therefore, as jurisdictional decision-makers.

Finding 5. Terminology used by emergency arbitrators is clearly inconsistent. Absence of proper conceptual categorisation

Emergency arbitrators, like arbitral tribunals, have not consistently used the correct terminology. By way of example, emergency arbitrators have conflated “jurisdiction” and “admissibility” within the *sui generis* ICC legal framework of emergency relief. On the one side, articles 29(5) and (6) of the ICC Rules have been assessed by emergency arbitrators as part of their analysis on admissibility rather than jurisdiction. On the other side, the “cannot await the constitution of the tribunal” test has been discussed on several occasions as part of jurisdiction rather than admissibility.

In the context of the current discussion, two points may be made as starting points. First, the decisions of emergency arbitrators may be subject to setting aside proceedings in many legal systems. Leaving aside the appropriateness, from a logic and policy point of view, of judicial review at this stage of the arbitral process,

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175 ibid para 83.
176 ICC EA Case 8 as renamed by the ICC Report (n13) para 83.
177 See Finding 1.
178 ICC Report (n13) para 83.
annulment proceedings are a reality in legal systems such as the United States or Spain. Secondly, admissibility issues, either those arising in general or under the context of emergency arbitration, are clearly distinguishable from arbitral jurisdiction, and therefore, must not be subject to judicial review. Accordingly, national courts shall not review issues such as whether an emergency arbitrator manifestly disregards an escalation clause which may prevent the emergency request from being admissible in emergency proceedings – general admissibility issue –; or whether the emergency request could have awaited the constitution of the tribunal with jurisdiction on the merits – *sui generis* admissibility issue under emergency arbitration.

These two points demonstrate, in essence, the importance of a correct legal categorisation. On the one side, if an admissibility issue is classified by the emergency arbitrator as a matter of jurisdiction, the emergency arbitrator risks dragging the potential reviewing court in annulment proceedings under wrong standards of review. Even if, in theory, national courts should *de novo* categorise the particular issue in annulment proceedings, in several cases the classification of the tribunal has been unquestioned by the reviewing court. On the other side, if the emergency arbitrator categorises a jurisdictional issue as part of the concept of admissibility, this will not prevent national courts to review the jurisdiction of the emergency arbitrator since national courts would theoretically conduct their own legal classification.

Finding 6. National procedural laws designed for litigation proceedings are not applicable to the powers of emergency arbitrators

Not surprisingly, emergency arbitrators have rejected to apply the procedural law of the arbitral situs to emergency proceedings. In *Accendo Banco v Deutsche Mexico*

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179 See (n 119). See also, *Judgment No 76 of 25 July 2019*, Bucharest Court of Appeal, where the court annulled an emergency arbitrator decision on the basis that pre-arbitral proceedings violate mandatory provisions of local law.
180 See Ch 5, § 3.2, Finding 6.
181 As long as judicial review is permitted under the *lex arbitri urgenti*. 

275
Holdings, for example, the emergency arbitrator rejected to import, to the emergency arbitration, the substantive criteria adopted by New York courts in litigation proceedings. Whilst the refusal to apply national procedural law may frequently be found in the context of the substantive standards required to obtain the particular remedy, emergency arbitrators are also expected to reject the application of domestic procedural law to the issue of their authority.

5. Conclusions

5.1. Recommendations to emergency arbitrators

The recommendations presented here are relatively similar to those proposed to arbitral tribunals in Chapter 5 on the basis that jurisdictional and competency aspects related to interim protection of rights in the pre-arbitral and arbitral stages are not tangentially different:

- Emergency arbitrators should assert authority to render urgent pre-arbitral relief, either generally or with respect to a particular remedy, on the basis of the concurrent application of the arbitration agreement, including the institutional rules adopted by the parties, and the lex arbitri urgenti.

- Emergency arbitrators must carefully analyse if issues such as jurisdiction, competence or admissibility impact on their authority to render interim relief. The fact that an emergency arbitrator has jurisdiction over the parties and over the subject-matter is not sufficient to assert authority to render emergency relief generally, or with respect to a particular remedy.

- Emergency arbitrators should examine their jurisdiction and the admissibility of the request if there are challenges in that regard raised by the parties or if required by the applicable institutional rules.

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182 ICC Case 24738, Order, 14 October 2019.
183 See Ch 5, § 4.1.
In ICC arbitration, emergency arbitrators must examine the following aspects regardless of the existence of jurisdictional challenges:

- Jurisdiction: analysis of any consent-related aspect, including the consent of the parties to submit pre-arbitral requests to emergency arbitration (Arts 29(5) and 29(6)(b)-(c) of the ICC Rules) and “applicability” test by reference to the date where the emergency provisions entered into force (Art 29(6)(a) of the ICC Rules: 1 January 2012).

- Admissibility: requirement that the request “cannot await the constitution of the tribunal” (Art 29(1) ICC Rules). This issue must not be conflated with the substantive standard of urgency which is not to be assessed by reference to the date where the arbitral tribunal might effectively render interim relief. In a similar vein, the specific admissibility test set out by the ICC Rules must not be conflated with general admissibility issues such as escalation clauses or waiver of the arbitration agreement which may also impact on the authority of the emergency arbitrator.

In non-ICC arbitrations, the emergency arbitrator must analyse any challenge as to his jurisdiction or authority. If there are no challenges and the institutional rules are silent with respect to the threshold of issues to be examined, the emergency arbitrator should consider confirming his jurisdiction over the parties and his authority to render pre-arbitral relief to reinforce the emergency order or award.

- Emergency arbitrators may examine i) jurisdictional challenges related to general consent-related aspects and ii) general admissibility issues on the basis of a prima facie analysis. Yet, a detailed examination or full review may also be a potential alternative if the jurisdiction or admissibility issue is not extremely complex. Emergency decisions do not, of course, bind the tribunal with jurisdiction on the merits. Emergency arbitrators should not assume that the fact that their decisions are not binding on tribunals necessarily leads to a prima facie analysis. These are two different issues.

- Emergency arbitrators must conduct a detailed review if the jurisdictional challenge is grounded on the consent of the parties to submit pre-arbitral requests to emergency arbitration. Challenges as to whether the parties have
agreed to opt-out of the emergency provisions, for example, should not be subject to a *prima facie* analysis, but rather, to a detailed and full review.

5.2. Recommendations to arbitration users

- If the parties want to vest the authority to render pre-arbitral relief in emergency arbitrators, they should carefully consider and examine different *leges arbitri urgenti* and institutional rules. The legal framework of emergency arbitration in, for example, Scotland is not the same as that in force in Bolivia. Nor are the powers of emergency arbitrators the same under the SCAI Rules as under the ICC Rules.

This thesis only addresses matters related to jurisdiction and competence, but obviously, arbitration users should also consider other important issues. Two of them are succinctly explained below:

- First, the parties should have in mind strategic considerations such as whether the remedy sought is available in emergency arbitration, costs, confidentiality, or the issue of enforceability.

- Secondly, the parties should consider the potential “restrictions” derived from the adoption of emergency arbitration. Even if this thesis does not address the issue of the interface between courts and emergency arbitrators, it should be noted that there seem to be two widely extended presumptions with respect to the principle of concurrent jurisdiction.
  - First, it is frequently assumed that in concurrent systems where interim relief can be obtained either from courts or emergency arbitrators, the applicant is entitled to resubmit, after a failed application in emergency arbitration, the same request, under the same circumstances, to the supporting courts. Yet, it should be noted that the principle of concurrent jurisdiction does not provide a “secondary forum of review”. National courts, like arbitral tribunals, have rejected applications for interim relief
which were previously denied in another forum insofar the circumstances have not changed and if the criteria or substantive standards adopted by the “second forum” would have been the same as those adopted by the “first forum” where the request was rejected.\textsuperscript{184}

- Secondly, one might have assumed that the provisions inserted into the applicable institutional rules confirming that emergency provisions do not prevent a party from seeking judicial relief, embody the principle of concurrent jurisdiction.\textsuperscript{185} Yet, if the applicable \textit{lex arbitri} has implemented a system of priority in favour of emergency arbitrators where courts can only intervene as long as the relevant arbitral body has no power or is unable to act, the parties might be unknowingly restricting their options to obtain judicial relief.\textsuperscript{186}

5.3. Recommendations to lawmakers

Several commentators seem to conclude that there are no practical problems if the authority of the emergency arbitrator is contractual since emergency arbitration serves the purpose of providing a fast and confidential procedure.\textsuperscript{187} Yet, as already explained, it is doubtful whether emergency arbitrators conceptualised as contractual decision-makers could render interim remedies such as anti-suit and anti-arbitration injunctions, \textit{astreinte} orders in France or peremptory orders in England. If a majority of legal systems adopt the view that emergency arbitrators are contractual decision-makers, the law of interim protection of rights would return to the 80s when it was not clear, for example, whether arbitrators could render security for costs. Even if for some legal systems, implementing the jurisdictional authority of emergency arbitrators would require twisting “square pegs into round holes”,\textsuperscript{188} the benefits clearly outweigh the strictly theoretical concerns of some scholars. International arbitration, rather than being a playground for the abstract discussion of

\textsuperscript{184} See, eg, Ashwani Minda v U-Shin OMP (I) Comm 90/2020 (Delhi HC, India).
\textsuperscript{185} See LCIA Rules, Art 9(13).
\textsuperscript{186} See (n69).
\textsuperscript{187} Beisteiner (n14) 331.
\textsuperscript{188} Fry (n90) 192.
commentators,189 should provide sensible solutions for practical problems arising out of international commercial transactions. From a policy point of view, there are no reasons in support of limiting the powers of emergency arbitrators beyond the already existing boundaries such as lack of coercive powers or impossibility to rule against third parties. Lawmakers should then consider adopting a pragmatic approach by equating the powers of emergency arbitrators to those of arbitral tribunals. In so doing, lawmakers would promote legal certainty and would ensure that emergency arbitration remains an efficient and effective mechanism.

5.4. Recommendations to arbitral institutions

Reference should be made here to subsection 3.4 of this chapter. Arbitration institutions may want to amend their emergency provisions in order to reaffirm the jurisdictional nature of emergency arbitration and to clarify the extent of the powers of emergency arbitrators acting under their respective rules. Even though the powers of emergency arbitrators should be jointly determined with the application of the lex arbitri urgenti, undoubtedly, arbitral institutions may point to the most appropriate legal development.

189 Some legal writers have wrongly described the discipline of the conflict of laws using similar terminology. See Michael Bogdan, Private International Law as Component of the Law of the Forum (Hague Academy of International Law 2012) 17.
CHAPTER 7
Conclusions

The final chapter of this thesis compiles, in section 1, the most important conclusions that have been presented in the main body of this work and, in section 2, anticipates future developments that may arise in each dispute resolution system within the specialist area of jurisdiction to render interim relief.

1. Jurisdiction and competence to render provisional and protective measures in transnational commercial disputes: main doctrinal conclusions

The distinction between jurisdiction and competence is important for the law of interim protection of rights.\(^1\) This thesis has demonstrated that the existence of problems related to these concepts depends on the circumstances of each case. By way of example, national courts supporting foreign litigation proceedings are likely to be concerned with the satisfaction of a substantial connection in order to render interim relief (jurisdictional issue). By contrast, an arbitral tribunal that has already asserted jurisdiction on the merits will be primarily focused on its authority to order injunctive relief, either generally or with respect to a particular remedy (competency issue). Furthermore, this thesis has also demonstrated that both concepts may arise in arbitration and litigation and that the legal regimes of competence and jurisdiction in arbitration and litigation have more similarities than one may have thought. First, the concepts of jurisdiction and competence retain their legal meaning in both dispute resolution systems regardless of the authority involved to render interim

\(^1\) See Schedule V.
measures. Although it is true that, in arbitration, the concept of competence has been renamed as “authority” or “procedural powers”, and in some instances, it has also been included within the broad umbrella of “jurisdiction”, this juridical concept can be still defined as the “matters or actions that are within the authority of a body with adjudicatory powers over the parties and the relief, either interim or final, that the said body may render”.2

Secondly, the legal frameworks of jurisdiction and competence to render interim relief are not radically different in arbitration and litigation. There are, indeed, many similarities. To begin with, as regards jurisdiction, the connecting factors adopted in both dispute resolution systems are the same or, at least, there is a strong parallelism between them. In international commercial disputes, the connecting factor conferring jurisdiction on the merits is, in most instances, based on consent. Choice of court agreements are then comparable to arbitration clauses in the sense that they embody the principle of consensual jurisdiction. With respect to ancillary jurisdiction to render interim relief, there is equally a strong parallelism between litigation and arbitration. The principles applicable to the supportive jurisdiction of courts in arbitral proceedings, including the determination of what constitutes a substantial connection, have been extracted from case law applicable to litigation proceedings. In England, for example, the landmark case was Mobil Cerro Negro v Petroleos de Venezuela,3 which transposed to the arbitration setting the principles of the law of jurisdiction as applied in previous cases dealing with international litigation. Finally, the extension of the competence of courts and tribunals to render provisional measures has also been conducted through a similar technique: by way of legislative reforms and allowing judges and arbitrators to render any remedy they deem appropriate. The exception is, however, emergency arbitration. In fact, the preferred option to implement emergency arbitration seems to consist in the extension of the powers of emergency arbitrators by equating their legal status to that of arbitral tribunals.

2 See Ch 2, 1.1.
3 [2008] EWHC 532 (Comm), [2008] 2 All ER (Comm) 1034.
Despite these similarities, the concept of jurisdiction in its vertical paradigm as understood in the conflict of laws\(^4\) has not always reached international arbitration. Indeed, some tribunals have manipulated this concept in order to exercise arbitral competence to render interim relief without having to properly examine their *prima facie* jurisdiction over the parties. Inexplicably, the arbitration agreement has been considered as a different phenomenon from the consent of the parties which satisfies the said jurisdictional analysis, and which confers arbitral competence to render interim relief.\(^5\) However, some institutional rules have been amended to clarify, at least implicitly, that the issue of arbitral jurisdiction includes whether the parties have consented to arbitrate; or in other words, whether the parties are bound by the arbitration agreement. Obviously, had arbitral tribunals adopted the vertical notion of jurisdiction as understood in private international law, no amendment of institutional rules would have been required. Without a doubt, what is missing in this context is a closer dialogue between international arbitration and private international law since, as many commentators have explained, international commercial arbitration predominantly operates within the conflict of laws.\(^6\)

2. The future of the law of jurisdiction in the specialist area of interim protection of rights

The future of the law of jurisdiction in the area of provisional and protective measures may perhaps involve the following issues.

In *international commercial litigation*,\(^7\) policy-makers might finally understand that formulations based on the principle of open jurisdiction are obscure and rudimentary, and accordingly, that such legal principle should be abandoned. Clear rules of jurisdiction should be adopted instead based on either i) the domicile of the defendant and the presence of assets or property, or ii) the enforceability of the remedy – which would confer jurisdiction to the courts of the forum where the

\(^4\) See Ch 2.
\(^5\) See Ch 5, Finding 5, A, 1.1.1.
\(^7\) See Ch 3.
remedy sought is enforceable. Article 35 of the Brussels Recast should be repealed and a new provision setting out a clear rule of jurisdiction should be adopted instead. International conventions, soft-law instruments, and recommendations of legal institutions should also adopt this solution since the principle of open jurisdiction creates more problems than it solves, particularly if the purpose of the said legal instruments is to harmonise or unify the law of interim measures.

In the regional sphere, the European Union created the first transnational provisional measure, the EAPO, which is likely to be, from a practical point of view, a failure. To date, this remedy does not appear to be widely used by litigants who have the option to obtain “national” interim relief instead. Reasonable doubts remain as to why the European legislator decided to embark upon such an undertaking, rather than improving the regime of provisional, including protective, measures of the Brussels-Lugano system.

In **international commercial arbitration**, the following trends may arise with respect to each of the judicial and arbitral bodies involved in arbitration.

**National courts**8 are expected to require a proper connecting factor based on a substantial connection between the parties or the dispute and the territorial jurisdiction of the relevant courts. In the absence of a substantial connection, national courts should only offer support to arbitral proceedings in cases where public policy exceptions arise, such as disputes involving international fraud, or in the highly exceptional case where no other forum is available to the parties. Furthermore, national courts should adopt a consistent approach towards their supportive powers in arbitration and foreign litigation proceedings. The connecting factors adopted in both dispute resolution systems are essentially the same, so there are no reasons which would support a differential treatment between litigation and arbitration when it comes to judicial support. As it can be seen, no substantial

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8 See Ch 4.
changes are recommended in this area since national courts should continue adopting a consistent approach to the exercise of supportive powers.

As regards arbitral tribunals, nine developments might dominate the future of the law of jurisdiction in the area of provisional and protective measures. The first of these developments is likely to take place in the context of the prohibition of arbitrator-rendered relief imposed by several legal systems. Fewer than a dozen countries currently impose this restriction and some of them such as Israel and Italy may imminently confer arbitrators the authority to render injunctive relief once legislative reforms are effectively implemented. Sooner or later, the majority of legal systems currently prohibiting tribunal-rendered relief will follow. The second aspect which might be amended is the concept of prima facie jurisdiction. As explained in Chapter 5, arbitral tribunals shall conduct a prima facie analysis of arbitral jurisdiction – if such issue remains unsettled – in order to assert competence to render interim measures. In this context, institutional rules might make clear that the prima facie examination of jurisdiction shall include the issue of whether the parties are bound by the arbitration agreement. It should not be assumed, from what has just been explained, that tribunals will be required to conduct an intricate analysis on aspects such as the validity of the arbitration clause or non-signatory issues. An arbitral tribunal may evidently refer these issues to a later stage of the proceedings. But arbitration rules may make clear that an arbitral tribunal cannot obviate or surpass the prima facie analysis on personal jurisdiction to render interim relief on the basis that arbitral jurisdiction is not a precondition to the exercise of their powers. This legal development has been already adopted in the context of: i) ICC emergency arbitration, and ii) the prima facie test of jurisdiction conducted by the President of the ICC.

Finally, emergency arbitration is a relatively recent phenomenon created by arbitral institutions. Since the emergency arbitrator procedure has not emerged from

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9 See Ch 5.
10 See Ch 6, Finding 3, A, 1.3.
11 See Ch 5, Finding 5, A, 1.1.1.
12 See Ch 6.
national law, the legal status and competence of emergency arbitrators are unsettled in a great majority of legal systems. It should come as no surprise then that this area is likely to be the main focus of future legislative reforms. In this context, it is possible to anticipate that many legal systems will equate the legal status of emergency arbitrators and arbitral tribunals since this option not only ensures the enforceability of emergency decisions but also confers emergency arbitrators the same competence to render interim relief as that of arbitral tribunals — albeit restricted, of course, to the pre-arbitral stage. This legal development, which was first adopted in Singapore, is spreading to many other legal systems of the Asia-Pacific region. It is only a matter of time until this development reaches legal systems of other regions and become the preferred option to implement the emergency arbitration procedure. Yet it should be noted that this trend might find resistance in, for example, some countries of continental Europe, where a majority of legal writers appear to reject the jurisdictional role of the emergency arbitrator.
### Schedule I: Analysis of awards and procedural orders on the authority of arbitrators to render interim relief

**Schedule I.A: Awards and procedural orders of arbitral tribunals**

<table>
<thead>
<tr>
<th>No.</th>
<th>CASE AND SOURCE OF PUBLICATION</th>
<th>TYPE OF PROBLEM(S): JURISDICTION, PROCEDURAL POWERS, ADMISSIBILITY, OR OTHER?</th>
<th>FURTHER EXPLANATION ON ARBITRAL JURISDICTION, ADMISSIBILITY, OR OTHER</th>
<th>PROCEDURAL POWERS: SOURCE OF ARBITRAL AUTHORITY?</th>
<th>A) APPLICABLE SUBSTANTIVE STANDARDS OR CRITERIA AND, B) OTHER REMARKS</th>
</tr>
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</table>
| 1   | Final Award of February 1994 in ICC Case 7210 (2000) 11 (1) ICC Ct Bull 49 | Arbitral authority or procedural power to grant an injunction preventing State X from making any disposition of the mineral rights in any part of the territory covered by the five original licence concessions. Two applications: interim and permanent injunction. | The tribunal applied the 1988 ICC Rules to conclude that it had “jurisdiction” to render the remedy, but that the set of rules did not expressly confer authority to arbitrators as opposed to the 1998 Rules. The defendant accepted the jurisdiction of the tribunal but it is not clear whether that means personal jurisdiction or the particular procedural power to render interim relief. No reference to France (the seat) to ascertain whether the tribunal had powers to render the particular remedy – the defendant argued that according to the applicable law to the merits, injunctive relief against a state was prohibited. The claimant argued that such relief was possible under principles of international law. The tribunal concluded that the Rules did not limit its power to render interim relief but no assessment of the lex arbitri was conducted in that regard. | | A) The tribunal applied “international law” when it decided on the applicability of the substantive condition of “not being able to be compensated in an award of damages”.

B) According to the tribunal, whether it had the power to render injunctive relief against a state was part of the exercise of its powers rather than “jurisdiction itself”: “the defendants’ submissions on this issue [are] relevant to the question of the exercise of such jurisdiction rather than to its existence”.

The tribunal rejected the injunction on the basis of a limit to its authority: “it could not have monitored any order made” (lack of enforcement or coercive powers). |

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1 Schedules I.A and I.B chronologically organise awards and procedural orders in accordance with the date in which each arbitral decision was rendered.
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<td>2</td>
<td><strong>Final Award of August 1994 in ICC Case 7895 (2000) 11 (1) ICC Ct Bull 64</strong></td>
<td>Arbitral authority or procedural power to render an injunction coupled with a fine for non-compliance.</td>
<td>The tribunal based its power on the ICC Rules subject to any mandatory provision of the law of the seat or agreement of the parties. After examining French law (Paris was the seat), the tribunal held that a tribunal seated in France had the power to render an injunction coupled with a fine for non-compliance.</td>
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<td>3</td>
<td><strong>Interim Award of March 1995 in ICC Case 7692 (2000) 11 (1) ICC Ct Bull 62</strong></td>
<td>Arbitral authority or procedural power to render several remedies including an anti-suit injunction.</td>
<td>The parties expressly included in the arbitration agreement: “The Arbitrator(s) shall have power to grant preliminary and permanent injunctive relief and to order specific performance of this Agreement.” Even though the parties explicitly referred to an arbitral power to render interim relief in their clause, the published extract of the decision does not include on what basis the tribunal asserted such authority.</td>
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Arbitral authority or procedural power to render:

- a provisional measure in favour of the claimant: provision of an irrevocable letter of credit for the full amount claimed plus arbitration costs, and
- a conservatory remedy in favour of the defendant: the deposit by the claimant of a ‘letter for a commission of 4% of the price’ in which the name of the beneficiary was left blank.

Subject-matter limitation.

The tribunal considered that there was a subject-matter limitation that prevented it from rendering the conservatory remedy sought by the defendant. The fact that “the claimant relied on the agreement dated 1992 and not on the undated letter promising a 4% commission puts this latter document outside the scope of this arbitration”. The tribunal continued as follows: “the jurisdiction of this tribunal cannot extend to the prevention of a possible misuse by a party of a document which remains outside the scope of the arbitration. Such prevention may be achieved only through State courts having jurisdiction.”

A) There are no sources applied by the tribunal to determine the standards required to render each of the remedies.

B) Both applications were rejected. The provisional measure was rejected on the basis of lack of urgency, lack of irreparable harm and prejudgment of the merits. The conservatory measure was rejected due to a lack of competence and urgency.
| 5 | **Interim Award of June 1996 in ICC Case 7544 (2000) 11 (1) ICC Ct Bull 56** | Arbitral authority or procedural power to order interim payment representing monies incontrovertibly due. | — | Application of the ICC Rules. The tribunal additionally analysed whether the parties or the mandatory provisions of French arbitration law (lex arbitri) limited their powers as set out by the applicable arbitration rules. Additionally, the tribunal noted that “several arbitral interim awards or orders have held that ICC arbitrators do have jurisdiction to order provisional measures”. |

| 6 | **Interim Award of 1996 in ICC Case 8786 (2001) 19 (4) ASA Bull 751** | Arbitral authority or procedural power to order security for costs. | — | The arbitrator applied the law of the seat (Switzerland, Art 183 PILA) and concluded that it had the power to render an order for security [11]. ² |

² References are provided in brackets [] to the relevant paragraphs, and in parentheses () to the relevant pages of each arbitral decision.
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<td>7</td>
<td>Arbitral authority or procedural power to render security for costs.</td>
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<td>The tribunal applied the law of the seat (Art 182(2) PILA) and answered affirmatively to the said question even if Swiss commentators and previous tribunals seated in Switzerland rejected the existence of such a power [8]. A timid reference to the Rules of the Geneva Chamber of Commerce can also be found in the arbitral decision.</td>
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<td>8</td>
<td>Arbitral authority or procedural power to render a total of five provisional measures.</td>
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<td>The tribunal applied the ICC Rules 1988 as the source of its powers. It then went on to assess the mandatory provisions of municipal law. Surprisingly, it applied the laws of Ontario (Toronto was the seat) but, additionally, Mexican law as the law applicable to the merits in order to concurrently assert authority to render interim relief.</td>
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A) Conversely, the tribunal did not apply Swiss law to the question of the substantive standards. It is not clear what sources the tribunal applied to the standards but it concluded that if a party entered into voluntary liquidation that is a risk that must be borne by the counterparty.

B) The applicant argued that the laws of Mexico and Ontario conferred arbitral authority to render interim relief. The defendant, however, considered that only Mexican law was applicable. For that reason, the tribunal may have cumulatively applied both laws. The parties did not mention the ICC Rules.

B) The tribunal argued: “the authority of the arbitrators to grant interim measures derives not only from their inherent powers to conduct the arbitral procedure”, but also from the ICC Rules.
<table>
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<th>Page</th>
<th>Final Award of April 1998 in ICC Case 9324 (2000) 11(1) ICC Ct Bull 103</th>
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<td>9</td>
<td>Personal jurisdiction and limits to the arbitrator’s procedural powers. The claimant applied to a court in Istanbul for an interlocutory injunction against its bank to prevent payment of a performance guarantee. In due course, Claimant started arbitration and asked, as final relief, for: (i) the court-ordered injunction to be extended (ii) the letter of guarantee by which the Turkish bank instructed an Egyptian bank to issue the performance bond to be released or declared null and void and (iii) the issuance of a conditional award to reimburse the amount of the guarantee, should the letter be paid. Personal jurisdiction: the sole arbitrator concluded that he did not have personal jurisdiction over the claimant’s Turkish bank on the basis that it was not a party to the arbitration agreement: “if it cannot address an order to (the Turkish bank), then it cannot extend an order that the competent court has issued to such bank”. The sole arbitrator identified a further limit to his procedural powers: the arbitrator “must take the relief as requested by Claimant and does not have the power to grant another relief than the one that was specifically asked for”. On this basis, he rejected the second application (letter of guarantee by which the Turkish bank instructed an Egyptian bank to issue the performance bond to be released or declared null and void) since, first, he could not grant an order addressed to the bank and, second, “to order Respondent to release the letter (…) was beyond his powers since this was not what Claimant requested”.</td>
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<th>10</th>
<th>Partial Award of April 1999 in ICC Case 10040 (2000) 11 (1) ICC Ct Bull 115</th>
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<td>Arbitral authority or procedural power to order the immediate return of machinery to the claimant. The tribunal applied Article 23 of the ICC Rules 1998 and no reference was made to English law (London was the seat).</td>
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<td>11</td>
<td>Interim Award of February 2000 in ICC Case 9950 (2011) ICC Special Supplement 24</td>
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<td>12</td>
<td>Interim Award of 2000 in ICC Case 10021 (2011) ICC Special Supplement 26</td>
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<td>13</td>
<td>Interim Award of May 2000 in ICC Case 10648 (2011) ICC Special Supplement 32</td>
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<td>14</td>
<td>Final Award of November 2000 in ICC Case 10062 (2011) ICC Special Supplement 30</td>
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<p>| 15 | Interlocutory Award of 2000 in ICC Case 10596 (2005) XXX YB Comm Arb 66 | <strong>Arbitral authority or procedural power</strong> to order the delivery of documentary materials. The defendant claimed that the relief requested by the claimant was not an interim measure and could not be rendered by the tribunal. | The seat (France) as referring to the application of the ICC rules. <strong>Long-standing ICC practice</strong> to confirm that the application is an interim measure within the meaning of Art 23 (1) ICC Rules which can be granted by an ICC arbitrator. | A) <strong>Judicial and arbitral practice</strong> to apply the requirement of “prima facie case on the merits” [5]. <strong>Legal commentary</strong> to apply “imminent or irreparable harm” [16]. And finally, <strong>ICC arbitral practice and legal commentary</strong> to apply the standard of “urgency” [19]. |</p>
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<th>Page</th>
<th>Reference</th>
<th>Text</th>
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<tr>
<td>16</td>
<td>Interim Award of May 2001 in ICC Case 8307 (2011) ICC Special Supplement 13</td>
<td>Arbitral authority or procedural power to render two orders: first, to provide a bank guarantee, and second, to discontinue proceedings in a national court (anti-suit injunction).</td>
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<td>17</td>
<td>Partial Award of May 2001 in ICC Case 10681 (2011) ICC Special Supplement 34</td>
<td>Arbitral authority or procedural power to render an anti-suit injunction with respect to court proceedings commenced in the Dominican Republic.</td>
</tr>
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The 1988 Rules applied to the dispute and the sole arbitrator found implicit authority to grant, generally, provisional remedies in Article 8(5). The tribunal also applied the lex arbitri (Art 183 PILA - Switzerland was the seat).

The sole arbitrator examined the particular power to render an anti-suit injunction on the basis of the arbitration practice at the seat (Switzerland) and academic commentary.

The sole arbitrator applied ICC practice (no reference to Switzerland) as the source of his particular power to render a bank guarantee.

A) The sole arbitrator determined the three applicable substantive standards or requirements on the basis of legal commentary (grave or irreparable damage, threat of grave or irreparable damage to the tribunal's jurisdiction, and preservation of the status quo and the enforcement of the outcome of the arbitral proceedings).
Personal jurisdiction and arbitral authority or procedural power to order the respondent to provide security in an escrow or similar account at a French bank.

Jurisdiction: since the issue of personal jurisdiction (consent/existence of an arbitration agreement) was not considered by the tribunal when it received the application to render interim relief, a *prima facie* analysis of jurisdiction was conducted (the tribunal simply relied on the preliminary findings of the ICC Court: an arbitration agreement may exist) [3].

The tribunal conflated “jurisdiction” with “power to render interim relief” [5].

The tribunal applied the ICC Rules and *arbitral case law* [4]. No assessment was made regarding French law (the seat was Paris); however, there was a reference to French law in the following terms: “the issue is whether the (...) tribunal has the power to grant interim (...) relief in a case (...) where the place of arbitration is in France” [1].

There was another important reference to the law of the seat in the analysis of one of the substantive requirements (urgency). The tribunal assessed whether “French international public policy will be violated if the tribunal grant[s] an award on interim and conservatory measures in the present case”.

Arbitral authority was accepted on the basis of the ICC Rules and academic sources. No reference was made to Belgian law when it came to arbitral authority *per se*.

Belgian law (Brussels was the seat) arose in the context of the substantive standards or requirements. The main problem was to determine whether Article 851 of the Belgian Judicial Code applied to the request since that provision is not part of the “Arbitration Act” and therefore, it was designed for Belgian municipal courts.

A) 1) *Urgency*: the tribunal seemed to apply French law but later rejected that possibility and ruled that French domestic procedural law was not applicable. Then it analysed whether mandatory provisions of French law prevented the rendering of the remedy. The tribunal relied on an assessment of international public policy (which should be part of the assessment of the procedural powers of the tribunal rather than under the substantive requirements). 2) *Prima facie case*: general rule in international arbitration [12].
<table>
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<tr>
<th>20</th>
<th><strong>Award by Consent of 2001</strong> in ICC Case 11443, Coll of ICC Arb Awards 2001-2007, 335</th>
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<tr>
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<td>Arbitral authority or procedural power to grant a provisional measure whose nature is to maintain the contractual status quo.</td>
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<td>The tribunal applied the <em>lex arbitri</em> (London was the seat: Section 39 EAA 1996), and the arbitration rules (Art 23 ICC Rules 1998) [5 and 6]. The arbitral tribunal also supported its authority on academic commentary. Interestingly, the following terminology was used: “this competence is recognised by the authors” [6]. A) No standards or criteria were required since the parties agreed on the terms under which the measure was granted.</td>
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<td>Arbitral authority or procedural power to order the attachment of property of the defendant.</td>
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<td>The tribunal applied Article 31 of the SCC Rules. No reference to Swedish law (the seat). However, the tribunal mentioned the SCC Rules and Swedish arbitration law in the context of the substantive standards to conclude that there were no criteria in any of them. Accordingly, the lack of reference to Swedish law may have been considered as an unnecessary step insofar as Swedish law also upholds that arbitrators possessed the authority to render the requested remedy. A) Due to the inexistence of criteria or standards in the applicable rules and <em>lex arbitri</em>, the tribunal applied Swedish procedural law to ascertain the requirements or substantive conditions required to render the requested measure (<em>prima facie</em> case and urgency).</td>
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<td>Lack of imperium or enforcement powers of arbitrators as a limit to their procedural powers.</td>
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<td>Enforcement limit impacting on the powers of the tribunal. The applicant sought to “attach” the property of Company B. The tribunal ruled that an order for attachment could not be granted since attachment presupposes a “state enforcement officer who impounds goods or other property”. B) As a consequence of the enforcement limitation, the application was reformulated by the tribunal as an order restraining Company B from any disposition of the property sold under the contract.</td>
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<td>22</td>
<td><strong>Final Award of 2002 in ICC Case 10904 (2006) XXXI YB Comm Arb 95</strong></td>
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<td>Admissibility: the claimant has potentially waived its right to arbitrate in the context of an application for a court-ordered interim measure and the defendant has not resisted the court’s action.</td>
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<td>The tribunal applied the law of Jordan as the law of the court’s forum to determine if the claimant has effectively waived the arbitration agreement.</td>
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<td>B) The tribunal conflated jurisdiction and admissibility: “the Arbitral Tribunal lacks jurisdiction to decide the merits of the dispute” [69].</td>
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<td>The tribunal ruled that the claimant applied for a court-ordered remedy but subsequently, in order to confirm such a provisional measure, it submitted the merits of the dispute to the Jordan courts.</td>
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<tr>
<td>Arbitral authority or procedural power to order the delivery to the claimant of all products received by the respondent or, alternatively, an order forbidding to offer, sell or supply such materials.</td>
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<tr>
<td>Admissibility: application to the tribunal in a case where a New York court had previously rejected to render an interim measure.</td>
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<tr>
<td>The tribunal assessed the principles of judicial efficiency or procedural economy to decide on whether the application was admissible (principles which the tribunal recognised as accepted by Swiss legal scholars).</td>
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<td>The tribunal applied the law of the seat (Art 183 Swiss PILA) to conclude that the provisions of the lex arbitri did not limit its power in so far as in Switzerland there was not an exclusive jurisdiction or either state courts or arbitral tribunals in the context of an application for interim relief [14 in fine].</td>
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<td>B) The tribunal concluded that it had authority or powers but the application was not admissible since the circumstances had not changed and the test to be applied by the tribunal would have been the same as that conducted by the New York court.</td>
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<td>24</td>
<td>Interim Award of April 2003 in ICC Case 12196 (2011) ICC Special Supplement 56</td>
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<tr>
<td>25</td>
<td>Procedural Order of June 2003 in ICC Case 12035 (2010) ICC Special Supplement</td>
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The tribunal examined, first, whether the substantive standards or requirements to render security for costs were satisfied. Since the applicant did not demonstrate a “change of the risk which goes beyond reasonable and fair expectations”, the tribunal did not examine, in a second stage, its authority to render interim relief. That said, the arbitrators exclusively referred to the *lex arbitri* (Swiss PILA) in the context of their authority to render an order for security: “there is no need for the Tribunal to examine whether it has the power to order security for costs and whether, in the affirmative, such power is vested in Art. 183 or rather in an arbitral tribunal’s general powers under Art. 182.”

A) It is not clear how the tribunal determined the requirements or standards applicable to order security for costs but it seems that it just conducted an assessment of the criteria advanced by the applicant in the terms of reference (non-enforceability of the award in Egypt, and capital decrease).
The tribunal based its authority on the ICC Rules [36] but also analysed whether the law of the seat (Hong Kong) limited its procedural powers [at 38].

The jurisdiction of the tribunal had not been determined so there was a clear distinction between “authority” and “jurisdiction” [37]. The tribunal did not require the satisfaction of *prima facie jurisdiction* but held that it was not precluded from awarding relief “by virtue of any objection to its jurisdiction, although those objections (...) may legitimately take account in determining how to exercise its discretion under Article 23(1)”.

A) The tribunal applied the law of the seat to the substantive standards or requirements (Schedule 5 of the HK Ordinance) and concluded that the applicable law did not prescribe any standards that must be mandatorily satisfied for the measure to be considered “necessary”. It then applied ICC arbitral jurisprudence and commentaries on ICC practice.
| 28 | Procedural Order of December 2003 in ICC Case 12542 (2005) 23 (4) ASA Bull 685 | Arbitral authority or procedural power to render security for costs. | Neither Swiss arbitration law nor the 1998 ICC Rules explicitly addressed the issue. The tribunal based its authority on previous arbitral practice of tribunals sitting in Switzerland (the seat). Indeed, it asserted authority on the basis of previous decisions which have interpreted the provisions of the PILA as conferring arbitral powers to render security for costs. It is important to note that the tribunal sought to interpret the PILA rather than the ICC Rules [38]. The tribunal did not rely on an inherent or implied power to render the particular remedy. |
| 29 | Interim Award of May 2005 in ICC Case 13194 (2011) ICC Special Supplement 72 | Arbitral authority or procedural power to render an order authorising or prohibiting an analyst to publish the price of shares and report. | A) The tribunal first applied legal commentary and previous arbitral practice to determine the standards which were not applicable. Secondly, the tribunal assessed the standards advanced by the applicant to decide if they were applicable to an order for security for costs: 1) application of Swiss arbitral practice to decide if insolvency was an appropriate standard: “claimant’s insolvency does not suffice as a matter of Swiss law to grant security” [55] and 2) application of previous arbitral practice with respect to the standard of “abusive claim”: “a few orders are insufficient to establish a general principle of procedure” [54]. |
| | | The tribunal did not consider the issue of whether it had personal jurisdiction over the analyst to prohibit or authorise the publication of the report. Interestingly, the measure was rejected on the ground that some substantive standards were not satisfied by the applicant. | No reference was made to New York law (NY was the seat). The tribunal states: “it is undisputed that this (…) tribunal has the power to grant interim relief as provided in Article 23(1) of the ICC Rules” [85]. |
| | | | A) The tribunal applied ICC practice to the existence of standards or requirements to grant the remedy and supported that by referring to an academic publication [85]. B) A New York court had previously prohibited the publication of the report, “until this order is dissolved, the award in the arbitration provides for said valuation proceedings to continue, or the further order of this court…” |
| No. | Procedural Order of January 2006 in ICC Case 12732 (2014) ICC Special Supplement 62 | Arbitral authority or procedural power to render security for costs. | — | The tribunal seems to have applied the arbitration rules. However, this is a very short extract. There is only the following reference: “although an order for security for costs is, in principle, available under Article 23 of the ICC Rules, it is very rarely granted, absent exceptional circumstances”. No reference to English law (the lex arbitri). |
|-----|----------------------------------------------------------------------------------|---------------------------------------------------------------------|---| B) The remedy was rejected on the basis of lack of exceptional circumstances and on the basis that the application came too late in the proceedings. |
| 30  | Procedural Order of February 2006 in ICC Case 13359 (2014) ICC Special Supplement 63 | Arbitral authority or procedural power to order security for costs. | — | Power exclusively based on the ICC Rules 1998. Interestingly, the tribunal referred to its general power to grant legal and other costs under Article 31 (1) of the Rules. No reference to the law of the seat (Paris). The tribunal argued, with respect to the applicable law, that “as this is an international arbitration with its seat in Paris, the Tribunal has concluded that no weight should be given to [practice, regulations and decisions in the country of the applicable law] to reject any provision for security for a party’s costs” [6]. |
Arbitral authority or procedural power to order security for costs.

Article 23 of the ICC Rules and Section 38 of the English Arbitration Act. In the context of the application of institutional rules, academic sources were used to conclude that security for costs is included within Article 23 of the Rules.

A) Application of section 38 of the English Act which establishes two substantive standards non-applicable to a request for security in arbitration. These criteria may be relevant to render security for costs in judicial proceedings (Order 23, Rule 1(1)a Rules Supreme Court). See paras 366, 368 and 369 of the 1996 DAC Report on the English Arbitration Bill. Compare clause 38(3) of the 1995 Bill (arbitral “power exercised on the same principles as the court”) with section 38(3) of the 1996 Act.

“Failure to pay ICC fees” does not disqualify the application for security (it is not an admissibility issue) but it is a standard to take into account and, therefore, an obstacle that led to the refusal of the application.
A) The tribunal required the existence of exceptional circumstances in the following terms: “this is consistent with the approach adopted by the English legal practice of ordering the posting of security for costs in international arbitration, namely, that an application for security for costs should be declined unless there are special circumstances”.

B) The ICC arbitration rules were acknowledged as a potential source of limits to the procedural powers incorporated by the lex arbitri. This is very uncommon since most tribunals conduct an inverse analysis.
Partial Award of January 2007 in ICC Case 13856, Sonera Holding v Cukurova Holding, unpublished

**Personal jurisdiction and admissibility.**

Eleven procedural orders were granted by the tribunal prior to the final determination on arbitral jurisdiction in this partial award. These orders addressed applications for interim measures. One of these orders dated March 2006 is analysed below.

Arbitral jurisdiction. The respondent argued that:
- the signatory of the agreement for the claimant was not authorised to sign it (no personal jurisdiction over the claimant) so there was a fundamental defect as to the existence of a valid arbitration agreement. Indeed, it was argued that the claimant was under an incapacity under the law applicable to it.
- lack of jurisdiction in personam over TeliaSonera since Sonera Holding was the only party to the agreement.

Admissibility: escalation clause as a precondition to arbitration (“amicable resolution of difference within 60 days”). This is a problem of admissibility of the claim but the issue was characterised as jurisdictional.

B) Respondent also argued that the tribunal did not have competence *ratione materiae* over the merits of the claim.

All jurisdictional challenges were rejected by the tribunal.
Arbitral authority or procedural power to render an interim measure where a party challenges the jurisdiction of the tribunal.

Admissibility of the application for interim relief where the same measures were sought, and rejected, by the courts of country X.

Prima facie analysis of jurisdiction. The tribunal argues that competency and admissibility issues do not form part of the requirement of prima facie jurisdiction in order to exercise its authority to render interim relief [4.3]. The tribunal only preliminarily examined the challenge as to the validity of the arbitration agreement which, according to the respondents, was not valid because the signatory for the claimant was under some incapacity.

Admissibility: the tribunal rejected the res judicata effect of court-ordered measures even if there was not a change of circumstances [5.2. in fine].

The tribunal applied the law of the seat (Swiss law) and the applicable rules to assert authority to render provisional remedies. However, the tribunal noted that these legal sources do not determine how to proceed if the jurisdiction of the tribunal is resisted by a party. After analysing international cases (ICJ and ICSID), legal doctrine in commercial arbitration, and case law at the seat, the tribunal concluded that it had the power to render interim relief if it was prima facie satisfied that it had jurisdiction. Remarkably, the tribunal quoted the following: “the arbitration tribunal must at least have prima facie jurisdiction in the main action. Otherwise, it also lacks jurisdiction to order the interim relief.”

B) The tribunal comprehensively analysed every potential applicable law or source to determine the applicable standards to render the requested remedy, including the application of the procedural law of the seat, and sources not applicable to this arbitration such as Article 17 of the 2006 version of the Model Law [6.1]. However, the tribunal decided at the end to consider the standards advanced by the parties in the application and answer to the request.
Arbitral authority or procedural power to order security for costs.

Arbitral authority to render security for costs was not in dispute. The tribunal applied the ICC Rules and Articles 182(1) and 183 of the Swiss PILA (Zurich was the seat).

A) The respondent argued that the Code of Civil Procedure of the Canton of Zurich applied on the basis of the “will of the parties as expressed in the arbitration agreement”. Section 73 of this Code provided that the lack of money of a claimant entitles to security. By contrast, the claimant argued that the said provision was not applicable to the arbitration.

The tribunal rejected its application but it did not determine the requirements or the law governing the application. It just analysed the standards set out by the respondent (eg, lack of money) and assessed them in accordance with arbitral jurisprudence of tribunals sitting in Switzerland, and academic commentary.
| 36 | Procedural Order of June 2007 in ICC Case 14581 (2014) ICC Special Supplement 86 | Arbitral authority or procedural power to render an anti-arbitration injunction (AAI) enjoining an arbitration commenced in another forum. | — | The tribunal applied the ICC Rules and the *lex arbitri* (Switzerland was the seat) to confirm its authority to render interim relief generally. With respect to its authority to render the particular remedy (an anti-arbitration injunction), the tribunal applied previous arbitral practice at the seat which confirmed that an AAI was included within its power to award injunctive relief. A) The tribunal applied previous arbitral practice and the *lex arbitri* to determine the standards which cannot be relied on to render an anti-arbitration injunction (*lis pendens*, competence-competence or res judicata). The tribunal determined the applicable requirements or standards to grant an AAI on the basis of academic sources (fraudulent conduct, urgency, irreparable harm and necessity to facilitate enforcement of the award). |
| 37 | Procedural Order 5 of December 2007 in ICC Case 14661 (2014) Special Supplement 74 | Arbitral authority or procedural power to order security for costs. | — | The tribunal exclusively referred to the fact that Article 23 of the ICC Rules includes the power to render security for costs as evidenced by ICC arbitration practice. French law (seat) was not applied. A) The standards to order the provisional remedy are not systematically set out by the tribunal. However, this might be explained by the fact that, in a previous procedural order, the arbitrators rejected a request for security for costs. |
### Procedural Order of December 2007 in ICC Case 14993 (2014) ICC Special Supplement 77

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<tr>
<td><strong>Arbitral authority or procedural power</strong> to order security for costs.</td>
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The tribunal debated whether, as a result of the adoption of Article 23 in the ICC Rules, the power to order security for costs was expressly reserved to arbitrators. In addition, the tribunal examined the law of the seat (Austrian law) to determine whether there were any restrictions to its power to grant security for costs.

A) The tribunal required a “fundamental change of situation” as a substantive standard by following the reasoning of another tribunal ‘seated’ under a different arbitral institution.

A list of circumstances considered by academic commentators as ‘exceptional’ and therefore, as qualifying cases where security should be granted, was also included in the procedural order.

### Final Award of June 2008 in ICC Case 14287 (2011) ICC Special Supplement 74

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<tr>
<td><strong>Arbitral authority or procedural power</strong> to order the respondent to pay into an escrow account a given amount in the concept of compensation for damages.</td>
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The tribunal concluded that it was authorised to render interim relief on the basis of the ICC Rules and the “leges arbitri” provisions at the place of the proceedings. Interestingly, it also argues that: “this competence would also be conferred by Polish law (…) as the state where the major part of the dispute is located or a substantial part of the subject of the parties’ principal interest concerning this dispute is located, even though Poland is not the place of arbitration” [IV.8.1].

B) Luxembourg and Dutch companies entered into a framework agreement for the acquisition of an interest in a Polish company undergoing privatisation.

A court from Poland had previously rendered a provisional measure.
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<td>40</td>
<td>Arbitral authority or procedural power to order security for costs in a case where the claimant was in a situation of manifest insolvency.</td>
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<td>The sole arbitrator asserted authority to grant security for costs on the basis that:</td>
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<td>- the parties accepted that authority.</td>
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<td>- commentators consider that Article 23 of the ICC Rules is broad enough to include security for costs, and</td>
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<td>- legal doctrine and practice support the view that Article 183 of the PILA (Bern was the seat) also extends to security for costs.</td>
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A) The existence or applicability of the first two substantive standards seems to be set out by reference to an academic source [13]. Yet, the arbitrator used several times the expression “tribunals sitting in Switzerland”. That may lead to concluding that the law of the seat governed the assessment *per se* of these requirements.

- Third standard: the parties agreed on one of the possible grounds being: “fundamental change of circumstances”.

- Balance of interests: not clear what the source of this fourth standard is [17].

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<td>41</td>
<td>Arbitral authority or procedural power to order security for costs.</td>
<td>—</td>
<td>The sole arbitrator applied Article 23 of the ICC Rules and Section 38 of the English Arbitration Act. Interestingly, he adds: “English procedural law, although not binding on the Sole Arbitrator, also provides for the granting of security for costs under Part 25 of the Civil Procedure Rules” [40].</td>
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A) The sole arbitrator explained that there is no “common denominator” when it comes to the substantive requirements which need to be satisfied in order to grant security for costs. After analysing the circumstances of the case and several factors (which circumstances or factors? The order is silent in that regard), the arbitrator lists the substantive conditions for the present case.
Personal jurisdiction and arbitral authority or procedural power to order security for costs.

The tribunal applied:
- the law of the seat (Switzerland), Art 183(1) PILA [5.2.1 to 5.2.5],
- Art 26 (1) of the SCAI Rules, adopted by the parties as part of their agreement to arbitrate,
- there was a challenge to the arbitral tribunal’s jurisdiction. The tribunal applied academic commentary and confirmed its power to order security for costs even if it ultimately did not have jurisdiction [5.2.10].

A) The tribunal applied “case law, commentary and international best practice” to the substantive standards of an order for security [6.3]. Even though the jurisdiction on the merits was questioned by all respondents, the tribunal did not conduct a prima facie analysis of arbitral jurisdiction.

B) Court proceedings were pending between some of the claimants and the respondents in this arbitration and some non-parties to the arbitration agreement. A temporary restraining order was issued by that court.

The tribunal rejected the remedy since the applicants did not demonstrate the existence of “exceptional circumstances”.


Personal jurisdiction: the jurisdiction of the tribunal to hear the merits of the case was questioned by all respondents (1-16).
Arbitral authority or procedural power to render three different interim measures. Alleged illegal dilution of the shareholding of Company X in its subsidiary.

The sole arbitrator applied Article 23(1) of the ICC Rules and Article 17 of the International Commercial Arbitration Law of Cyprus 1987 (Nicosia was the seat).

The arbitrator noted that the lex arbitri included a narrower power ("interim measure (...) necessary in respect of the subject matter of the dispute") than the ICC Rules ("any measure that it deems appropriate"). This subject-matter limitation was not addressed by the arbitrator, nor did it have an impact on the application for interim relief.

A) The arbitrator applied academic commentary (Lew, Mistelis and Kroll) to ascertain the applicable substantive standards or requirements (no prejudgment of merits and threat of irreparable or substantial harm which cannot be compensated by damages).

B) The arbitrator rejected the application, among other reasons, on the basis of the concept of interim relief: preservation of the status quo at the commencement of the arbitration (dilution had already taken effect).
The tribunal applied ICC arbitration rules to its authority to render interim relief generally. As regards the specific measure sought by the applicant, the arbitrators noted that there is not an open or closed list of measures they can render under the rules and referred to academic commentary in order to provide a list of remedies (however, note that the ICC Rules refer to “any measure it deems appropriate”). Interestingly, the tribunal also used the Model Law list of provisional remedies in Article 17(2) as an example of best practice. Finally, it concluded that it had the authority to render an order prohibiting the use of a trademark and related IPRs.

In the second stage, the tribunal referred to the mandatory provisions of the lex arbitri (laws of Luxembourg) to ascertain whether there was a limit to its power.

A) ICC case law, the Model Law and the law of the seat were applied to the requirements or substantive standards.

B) This award seems to adhere to the model according to which the powers to render injunctive relief are conferred by the arbitration agreement (including arbitration rules) and the lex arbitri is simply examined in order to assess whether a restriction or limit on such a power exists.

Interestingly, the defendant argued that the seat was Italy and the applicable procedural law was Italian law even if the clause clearly designated Luxembourg as the arbitral seat. Indeed, the defendant tried to sabotage the application for interim relief on the basis that Italian law prohibits tribunal-rendered remedies.
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<th>Procedural Order of December 2012 in ICC Case 18563 (2014) ICC Special Supplement 89</th>
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<tr>
<td><strong>Arbitral authority or procedural power</strong> to render an anti-suit injunction (ASI) enjoining court proceeding commenced in another forum. <strong>Jurisdiction in personam</strong> over one of the claimants (Claimant 1). Claimant 2 joined the arbitration and was accepted by Respondent as the proper party to the arbitration agreement.</td>
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<tr>
<td>Challenge to the jurisdiction of the tribunal. The tribunal held: “the in personam jurisdiction is not a precondition for granting an anti-suit injunction. The power of arbitrators to grant such a relief stems from the existence of a valid arbitration agreement and it is the protection of the arbitration agreement’s integrity which must be the rationale to vest the power in the arbitral tribunal.”</td>
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<td>One may argue, however, that in arbitration, there is no arbitral jurisdiction generally considered as the tribunal seems to suggest. Due to the consensual nature of arbitration, there is jurisdiction over specific persons and jurisdiction over the matters submitted to the arbitral forum. And that is the end of the matter.</td>
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<td>The tribunal applied <strong>the lex arbitri</strong> (Switzerland was the seat) and the <strong>ICC Rules</strong>.</td>
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<td>A) The tribunal distinguished between provisional measures related to the merits of the claim (e.g. freezing order) and provisional measures related to the procedure (e.g. ASI). It determined that the standards or requirements which should be satisfied are different in each of these categories. In the context of the ASI, the tribunal listed two requirements (breach of arbitration agreement and aggravation of the dispute) without reference to any source (either arbitral case law or legal commentary) or applicable law.</td>
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<tr>
<td>The tribunal conducted a partial <strong>prima facie</strong> analysis on arbitral jurisdiction.</td>
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<th>Final Award of March 2014 in ICC Case 18724, Travis Coal Restructured Holdings v Essar Global, unpublished</th>
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<td>Arbitral authority or procedural power to grant pre-award security. The tribunal deferred to grant the remedy in a procedural order but addressed again the issue in the final award.</td>
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<td>The tribunal applied, first, the arbitration agreement since the parties explicitly vested the authority to render “orders for interim relief” in arbitrators and, secondly, the ICC rules. No reference was made to New York law as the seat of arbitration.</td>
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<td></td>
<td>A) The tribunal distinguished between its authority to render interim relief, and the applicable law to the substantive standards or requirements; matters which were decided in accordance with New York law and international law [374 and 375].</td>
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</table>
This case illustrates the importance of the seat. The tribunal applied the ICC rules subject to the mandatory provisions of the *lex arbitri*. However, the clause was defective as to the location of the seat. Whilst the Government of Trinidad and Tobago argued that the seat was in its territory, Sural considered that Florida was the seat. The tribunal had to determine its location in order to determine the extent of its powers (Florida was designated as the arbitral seat).

According to Sural, under Florida law, “the award of attorneys’ fees and any interim measure securing them is prohibited”. The tribunal, however, argued that “US federal courts had accepted the granting of attorneys’ fees if the parties had expressly so agreed”. Rather than applying the law of the seat, the tribunal applied the law governing the arbitration agreement (laws of Trinidad and Tobago) to determine whether the term “costs” as included in the arbitration agreement included attorneys’ fees. In adopting such an approach, the tribunal made clear that this case was different to the potential situation where there was a mandatory rule of Florida law prohibiting the tribunal from awarding attorneys’ fees - not the case here.

A) The tribunal assessed the relevant circumstances of the case (including third party funding) in the context of the applicable criteria or standards to render security for costs, but it did not refer to any legal or arbitral sources.

B) The order was not granted on the basis that the applicant did not satisfy the substantive standards required to obtain an order for security for costs.
<table>
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<th>Order of September 2014 in ICC Case 19644, Compagnie des Grands Hotels d’Afrique v Starwood, unpublished</th>
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<tr>
<td>Arbrital authority or procedural power to grant several remedies including an order to return a hotel located in Morocco to the claimant with immediate effect.</td>
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| The tribunal applied the *lex arbitri*, the applicable institutional rules and the arbitration agreement. The tribunal considered that its power was conferred by the ICC rules and examined the agreement to arbitrate and the mandatory provisions of the English Arbitration Act (London was the seat) as potential limits to the powers conferred by the rules.

The parties did not challenge the arbitral power to render the relief requested.

A) The tribunal argued that in “international commercial arbitration practice” there are four substantive standards or criteria which need to be satisfied but it did not refer to any prior decision or source (urgency, irreparable harm, prima facie case on the merits and balance of interests).

The tribunal interpreted the said standards without reference to any sources. For example, irreparable harm was interpreted as “substantial harm which would not be readily compensated by an award of damages” |
Schedule I.B: Awards and orders in arbitral summary proceedings

Arbitral summary proceedings are distinct from emergency arbitration and proceedings on the merits. Institutions such as the Dutch *kort geding* or the French *référé-provision* are *sui generis* procedures difficult to categorise. That said, decisions on summary proceedings have been included in this chapter since, from a practical point of view, these proceedings are closer to arbitral proceedings on the merits than to emergency arbitration. First, even though conceptually, summary proceedings do not aim at solving the merits of the case, in a majority of cases, these proceedings do resolve the parties’ dispute. Secondly, in contrast with emergency arbitration, these proceedings do not require the parties to file an action in order to determine the merits of the dispute.

**Figure I.1. ‘Provisional’ relief in summary proceedings.** Arbitral summary proceedings share features with the proceedings on the merits and emergency arbitration. If emergency arbitration and the proceedings on the merits are located at each side of the spectrum, summary proceedings should be found somewhere in the middle of that spectrum.
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<th>No.</th>
<th>CASE AND SOURCE OF PUBLICATION</th>
<th>TYPE OF PROBLEM(S): JURISDICTION, PROCEDURAL POWERS, ADMISSIBILITY OR OTHER?</th>
<th>FURTHER EXPLANATION ON ARBITRAL JURISDICTION, ADMISSIBILITY OR OTHER?</th>
<th>PROCEDURAL POWERS; SOURCE OF ARBITRAL AUTHORITY?</th>
<th>A) APPLICABLE SUBSTANTIVE STANDARDS OR CRITERIA AND, B) OTHER REMARKS</th>
</tr>
</thead>
<tbody>
<tr>
<td>50</td>
<td><strong>Interim Award of December 1996 in NAI Case 1694 (1998) XXIII YB Comm Arb 97</strong></td>
<td>Arbitral authority or procedural power to order security for costs in arbitral summary proceedings.</td>
<td></td>
<td></td>
<td>A) The tribunal applied the law of the seat to the applicability or existence of substantive standards: urgency, <em>prima facie</em> and balance of interests [26]. B) The parties agreed on their submissions that the authority (or the request) was governed by Dutch law.</td>
</tr>
<tr>
<td>51</td>
<td><strong>Award of December 2006 in NAI Case 3310 (2008) XXXIII YB Comm Arb 160</strong></td>
<td>Arbitral authority or procedural power of the sole arbitrator to render relief in arbitral summary proceedings.</td>
<td></td>
<td></td>
<td>A) The parties disagreed on the applicable law to the interpretation of the substantive standards (either Dutch law or international principles) [13]. Surprising reference of the tribunal to Dutch law as the law governing the agreement to confirm that Dutch law applied [14]. B) The arbitral authority of the sole arbitrator was not challenged by the parties. The arbitrator rejected the application of <em>Van Uden</em> as a restriction to its power [17].</td>
</tr>
</tbody>
</table>
Authority of the arbitrator to render relief in arbitral summary proceedings.

Indirect reference to the law of the seat and NAI rules: “an arbitral tribunal sitting in the Netherlands under the NAI Arbitration Rules may provide interim relief (...) in cases of urgency” (referring to arbitral summary proceedings but no specific provision of Dutch law or the rules is determined as the source of the powers of the arbitrator) [39].
Schedule II: Interim Relief Order or Award Toolkit

[This toolkit is based on the checklist models proposed by the International Chamber of Commerce. Interestingly, the ICC has not published any checklist aimed at facilitating the job of arbitral tribunals with jurisdiction on the merits in the context of an application for interim relief. Thus, this toolkit intends to provide tribunals hearing the merits of the dispute with guidance when drafting an order or award on interim measures of protection. The toolkit is composed of, first, checklists of elements which arbitrators should assess or include as part of their arbitral decisions, and secondly, explanatory notes included in boxes.]

1. Introduction

☐ A. Name of the arbitral institution and case number.

☐ B. Title of the decision clearly identifying it as a Procedural Order or Interim Award on interim relief.

☐ C. Identification of the names and addresses of the parties, including their representatives.

☐ D. Identification of the arbitrators and their professional addresses.

2. Application(s) for interim relief, answer to the request and procedural history

☐ A. Request for interim relief by the applicant(s).

☐ B. Answer to the Request for interim relief and counter applications.

☐ C. If there is an application for court-ordered measures or emergency arbitration proceedings:

  ☐ i. date of application for interim relief in these proceedings, particularly with reference to the date of constitution of this Tribunal.

  ☐ ii. description of whether the proceedings are pending or a decision has been already rendered.

  ☐ iii. issues decided by the emergency arbitrator or the court.

  ☐ iv. dispositive part of the order or judgment clearly describing whether or not the remedy was granted, on what grounds and other relevant elements.

☐ D. Description of the challenges of the parties, if any, as to the jurisdiction of the tribunal or the admissibility of the claims on the merits and/or the application for interim relief.

This part of the decision should include every challenge and issue raised by the parties to the proceedings, including: i) the procedural history of any applications for interim relief applied for in a different forum, and ii) challenges as to the jurisdiction of the tribunal or the admissibility of the claims.

Reference to the dates of commencement of court proceedings must be included since some legal systems impose limitations to court-ordered relief once the proceedings as to the merits have already commenced. Court proceedings would then require the permission of the Tribunal or the parties.

The other elements included in this checklist will help the Tribunal, at a later stage, to reach a decision if a party asks to extend, revoke, or modify remedies rendered in another forum.
3. Challenges, if any, as to the jurisdiction of the tribunal or admissibility of the claim(s)

3.1. Admissibility challenges in the context of the application for interim relief.

- *Res judicata* of an order or award on interim relief previously rendered in another forum:
  
  □ A. Application of the *lex arbitri* to determine whether the tribunal is bound to apply the *lis pendens* rule.
  
  □ B. Assessment of the elements which would prevent the Tribunal to exercise its powers in the context of interim protection of rights (such as granting a new remedy or extending, modifying or revoking a prior order):
    
    □ i. identity of persons or parties.
    
    □ ii. identity of action and same Request submitted to the court and to this Tribunal.
    
    □ iii. facts submitted and evidence are the same.
    
    □ iv. the test adopted by the court and the one applied by this Tribunal are the same and due process was granted in the court proceedings.

Challenges as to the admissibility of the Request for interim relief must be resolved by the Tribunal at this stage and cannot be deferred to a later stage of the proceedings — no preliminary assessment on the basis of a *prima facie* analysis — since, otherwise, the Tribunal would be partially dealing with the Request for interim measures.

3.2. Challenges as to the jurisdiction of the Tribunal or the admissibility of the claims on the merits (admissibility of claims other than the Request for interim relief).

The Tribunal *may finally decide these challenges before or in the context of an application for interim relief*. However, the urgent nature of the Request advises against an intricate analysis of arbitral jurisdiction or admissibility.

The Tribunal *may decide to postpone the final decision as to its jurisdiction and admissibility of the claims on the merits (once it hears all evidence put forward by the parties).*

If the Tribunal decides to defer jurisdiction and admissibility to a later stage of the proceedings:

□ A. Decision of the tribunal to defer the final decision on jurisdiction or admissibility.

□ B. Reference to a *prima facie* analysis of jurisdiction or admissibility conducted under heading 6 of this toolkit.

The Tribunal should make a clear conceptual distinction between *’admissibility’* and *’jurisdiction’* in order to avoid an unjustified extension of the review powers of national courts.

Challenges arising from *res judicata* issues, escalation clauses, time-barred applications, or waiver of the right to arbitrate are not jurisdictional since these problems are not concerned with the authority of the Tribunal over the parties or the subject-matter of the arbitration agreement. These are, indeed, admissibility problems.
4. Tribunal findings as to the application for interim relief: introduction

☐ A. Quotation of the arbitration agreement, including the institutional rules, if so, adopted by the parties.

☐ B. Record and quotation of any amendments to the arbitration agreement, institutional rules or lex arbitri as adopted by the parties.

☐ C. Quotation of the choice of the arbitral seat by the parties or decision of the appointing authority, or the tribunal itself fixing the juridical seat.

5. Arbitral authority to render the requested remedy

5.1. Ascertaining the powers of the tribunal to grant the requested remedy:

☐ A. Application of the specific arrangements adopted by the parties.

☐ B. Application of the institutional rules adopted by the parties.

☐ C. Application of the arbitral legislation of the seat (lex arbitri).

The Sole Arbitrator or the Arbitral Tribunal should apply each of these sources to concurrently determine whether they possess the authority to render the requested remedy (including the power to extend, modify or revoke a measure rendered in another forum). Some of these sources may limit the powers otherwise vested in arbitrators by other sources; therefore, it is essential to assess every source as included in this list (even if the parties agree on the authority of the Tribunal to render interim relief).

Depending on the type of arbitration or the facts of the case, not all sources would apply (e.g. in ad hoc arbitration the parties do not normally adopt arbitration rules).

The Sole Arbitrator or the Arbitral Tribunal should distinguish between ‘jurisdiction’, ‘competence ratione materiae’, ‘admissibility’ and its ‘power to render interim measures’. The Tribunal should avoid using terminology such as “jurisdiction to render interim relief”. The power or authority of a tribunal to render a specific remedy is not a matter of jurisdiction over the parties or over the subject-matter as submitted to it by the arbitration agreement. Terminological clarity and proper conceptual categorisation would enhance the enforceability of the decision and will minimise risks as to the potential annulment or refusal of recognition, particularly, in legal systems which are not considered to be “arbitration friendly”.

5.2. If the Sole Arbitrator or the Arbitral Tribunal believe that none of the sources included in 5.1. confer authority to grant the requested remedy:

☐ A. Interpretation of the applicable institutional rules on the basis of either:

- legal or academic commentary or

- previous arbitral practice under the auspices of the same arbitral institution.

☐ B. Interpretation of the lex arbitri on the basis of previous arbitral practice at the seat.
The Sole Arbitrator or the Arbitral Tribunal is not bound by previous arbitral decisions but, interpreting both the applicable institutional rules and the lex arbitri on the basis of previous arbitral practice and legal commentary ensures compliance with party autonomy and maximises the enforceability of the decision.

The Tribunal should not:

- apply the procedural law of the seat (other than arbitration legislation) to fill in gaps unless there are good reasons supporting the application of such provisions to an international arbitration.

- base its authority on the so-called ‘inherent powers’ even if this is, for example, suggested by an important professional organisation such as the CIARB. The concept of inherent powers is alien to legal systems of civilian tradition which might be ready to annul any decision rendered on such basis, particularly, considering the consensual nature of arbitration. By contrast, legal systems such as the US seem to accept such powers. If the Tribunal decides to adopt this risky approach, it is strongly recommended to analyse the lex arbitri in order to ensure, to the possible extent, the enforceability of the decision.

5.3. If there has been a prior order or award on interim relief:

☐ A. Restate the information provided in the prior order or award under 5.1 and, if applicable, 5.2 above.

☐ B. Refer to the existence of the prior order or award on interim relief, particularly, include:

☐ i. the date of the decision,

☐ ii. the issues decided on the order or award, and

☐ iii. the dispositive part of the order or award by clearly describing whether or not the remedy was granted.

6. Substantive standards or requirements

Two issues should be distinguished here: the existence or applicability of requirements in the context of a particular remedy (e.g. urgency, irreparable harm, prima facie case on the merits, prima facie jurisdiction, balance of interests...) and the assessment of such standards by the Tribunal.

6.1. Applicability of requirements or substantive standards

☐ A. Assessment of the applicable institutional rules and the lex arbitri to ascertain if there are any required standards that need to be satisfied.

Normally, the lex arbitri and institutional rules are silent on the applicability of standards but there are some exceptions such as Article 17A of the Model Law (2006 version), or the Scottish and English Acts which negatively determine the standards which cannot be required in the context of an application for security for costs.
If the Sole Arbitrator or the Tribunal is either unsure or unfamiliar with international arbitration, there are guidance documents that may help them to decide on the applicability of substantive standards such as, for example, the CIARB Principles on Interim Measures (Article 2).

6.2. Assessment of requirements or substantive standards

- Have the applicant demonstrated that according to the facts of the case and, on the basis of the evidence presented to this Tribunal, the substantive standards or requirements are met?
- Clear decision of the Tribunal as to the requested measure(s) in light of the assessment of substantive standards.
- Statement confirming that any prima facie analysis (of the merits or jurisdiction) conducted by the Tribunal under this part of the decision does not prejudge or advance the merits of the case.

7. Form of the decision: order or award

- Assessment of the applicable institutional rules and lex arbitri to ascertain whether the Tribunal has a discretionary power as to the form of the decision on interim relief.
- If the Tribunal has discretionary powers:
  - i. form of the decision adopted by the Tribunal: order or award?
  - ii. on what basis?

8. Decision as to legal costs

- Determination of the legal costs of the parties or deferral to a subsequent, including the final, award.
- Allocation of costs unless the tribunal defers the issue to a subsequent award.

Normally, decisions as to legal costs are deferred by virtually every arbitral tribunal to the final award on the merits. The order or award on interim relief should include a clear statement in that regard.

9. Dispositive part
A. List of all decisions made by the Tribunal with respect to the application(s) for interim relief, including allocation of costs.

For example: The Sole Arbitrator or the Arbitral Tribunal resolves:

1. 
2. [Clear list of decisions adopted by arbitrators without exhaustive explanation].
3. 

B. The arbitral decision deals with all remedies sought by the applicant(s) in its Request, and all countermeasures requested by the counterparty in the Answer to the Request (the Tribunal should include a clear statement confirming that the decision complies with this requirement).

C. Seat of arbitration (City and country/nation/state/province or territory).

D. Date and signature of arbitrators.
**Schedule III: Analysis of awards and orders on the authority of emergency arbitrators to render pre-arbitral relief**

<table>
<thead>
<tr>
<th>No.</th>
<th>CASE AND DATE OF DECISION</th>
<th>TYPE OF PROBLEM(S): JURISDICTION, COMPETENCE, POWERS, ADMISSIBILITY, OR OTHER?</th>
<th>SOURCES APPLIED TO THE “JURISDICTIONAL” PROBLEM</th>
<th>A) APPLICABLE SUBSTANTIVE STANDARDS OR CRITERIA AND, B) OTHER REMARKS</th>
<th>JURISDICTIONAL OR CONTRACTUAL AUTHORITY OF THE EA?</th>
</tr>
</thead>
</table>
| 1   | ICC Case 19764/AGF, *Marsoft v United*, Order of Emergency Arbitrator, 31 October 2013 | Jurisdiction. Challenge to the jurisdiction of the EA on the basis that proceedings on interim relief were pending before the courts of Texas. | - The application was **admissible** based on Arts 29(5) and (6) ICC Rules: i) parties were signatories of the arbitration agreement ii) agreement concluded after January 1, 2012, and iii) no opt-out of the emergency provisions. It seems that the arbitrator considered this as an admissibility test, but Arts 29(5)-(6) are about jurisdiction/applicability.  
- The EA had **jurisdiction** regardless of the proceedings before the courts of Texas: Art 29(7) ICC Rules.  
No reference to the *lex arbitri* (London was the seat) to assert authority to render any particular remedy. However, the EA looked at the *lex arbitri* to decide on the required standards to render pre-arbitral relief. | A) In order to determine the substantive standards, the EA looked at the *lex arbitri*, specifically to the provision applicable to arbitral tribunals (Art 38 English Arbitration Act). After concluding that the *lex arbitri* and the rules do not set out any standards, the EA applied international sources (previous arbitral awards) to decide that four criteria applied (irreparable harm, urgency, prima facie case and other circumstances).  
B) Application rejected on the basis that the applicant did not demonstrate the required standards. | The EA considered that he had **jurisdictional powers** since he looked at the *lex arbitri*, and therefore, he believed that his power was subject to the provisions of the English Arbitration Act 1996. |

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1 Schedule III chronologically organises emergency decisions in accordance with the date in which each decision was rendered.
Jurisdiction, admissibility and power to render penalties.

The jurisdiction of the EA and the admissibility of the application was not contested by the parties. The parties, however, disagreed as to whether an EA had the power to render penalties.

- **Jurisdiction ratione personae**: Art 29(5) ICC Rules 2012. There was no objection of the respondent so the EA quoted Boog and argued that he “should limit [himself] to confirming jurisdiction”.

- **Applicability of the emergency provisions**: Art 29(6) (arbitration agreement on or after 1 January 2012; no opt-out; and no other pre-arbitral procedure). These requirements have been assessed by EAs either as an applicability test or as a jurisdictional test (see EA ICC Report, para 14).

- **Power to render penalties** (or jurisdiction ratione materiae as named by the EA): analysis of Art 183 PILA and Swiss case law, and interpretation of the arbitration clause. The EA concluded that he had the power to render penalties.

- **Admissibility** (Arts 6(2) and 29(1)): urgent application that cannot await the constitution of the arbitral tribunal. The EA distinguished this requirement from the assessment of imminent risk as a substantive standard. Two elements were considered: date where the tribunal can render relief, and whether the relief would become “moot” if the applicant had to wait to the constitution of the tribunal.

A) The lex arbitri determined the applicable standards. However, the Swiss PILA does not establish any criteria. Accordingly, the EA used “international arbitration practice” to require urgency/imminent harm and prima facie case (the latter to be assessed in accordance with the lex causae).

B) The power to render penalties was assessed by the EA under the heading of “jurisdiction”.

The EA considered that he had jurisdictional authority. The EA argued that: “There should be no question that Chapter 12 is applicable to emergency arbitrator proceedings with a seat in Switzerland, if not directly, by analogy. (...) Under Swiss law, the emergency arbitrator’s decision has the same legal nature as an order for interim (...) measures taken by an arbitral tribunal.” The EA then equated an EA to arbitral tribunals when assessing the Swiss PILA. Furthermore, the EA asserted the authority to render astreintes. It is doubtful whether a contractual decision-maker would possess such power.
<table>
<thead>
<tr>
<th>Decision</th>
<th>Case and Parties</th>
<th>Issue</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>ICDR Case 01-14-0001-4742, United Media and Trilado v Forbes, Order with Respect to Forbes Media LLC's Request for Emergency Interim Measures, 19 August 2015</td>
<td>No reference of the EA to his jurisdiction over the parties or his authority to render the remedy sought by the applicant.</td>
<td>A) No sources were determined to decide on the substantive standards. B) Application of the US Executive Order which seemed to enjoin Forbes from engaging in licence agreements with the claimants. Emergency relief rejected.</td>
</tr>
<tr>
<td>4²</td>
<td>ICDR Case 01-14-0001-4742, United Media and Trilado v Forbes, Opinion on Request for Emergency Measures and Award of Interim Injunctive Relief, 5 February 2016</td>
<td>Authority to render the specific relief requested by the applicant (order preventing a party to use Forbes mark and names, and an anti-suit injunction). Renewal of earlier request (see decision 3 of this table). Authority to render the remedies sought, including an anti-suit injunction on the basis of the applicable institutional rules and the arbitration agreement.</td>
<td>A) No sources determined to decide on the substantive standards (prima facie case, irreparable harm, possible violation of US Executive Order and balance of equities). Jurisdictional. The EA rendered an anti-suit injunction. It is doubtful whether a contractual decision-maker could prevent a party from commencing court proceedings (including actions with the purpose to enforce a judgment).</td>
</tr>
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</table>

² Decisions 3 and 4 of this table are part of the same dispute.
Jurisdiction, admissibility, and power to render ex parte relief.

Prior to this application, an ex parte order was rendered in order to: i) “freeze” bank accounts and ii) prohibit the respondent from disposing of two vessels. This request sought to confirm these ex parte remedies once the respondent was notified.

- **Jurisdiction over non-signatories.**
  The EA lacked jurisdiction to render remedies against a non-party, banks and ship registries (attachment of bank accounts and arrest of vessels). Reference to Art 178(1) PILA, the *lex arbitri*, when the applicant insisted on the jurisdiction over a non-signatory.

- **Jurisdiction:** the EA argued that “if the applicant seeks a preliminary order, if the respondent has raised jurisdictional objections or does not participate in the proceedings” the EA should require that a valid arbitration agreement exists between the parties. No legal source in support of this passage. Doubts as to whether a Greek or a Liberian company was bound by the agreement. Jurisdiction over the latter was confirmed since the Liberian entity signed the agreement.

- **Admissibility:** “unless the parties have otherwise agreed” of Art 43(1), SCAI Rules 2012. It should be noted that the admissibility test of SCAI EAs (as it was named by this EA) is different from that of ICC EAs.

- **Power of an EA to render ex parte relief.** Application of the Swiss PILA and Art 26(3) of the Rules which authorises arbitral tribunals to render preliminary orders (therefore, EA=AT).

A) **No sources** were mentioned but the expression “a request will typically be successful” points to general principles of arbitration practice. *Prima facie* case, irreparable harm and balance of interests.

B) - In the preliminary orders, the EA reshaped the requests from *in rem* attachment and arrest orders originally sought by the applicant to *in personam* injunctions on the basis of a “good faith interpretation of the [applicant’s] prayers [for emergency relief].”

- **Proceedings terminated** with respect to a party for lack of notification of the ex parte order.

Jurisdictional. The EA explained that the emergency proceedings were conducted under Chapter 12 of the PILA. The EA also explained that the powers of EAs extend to *ex parte* remedies. Furthermore, the EA applied the *lex arbitri* to assess her jurisdiction over a non-signatory.
SCC Case EA 2016/142, Anoto and Livescribe v Leapfrog, Order on Emergency Decision on Interim Measures, 3 October 2016

Jurisdiction and power to render pre-arbitral relief. The respondent argued that one of the applicants was not a party to the arbitration agreement, and therefore, that the EA did not have jurisdiction to render pre-arbitral relief.

- **Jurisdiction** over an alleged non-party: *prima facie* analysis on the basis of the content of the agreement and the conduct of the parties.

- **Power** to render pre-arbitral relief: application of the SCC rules (“any [remedy]... it deems appropriate”). Interestingly, the EA argued that he had the power to render the same or almost the same remedies as those sought as final relief (as long as such remedies remain provisional).

- No reference in any of the two previous cases to the *lex arbitri*, but Swedish law was applied to the assessment of substantive standards.

A) The EA determined the substantive standards required to render pre-arbitral relief without reference to any source.

B) Application of the *lex arbitri*, Swedish law, to the assessment of the substantive standards (merits of the emergency request).
Jurisdiction over a non-party. Applicability test conducted by the President of the ICC (Art 1(5), Appendix V): the emergency provisions do not apply with respect to a non-party. Even if the ICC Rules name it “applicability test”, this is a matter of jurisdiction: the ICC provisions have adopted a terminologically inconsistent framework that does not reflect the nature of the problem.

Jurisdiction over the parties: Art 29(5) ICC Rules 2012, the parties were a signatory and a successor to a signatory of an operating agreement containing an arbitration clause.

Admissibility. Art 29(1): “it is undisputed that no tribunal would be constituted by October” and the application could not wait for the tribunal. The EA was on the view that “urgency” = “cannot await the constitution of the tribunal”.

Applicability: arbitration agreement concluded in 2005 so the requirement of Art 29(6) was not satisfied. However, the parties agreed that the emergency provisions were applicable. Therefore, the EA confirmed, on that basis, that the emergency provisions were applicable.

A) It seems that the EA applied “international arbitration practice” in order to determine the substantive standards since it referred to scholarly commentary. No urgency was required as criteria (irreparable harm, prima facie case, and balance of interests).

B) Application rejected on the basis of lack of evidence showing irreparable harm.

Unclear.
<table>
<thead>
<tr>
<th>Page</th>
<th>Case/Court Information</th>
<th>Key Issues</th>
<th>EA Decision</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>ICC Case 23177/TO, Kosmos Energy v ERHC Energy, Order of Emergency Arbitrator, 13 November 2017</td>
<td>Jurisdiction, applicability and admissibility.</td>
<td>Application of the ICC Rules 2017. Admissibility was not properly assessed by the EA in accordance with ICC standards (“application cannot await the constitution of the arbitral tribunal”). The EA simply concluded that the application was admissible without further explanation.</td>
<td>A) The EA applied the standards advanced by the parties.</td>
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<td>9</td>
<td>ICDR Case 01-18-0001-6009, Iberdrola Energy Projects v Footprint Power, Interim Emergency Order, 14 May 2018</td>
<td>Subject-matter and admissibility of the application (however, the EA categorised the latter as a jurisdictional problem). Respondent challenged: - subject-matter: it argued that the transaction as regards the letter of credit was outside the scope of the submission to arbitration. - the “jurisdiction” of the EA on the basis that a Dispute Review Board Provision prevented him from rendering any relief.</td>
<td>Arbitration agreement and institutional rules. Subject-matter challenge rejected on the basis of the interpretation of the arbitration agreement and the circumstances of the case. Jurisdictional challenge rejected on the basis of contractual interpretation of the DRB provision.</td>
<td>A) Even if the EA argued that “the ICDR Rules do not incorporate procedural/substantive law of the state courts relating to the grant of preliminary injunctive relief”, he assessed the main criterion advanced by the parties which led him to the application of the law of the sea (New York law). He interpreted the “fraud exception” to the independence rule as interpreted by the courts of New York (judicial restraint upon potential abuses of letters of credit). He concluded that to take payment upon a unilateral assertion of breach would constitute “irreparable harm”.</td>
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<tr>
<td>No.</td>
<td>Case Reference</td>
<td>Description</td>
<td>Jurisdiction</td>
<td>Power to render pre-arbitral security</td>
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<td>10</td>
<td>ICDR Case 01-18-0003-0632, Al Raha v PKL Services, Interim Emergency Order, 27 August 2018</td>
<td>The parties entered into a Teaming Agreement which included an ICDR arbitration clause. The Teaming Agreement expired and the parties subsequently entered into a subcontract that did not include any forum selection clause. However, the subcontract attached the teaming agreement as an exhibit and incorporated provisions of it. The question was then whether the EA had jurisdiction over the parties on the basis of an arbitration agreement.</td>
<td>The parties agreed to resolve their disputes under ICDR arbitration. So, Article 6(3) of the Rules conferred jurisdiction to rule of the EA’s jurisdiction. No reference to the lex arbitri.</td>
<td>A) It is unclear the criteria used by the EA to determine the substantive standards applicable to this case. However, it seems that she analysed the criteria advanced by the applicant.</td>
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<td>11</td>
<td>ICDR Case 01-18-0003-0504, Luzar Trading v Tradiverse, Emergency Interim Award, 29 August 2018</td>
<td>Arbitration rules and lex arbitri (New York law). The EA mentioned two US decisions that confirmed the power of arbitrators to render pre-arbitral security awards (e.g. British Ins Co of Cayman v Water Street, SDNY 2000).</td>
<td>A) No clear or systematic application of substantive standards. Brief and undetailed analysis of the criteria advanced by the parties.</td>
<td>The EA considered that she possessed jurisdictional powers to render pre-arbitral relief. In fact, the EA argued that an EA has the “general power to award security under the Federal Arbitration Act”.</td>
</tr>
</tbody>
</table>
The parties did not challenge the jurisdiction of the EA.

Jurisdiction asserted on the basis of the arbitration agreement.

The jurisdiction of the EA was explicitly recognised in the arbitration agreement. The EA also applied the HKIAC Rules. No reference to Hong Kong law as the lex arbitri.

A) The applicable substantive standards were set out by the institutional rules: Art 23(4) of the HKIAC Rules 2013 (non-exhaustive list).

B) The 2013 Rules seem to classify “urgency” in the sense that the application “cannot await the constitution of an arbitral tribunal” as an admissibility test but the EA analysed it as part of the substantive assessment of the application.

- The EA determined that the choice of substantive law by the parties (Hong Kong law) applied to the emergency proceedings. This is difficult to understand unless he referred to the assessment of the substantive standards (indeed, the EA applied Hong Kong law to examine whether prima facie case and balance of interests were satisfied as understood under Hong Kong law).

In arbitrations seated in Hong Kong, the authority of the EA is jurisdictional (see Ch 6, § 3.3.2). Under Hong Kong law, however, the powers of EA are not supposed to be the same as those of arbitral tribunals. Yet, in this case, the EA applied provisions that were designed for arbitral tribunals (e.g. Art 23(4) which refers to arbitral tribunals (Art 23(2)) rather than to emergency arbitrators).
<table>
<thead>
<tr>
<th>ICC Case 24738/MK, Accendo Banco v Deutsche Mexico Holdings, 14 October 2019</th>
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<tbody>
<tr>
<td>The parties did not contest the jurisdiction of the EA or the applicability of the ICC EA provisions.</td>
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</tbody>
</table>

**Jurisdiction**: application of Art 29(5) Rules to conclude that the parties were signatories. The EA formulated the matter of jurisdiction as an **applicability test** (“the EA Rules only apply to parties that are signatories”).

**Applicability**: Art 29(6) Rules. The three conditions were satisfied. The applicability test was conducted under the heading of “jurisdiction” but with the right terminology: “the EA provisions shall not apply…”.

**Admissibility of the application**: Art 29(1) – not challenged by the parties.

A) **Lex arbitri** (New York was the seat). Since there are no standards set out by the law of the arbitral situs: application of general principles of arbitration practice (by reference to scholarly commentary). The EA rejected to import the criteria adopted by New York courts in litigation proceedings.

B) Application denied: the applicant did not demonstrate urgency or irreparable harm.

**Jurisdictional authority**. The EA attempted to find the applicable substantive standards in the **lex arbitri** (New York law). Even if New York arbitration law does not set out any standard, the attempt of the EA demonstrates that the EA believed that national arbitration legislation applied to the exercise of her authority.
The same issues are examined in chapters 5 and 6. This correlation table facilitates the comparison between the research findings of Chapter 5 (arbitral tribunals) and Chapter 6 (emergency arbitrators).

<table>
<thead>
<tr>
<th>Arbitral Tribunals (Chapter 5)</th>
<th>Emergency Arbitrators (Chapter 6)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><strong>Finding 1</strong>: Emergency arbitrators as jurisdictional decision-makers</td>
</tr>
<tr>
<td>Finding 1: Arbitral seat</td>
<td>Finding 2: Arbitral seat</td>
</tr>
<tr>
<td>Finding 2: Sources of arbitral authority</td>
<td>Finding 3: Sources of jurisdiction and sources of arbitral authority</td>
</tr>
<tr>
<td>Finding 3: Sources of arbitral authority in situations of <em>lacunae</em></td>
<td>Finding 4: Distinction “authority” v “substantive standards”</td>
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<td>Finding 4: Distinction “authority” v “substantive standards”</td>
<td>Finding 5: Limits and boundaries</td>
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<td>Finding 3: Sources of jurisdiction and sources of arbitral authority</td>
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<td>Finding 6: Terminology inconsistent</td>
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<tr>
<td>Finding 7: National procedural law not applicable</td>
<td>Finding 6: National procedural law not applicable</td>
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</table>
Schedule V: Main legal concepts used throughout this thesis

International jurisdiction

Adjudicatory jurisdiction
Who possess authority to determine a given dispute?

Jurisdiction in personam
Authority to adjudicate of a court or arbitral body over the parties according to a base of jurisdiction, either connected or consensual

Jurisdiction in rem
Authority to adjudicate of national courts over a thing - the res

Competence
What can a adjudicatory body (court or tribunal) do and what is the extent of its powers?

Competence ratione materiae
Authority of a court or arbitral body to adjudicate disputes of a specific nature

Remedies
Relief or remedies that can be competently granted by a court or arbitral body

Power to render interim relief
Authority of a court or tribunal to protect the rights of the parties while the resolution of their dispute or its enforcement is pending

Power to render final relief
Authority of a court or tribunal to render final relief such as monetary compensation, final injunctions, or declaratory relief
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