Deference in International Commercial Arbitration

Deference in International Commercial Arbitration

The Shared System of Control in International Commercial Arbitration

Edited by

Franco Ferrari
Friedrich Rosenfeld

Wolters Kluwer

Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: lrs-sales@wolterskluwer.com
Website: www.wolterskluwer.com/en/solutions/kluwerlawinternational

Sold and distributed by:
Wolters Kluwer Legal & Regulatory U.S.
920 Links Avenue
Landisville, PA 17538
United States of America
E-mail: customer.service@wolterskluwer.com

Printed on acid-free paper.

ISBN 978-94-035-0307-3

e-Book: ISBN 978-94-035-0317-2
web-PDF: ISBN 978-94-035-0327-1

Printed in the Netherlands.

Editors

Franco Ferrari joined NYU as Professor of Law on a full-time basis in September 2010. At NYU, Professor Ferrari also acts as the Executive Director of NYU's Center for Transnational Litigation, Arbitration, and Commercial Law. Before joining NYU, Professor Ferrari was Chaired Professor of International Law at Verona University School of Law (2002-2016), Chaired Professor of Comparative Law at Bologna University School of Law (1998-2002) and Tilburg University School of Law (1995-1998). After serving as a member of the Italian Delegation to various sessions of the United Nations Commission on International Trade Law (UNCITRAL) from 1995 to 2000, he served as a legal officer at the United Nations Office of Legal Affairs, International Trade Law Branch (2000-2002), and was responsible for numerous projects, including the preparation of the UNCITRAL Digest on Applications of the UN Sales Convention (2004 edition). Professor Ferrari is a prolific author, specialized in international commercial law, conflict of laws, comparative law, and international arbitration. He is also a member of the editorial board of various peer-reviewed European law journals (*Internationales Handelsrecht*, *European Review of Private Law*), a co-editor of Elgar Monographs in Private International Law, and the former General-Editor of the *European International Arbitration Review* (2017-2019). Professor Ferrari acts as an arbitrator in both international commercial arbitrations and investment arbitrations.

Friedrich Rosenfeld is a partner at HANEFELD, an arbitration boutique with offices in Hamburg and Paris. He represents companies and states in arbitration proceedings with a focus on construction, post-M&A, commercial and investment disputes. Additionally, he has been appointed as arbitrator in cases involving a range of applicable substantive laws and seats (e.g., Austria, Denmark, England, France, Germany, Greece, Israel, Macedonia, Switzerland, and the United States). His expertise is recognized in international rankings.

Alongside his full-time practice as counsel and arbitrator, Professor Rosenfeld is also Global Adjunct Professor at New York University (Paris programme), Honorary Professor at the International Hellenic University in Thessaloniki, and Lecturer at Bucerius Law School in Hamburg. He has published various books on international

arbitration. Prior to joining his current firm, Professor Rosenfeld worked as a consultant for the United Nations Assistance to the Khmer Rouge Trials in Cambodia. He studied at Bucerius Law School in Hamburg and Columbia Law School in New York. Professor Rosenfeld was a fellow of the German National Academic Foundation and holds a PhD in International Law (summa cum laude).

Contributors

Alexander Afnán is an associate at Hughes Hubbard & Reed in Washington, DC, where he practises international commercial arbitration, litigation, and FCPA matters. Mr Afnán is a graduate of Georgetown University Law Center and the University of Edinburgh. His prior research covers poverty, police abolition, and civil rights in the United States.

Mihaela Apostol is a member of the Romanian Bar (2012) and solicitor of England & Wales (2020). Ms Apostol holds an LLM in International and European Business Law (Panthéon-Sorbonne) and an LLM in International Commercial Arbitration (Stockholm University). She has experience as counsel and tribunal secretary in international arbitration.

Kate Apostolova is a counsel in the international arbitration practice in Mayer Brown's Singapore office. Ms Apostolova has extensive experience in international investor-state arbitrations, commercial arbitrations, and international litigation proceedings. She represents clients in a wide range of industries, including oil & gas, mining, nuclear power, construction, finance, private equity, pharmaceuticals, and technology. Ms Apostolova has appeared as oral advocate and been involved in cases before all major arbitral institutions, US courts, the ICTY, ECtHR, and ITLOS. She has also been appointed as an arbitrator in institutional and ad hoc arbitrations and is a certified mediator. She is also recognized by all major legal directories and is ranked No. 1 in the *Who's Who Legal's Most Highly Regarded* list of international arbitration practitioners in the Asia-Pacific for 2020. She was also named a 2021 *Rising Star* by *Law360*, recognized in *Chambers Global* 2022, and listed in the *Legal 500's The Arbitration Powerlist: Southeast Asia* 2022.

Ritika Bansal is an associate in the international dispute resolution team of Nishith Desai Associates. She previously worked in the international arbitration team at Shardul Amarchand Mangaldas. Ms Bansal completed her LLM in International Business Regulation, Litigation, and Arbitration at New York University (NYU) School

of Law in 2021. She holds a BA LLB (Hons) from the National Law School of India University, Bangalore.

George A. Bermann is a professor at Columbia Law School and the Director of the Center for International Commercial and Investment Arbitration. He is an experienced international commercial and investment arbitrator, serving in that capacity for 40 years. He is also the founding member of the Governing Board of the ICC International Court of Arbitration; head of the global advisory board of the New York International Arbitration Center; Chief Reporter of the ALI Restatement of the US Law of International Commercial Arbitration; co-editor-in-chief of the *American Review of International Arbitration*; and author of numerous books and articles in the international arbitration field.

Emilio Bettoni is a partner at ArbLit – Radicati di Brozolo Sabatini Benedettelli Torsello, where he specializes in commercial and investor-State arbitration with a particular focus on disputes linked to Latin America or Spain. He graduated summa cum laude from the University of Milan School of Law (2011) and holds an LLM from NYU School of Law (2013) and a PhD from the University of Milan (2018). Mr Bettoni is a dual-qualified attorney (Italy and New York) and speaks fluent Italian, English, and Spanish.

Stavros Brekoulakis is Professor of International Arbitration at the Queen Mary University of London and an Arbitrator at 3 Verulam Buildings (Gray's Inn). Professor Brekoulakis is widely recognized as a leading authority in the field of international arbitration. His academic work includes leading publications which have been cited by international arbitral tribunals and national courts in several jurisdictions.

Giuditta Cordero-Moss, Dr juris (Oslo), PhD (Moscow), is a professor at the Law Faculty of the University of Oslo. She publishes in Norway and internationally and is often invited to lecture internationally. She held the special lectures at the Hague Academy of International Law in 2014 and was the co-director of the Academy's Centre for Studies and Research on arbitration and the applicable law (2021). She is also the President of the International Academy of Comparative Law (since 2022), a member of the Curatorium of the Hague Academy of International Law (since 2019), and vice chairman of the Board of the Financial Supervisory Authority of Norway (since 2014). Professor Cordero-Moss is also a member of the International Court of Arbitration; the International Chamber of Commerce (since 2018); the UNCITRAL Working Group II on Arbitration (since 2007); the Norwegian Governmental Tariff Board (since 2015); and the Norwegian Academy of Science and Letters (since 2016), among others. She also served as Judge (2007-2020) and President of the European Bank for Reconstruction and Development Administrative Tribunal.

Rémy Gerbay is a partner in the Hughes Hubbard & Reed Arbitration group in Washington, D.C. Mr Gerbay is the Co-chair of the American Society of International Law's Dispute Resolution Interest Group and was a former Deputy Registrar at the LCIA and Registrar of DIFC-LCIA. Mr Gerbay also holds a permanent academic

appointment at the University of London (Queen Mary), where he is the co-director of an LLM programme in arbitration. His academic research focuses on the functions of arbitral institutions, arbitral decision-making, and legal theory.

Weixia Gu is an associate professor at the University of Hong Kong (HKU), Faculty of Law, and a co-chair of the American Society of International Law (ASIL) Asia-Pacific Interest Group (2018-2021). Dr Gu is an elected member of the International Academy of Comparative Law and sits on the Governing Council of the China Society of Private International Law and Hong Kong Institute of Arbitrators. Her research focuses on international arbitration, dispute resolution, private international law, and cross-border legal issues. She is the author and editor of over 60 books, book chapters, and journal articles. Her works have appeared in leading comparative and international law journals in the East and West, and her scholarship has been cited by the US Court of Appeals Eleventh Circuit, US Texas Supreme Court, and Singapore Law Gazette.

Linda H. Martin is a partner at Freshfields Bruckhaus Deringer US LLP and Co-Head of its US Commercial Litigation practice. She has extensive experience resolving complex and cross-border commercial disputes across a broad range of industries and practice areas, and in all stages of business dispute resolution, including litigation, arbitration and mediation. Based in New York, she appears regularly in federal, state and bankruptcy courts across the United States. Linda has litigated numerous disputes under 28 U.S.C. §1782 at the US district court and appellate court levels, both offensively and defensively. Her experience with §1782 also includes representing the International Chamber of Commerce and the United States Council for International Business in submitting an amicus brief to the Supreme Court of the United States in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022). Ms Halliday Martin is a cum laude graduate of Harvard University and Duke University School of Law.

Joongi Kim is Professor of Law at Yonsei University. His research focuses on international dispute resolution, international trade and investment, corporate governance, and good governance. He sits on the editorial boards of multiple journals, including the *International Investment Law and Arbitration* (Brill), the *Asian Journal of Comparative Law* (Cambridge University Press), the *Dispute Resolution International* (IBA), and the *Korean Arbitration Review*.

Alberto Malatesta is Professor of Private International Law at the University Cattaneo (Castellanza, Italy) and his academic contributions cover mainly private international law and international arbitration law. He is a member of the Scientific *Board of the Rivista di Diritto Internazionale Privato e Processuale*, one of the leading journals in Europe in the field. Professor Malatesta is a member of the Italian Bar and currently Of Counsel at FDL Law Firm in Milan. He is an independent arbitrator and has served under the main institutional rules. He acts as Secretary General of the Italian Branch of the International Law Association (since 2013). Professor Malatesta also served as the Italian delegate to the Hague Conference of Private International Law (2005-2007). He held several classes and conferences on private international law and arbitration law at various law schools and institutions across Europe and South America.

Luke Nottage (BCA, LLB, PhD from Victoria University of Wellington, LLM, LLD from Kyoto University) specializes in international arbitration, corporate governance, contract, and consumer law. He is Professor of Comparative and Transnational Business Law at Sydney Law School and Special Counsel at Williams Trade Law. He has consulted for law firms worldwide, ASEAN, EC, UNCTAD, UNDP, OECD and the governments of Japan and Saudi Arabia. Dr Nottage is a committee member of ACICA, listed on the Panel of Arbitrators for the AIAC, BAC, CAAI, JCAA, KCAB, NZIAC, SCIA, and TAI. His 19 books include *International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts* (Elgar, 2021), *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (eds, Wolters Kluwer, 2021), *International Investment Treaties and Arbitration Across Asia* (eds, Brill, 2018), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (eds, Routledge 2011), and *International Arbitration in Australia* (eds, Federation Press, 2010).

Esmé Shirlow is an associate professor at the ANU College of Law where she teaches and researches in the fields of public international law, international dispute settlement, and international investment law and arbitration. Dr Shirlow is the General Editor of the *Australian Yearbook of International Law* and Associate Editor with the ICSID Review and Kluwer Arbitration Blog. She is also the Vice-President (Australia) of the Australian and New Zealand International Law Society, and Co-chair of the Society's International Economic Law Interest Group. Dr Shirlow maintains a practice in international law and has advised parties to investment treaty claims and in proceedings before the International Court of Justice (ICJ). Prior to joining the ANU, she worked in the Australian Government's Office of International Law.

Dennis Solomon is Professor of Civil Law, Private International Law and Comparative Law at the University of Passau Faculty of Law, Germany, and the Managing Director of its Institute for International and Foreign Law. Professor Solomon studied Law in Passau and Berkeley and obtained tenure as Professor of Law at the Eberhard Karls Universität Tübingen, Germany, in 2005. He later joined the Faculty of Law of the University of Passau in 2008. Professor Solomon holds an honorary doctorate from the University of Kragujevac, Serbia. He is also a member of the European Association of Private International Law, the Association of International Procedural Law, the German Society of International Law, the Association of Comparative Law, the German-American Lawyers' Association and the German Institution of Arbitration. Professor Solomon's main areas of research, teaching and publication are private international law, international civil procedure, and arbitration.

Summary of Contents

Table of Contents

CHAPTER 10

Deference and Provisional Measures: The Principle of Concurrent Jurisdiction Revisited

Alberto Malatesta

§10.01 INTRODUCTION

For a long time, provisional measures in international arbitration[1] have given rise to debate among legal writers and practitioners. Among the toughest topics in the field is the issue of the concurring powers of arbitrators and state courts.

It is commonly known that international commercial arbitration proceedings can take time and that interim measures are often crucial in safeguarding the effectiveness of the final award and preventing the recourse to arbitration from becoming meaningless. Consequently, on the assumption that a twofold approach can ensure better protection and support of the arbitral process, over the past few decades it has become widely recognized that both arbitral tribunals and state courts are in principle authorized to grant provisional relief in connection with an international arbitration.[2]

1. It is well known that many difficulties arise when one attempts to define the concept of 'provisional measures' whose boundaries are uncertain, if not obscure, and can vary depending on the relevant applicable laws. For the purpose of this chapter, the definition encompasses all relief aimed at protecting the parties' rights until the final award is rendered, regardless of what the measures are designed to obtain (e.g., conservation and protective measures, anticipatory orders, decisions aiming to preserve or produce evidence, etc.). In the following pages, the term 'interim measures' is used interchangeably with 'provisional measures', mirroring the language employed by most relevant international texts (*see*, the UNCITRAL Model Law) as well as in international practice.
2. In this respect, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 ('Model Law'), has had a great influence. *See* respectively Article 17 para. 1 ('Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a parties, grant interim

This model is usually referred to as the principle of concurrent jurisdiction and is considered a general principle of international commercial arbitration.[3]

The principle of concurrent jurisdiction gives rise to the intricate question of how the relationship between courts and arbitral tribunals should best be organized. National laws, sometimes prompted by the provisions of the UNCITRAL Model Law, as well as case law and commentary, has developed guidance aimed at establishing the circumstances in which an adjudicatory body should pay 'deference' to another.

This chapter examines these issues in greater detail. It begins with remarks on the legal foundation and scope of the jurisdiction of arbitral tribunals and state courts under major arbitration statutes and institutional rules. Then, it explores the rationale underlying the allocation of authority on interim relief between courts and tribunals. A proposal is made on how to resolve the problems that may arise from the exercise of concurrent jurisdiction, such as the duplication of proceedings, conflicting decisions or the revocation of an order issued by an arbitral tribunal by a State court or vice versa.

§10.02 THE JURISDICTION OF ARBITRAL TRIBUNALS UNDER THE MAIN ARBITRATION LAWS AND INSTITUTIONAL RULES

The authority of arbitrators to grant interim relief is usually afforded by the applicable national arbitration legislation. From a private international law point of view, the jurisdiction of arbitrators[4] to issue provisional measures stems from the law of the place of arbitration or of the arbitral seat (*lex arbitri*). This view is reflected in most court decisions, arbitral awards and commentaries.[5]

---

measures') and Article 17J ('A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts').

3. *See*, Ronald A. Brand, 'Provisional Measures in Aid of Arbitration', in Fabrizio Marrella & Nicola Soldati (eds), *Contracts and International Trade Law. Essays in Honour of Giorgio Bernini* (Giuffrè, 2021) 311; Gary B. Born, *International Commercial Arbitration* (Alphen aan den Rijn, 3rd ed., Kluwer Law Int'l 2021) vol. II, Ch. 17, 2263, 2310 (electronic version); Rachael D. Kent & Amanda Hollis, 'Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration' in Diora Ziyaeva (ed.), *Interim and Emergency Relief in International Arbitration* (Jurisnet LLC 2015) 87; Jean-Francois Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (2nd ed., Sweet & Maxwell 2007) 521; Andrea Carlevaris, *La tutela cautelare nell'arbitrato internazionale* (CEDAM 2006) 35; Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005) 66; Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 711; Sébastien. Besson, *Arbitrage international et mesures provisoires. Étude de droit comparé* (Schulthess 1998) 240.
4. Even if the terms 'power' and 'jurisdiction' are used interchangeably throughout the chapter, the determination of whether arbitrators have the authority to order interim measures is similar – though clearly not identical – to a matter of jurisdiction. Accordingly, a choice-of-law perspective, though very common in literature, is rejected.
5. *See*, Kent & Hollis (n. 3) 88; Christopher Boog, 'The Laws Governing Interim Measures in International Arbitration' in Franco Ferrari & Stefan Kröll (eds), *Conflicts of Laws in International Commercial Arbitration* (2nd ed., JurisNet LLC 2019) 323, 334 (considering other laws and correctly denying their relevance). However, the author opines that the parties' autonomy prevails over the provisions of the applicable law: cf. Boog (n. 5) 330. In the same vein Born (n. 3) 2280 (the arbitral tribunal should consider itself competent to order provisional measures

More specifically, the answer should be found on the basis of the following reasoning: (i) the law of the seat determines whether and the extent to which an arbitral tribunal is allowed to grant such relief; (ii) the tribunal is bound to respect mandatory rules, if any, preventing it from taking such orders; (iii) in the absence of such mandatory rules, the authority of the tribunal will ultimately depend on the parties' agreement to arbitrate.

Historically, state courts were the only authorities empowered to grant interim measures in aid of international (as well as domestic) arbitration proceedings. This was justified with the argument that provisional measures have a coercive rather than adjudicatory nature. Over time, however, the vast majority of jurisdictions have given up their distrust and scepticism towards arbitration, and accordingly adopted liberal rules that, to a greater or lesser extent, expressly confirm the authority of arbitrators at the seat of arbitration to order interim measures.[6] Sometimes, national laws even provide for the possibility that arbitrators themselves file applications before state courts to ensure that their jurisdictional decision will be enforceable.[7]

The lack of *imperium* is indeed problematic not only for interim measures but for international arbitration as a whole and cannot be considered a valid objection.[8] Therefore, in modern times, it is accepted that arbitrators have the authority to issue decisions on interim relief. This does not only ensure that arbitration remains an efficient means of settlement of international disputes. Arbitrators are also well placed to decide on a provisional request, as they are already seized with the merits of the case and have extensive knowledge thereof.

Very recently, even the arbitration law of Italy – until then one of the last bastions of the mandatory prohibition of provisional measures ordered by arbitral tribunals – was aligned with this global trend, even though Italian law still requires an express authorization by the parties for an arbitral tribunal to grant interim relief.[9]

Also, many arbitral institutional rules provide for the (broad) power of arbitrators to grant provisional measures.[10] These provisions are of paramount importance to the

when the parties have expressly granted it such power, notwithstanding the contrary provisions of the law of the seat, to be regarded in this case as violating the 1958 New York Convention).

6. *See*, Boog (n. 5) 331.
7. *See*, Swiss Private International Law Act 1987, Article 183, para. 2.
8. *See,* Giovanni Zarra, 'The Functions of Provisional Measures in International Commercial Arbitration: Between Efficacy and Innovation' in Fulvio Maria Palombino et al. (eds), *Provisional Measures Issued by International Courts and Tribunals* (Springer 2021) 280.
9. *See*, the Italian Parliament Bill of 25 November 2021, Article 1 para. 15 (delegating the Government to reform the Italian Code of Civil Procedure) according to which arbitrators will have 'the power to issue interim measures in the event of express will of the parties, manifested in the arbitration agreement or in a subsequent written act, unless otherwise provided by the law'. Within one year, pursuant to these guidelines, the Government will enact a legislative decree implementing the reform. After Italy's changes, apparently only China and Thailand still reserve the power to order interim measures to state courts exclusively.
10. For example, International Chamber of Commerce (ICC) Rules 2017, Article 28 para. 1; London Court of International Arbitration (LCIA) Rules 2010, Article 25; Singapore International Arbitration Centre (SIAC) Rules 2016, Article 30 para. 1, Camera Arbitrale di Milano (CAM) Rules 2020, Article 22 para. 2.

extent that they are a measure of the parties' will, given that arbitration agreements rarely deal directly with this subject but frequently refer to institutional rules instead.

The authority of arbitrators to order interim relief is recognized in principle and to some extent even wider than the one of national courts. This holds true in particular for the available remedies. In short, while state courts can grant remedies only if the latter are recognized by their lex fori, arbitral practice shows that arbitrators are competent to order any interim measures they deem to be 'necessary' or 'appropriate'.[11] On the other hand, the parties are free to agree upon the types of measure that can be ordered, and they frequently do so by referring to specific arbitration rules, such as the well-known Article 26, paragraph 2 of the UNCITRAL Rules of Arbitration.

§10.03 … AND ITS LIMITS

From a different perspective, the scope of arbitral jurisdiction on measures of interim relief seems to be more restricted than the one of courts in litigation.

Notwithstanding the development of a uniform and wide array of measures in arbitral practice, arbitrators cannot in fact order all the measures which a court could order. To give some examples, in several jurisdictions, it is highly controversial, if not prohibited, for an arbitral tribunal to order the freezing of assets (e.g., *saisie conservatoire,* attachment, *sequestro conservativo*) because such measure concerns the enforcement stage which is seen to be the responsibility of national courts.[12]

There are also other significant limitations on the power of arbitrators which stem from the contractual nature of the arbitral process.

First, an arbitral tribunal cannot issue any measure until it has been constituted. This can substantially impact some cases, where critical and urgent problems arise at the outset of the dispute. To overcome this drawback, leading arbitral institutions have adopted provisions on 'emergency arbitrators' for the purpose of issuing urgent orders before the constitution of the arbitral tribunal. This mostly occurs on an 'opt out' basis (i.e., whenever parties agree to arbitrate under these rules without explicitly agreeing not to apply the rules on emergency arbitration).[13] In practice, therefore, an arbitral urgent remedy is often also available prior to the constitution of the tribunal. This development begs a relatively new question, namely whether an application for an appointment of an emergency arbitrator precludes access to national courts.[14]

---

11. *See*, Boog (n. 5) 344 (where a survey of the positions on the issue can be found); Poudret, Besson (n. 3) 535. The same approach is taken with regard to the requirements for the admissibility of the relief (mainly, with regard to protective measure: irreparable harm and likelihood of success). *See also*, Zarra (n. 8) 285.
12. This is the case in France where these measures can be taken by law by national courts only. *See*, French Code of Civil Procedure 1981, Articles 1468, 1506.
13. *See*, Philippe Cavalieros & Janet Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations* (2018) J. Intl Arb. 275, 275; Born (n. 3) 2276.
14. *See*, Cavalieros (n. 13) 283, 286 (citing an English High Court judgment in 2016 rejecting a request for an interim freezing order on the basis of section 44 para. 5 of the Arbitration Act (*see* next paragraph) because the claimant had previously made an emergency arbitrator application for the same relief before the LCIA and the latter refused it. According to the authors, this 'court-subsidiarity approach may have been taken too far').

Second, an arbitral tribunal lacks the power to issue orders against third parties because they are not bound by the arbitration agreement. For example, absent its consent to arbitrate, a tribunal cannot address an order to a bank to act or refrain from acting in relation to some assets, such as particular bank accounts, even if they are connected with the subject matter of the arbitration.[15]

Third, due process principles can limit arbitral powers. Assuming that arbitration proceedings are different from judicial proceedings and require full access by all parties at every stage of the process, it is frequently maintained that arbitrators are precluded from granting interim relief on an ex parte basis, i.e., without the involvement of the party they are to be used against. Even though in recent times this is seen much more favourably than before, the issue is still very controversial.[16]

Finally, the impact of party autonomy must be considered. The jurisdiction of the arbitrators is certainly not a matter of public policy and therefore nothing precludes parties from excluding the tribunal's power to order provisional measures. They could remove some measures from the tribunal's jurisdiction or entrust only the national courts with handling provisional measures applications.

Generally, parties confer the authority to grant interim measures on the arbitrators, unless they expressly state otherwise in their agreement.[17] An agreement empowering parties to apply to the courts for provisional measures cannot be interpreted as denying or withholding such a power from the arbitral tribunal.[18] In all these cases, accurate drafting is crucial, but some additional requirements may also be envisaged under the applicable national laws (e.g., the recent Italian law).

§10.04 THE JURISDICTION OF STATE COURTS IN SUPPORT OF ARBITRATION …

As mentioned above, it is well established that parties may also request provisional measures from courts; this holds true despite the existence of an arbitration agreement. In other words, as an exception from the principles governing international arbitration, the jurisdiction of arbitrators in this field is not exclusive.[19]

Article 17J of the UNCITRAL Model Law clearly states that national courts should retain the power to issue such measures. There are no theoretical obstacles to this idea. It is in fact rightly stated that: (i) a party seeking urgent assistance of national courts does not violate the agreement to arbitrate; and (ii) such an application does not

15. *See*, Donald 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.), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series No. 12 (Wolters Kluwer 2005) 205.
16. *See*, Carlevaris (n. 3) 342; *See also*, Zarra (n. 8) 285 (for recent developments in favour of 'preliminary temporary' orders, as codified by Article 17 B and C of the revised UNCITRAL Model Law).
17. Donovan (n. 15) 238; Zarra (n. 8) 283.
18. More cautious on these last cases, Gaillard (n. 3) 718.
19. Born (n. 3) 2310 (describes this double jurisdiction as 'an exception to the general principles of arbitral exclusivity and judicial non-interference in the arbitral process').

amount to a waiver of the arbitral proceedings on the merits. These principles are clearly affirmed by Article 9 of the UNCITRAL Model Law, the jurisdictions incorporating it and the 1961 European Convention on international commercial arbitration whose Article VI paragraph 4 provides that a 'request of interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreements or regarded as a submission of the substance of the case to the court'.[20]

Most national laws expressly provide for the power of courts to order provisional measures in aid of international arbitration, and, in the absence of statutory provisions, case law has endorsed the same proposition.[21]

Article 17J of the Model Law goes so far as granting such authority to courts which are not located at the seat of arbitration. Notwithstanding the Model Law's position, few national legislations expressly give their courts such authority.[22] More frequently, laws are silent on the issue, thus giving rise to uncertainty. Presumably, this is due to the fear of interfering with the tribunal or, worse still, with the supervisory role of the courts at the seat of the arbitration. However, this concern appears to be largely overstated, given that conflicts are to some extent unavoidable in international disputes and that appropriate tools have been designed to overcome them. The point is crucial, on the contrary, considering the need of support for foreign arbitrations.

Be that as it may, the involvement of the courts is usually explained as a means to support the arbitral process: in some circumstances, there may be an actual need to allow a party to request orders from state courts not seized with the merits, and even lacking competence to hear the case.

Though it stems from such a pro-arbitration posture, this two-track jurisdiction is handled with extreme caution, if not suspicion, almost by way of a rematch against the times of hard restraint towards arbitration. In the last few years, both statutes and judicial decisions have increasingly limited the circumstances under which national courts can grant relief in connection with arbitrations, adopting instead a preference for relief by arbitral tribunals.

Under some arbitration laws, courts are not given the full power to award provisional measures. Remarkable examples are given by the French and (the brand

20. *See*, Brand (n. 3) 327 (stressing that Article 9 of the Model Law does not limit the authority to courts of the State of the seat of the arbitration only); Gaillard (n. 3) 715 (mentioning some court decisions).
21. *See*, Boog (n. 5) 361(the main examples are Switzerland, Germany, the Netherlands). In the United States (US), the well-known *McCreary* decision rendered in 1974 by the US Federal Court of Appeals (3d Circuit), according to which by ordering an attachment a court would contravene the New York Convention, Article II para. 3, has long been an exception and still gives rise to uncertainty. *See*, the strong criticism by Gaillard (n. 3) 712; Born (n. 3) 2311 (for a thorough analysis of recent developments).
22. This is the case of English law. *See*, Robert Merkin & Louis Flannery, *Arbitration Act 1996* (3rd ed., Informa Law 2005) 102 (under English law, by virtue of Arbitration Act 1996, section 2, para. 3, courts have the power to grant provisional measures in support of foreign arbitrations, subject to whether the courts consider the exercise of such power 'inappropriate'. It can be easily said that appropriateness occurs when assets are in England, or when evidence is to be preserved there, too). *See also*, South African International Arbitration Act 2017, Article 17J.

new) Italian laws where applications can only be made before the constitution of the arbitral tribunal.[23]

Some other jurisdictions instead allow courts to grant provisional measures only when strictly needed. English law reflects this approach, by requiring that courts, in any case, act 'only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively'.[24] National court decisions in various jurisdictions have developed similar principles.[25]

Finally, it may be that judicial authority could be explicitly removed by party autonomy.[26] On the other hand, some jurisdictions tend to guarantee in any event, the availability of legal protection by the State, at least to their citizens.[27] In the absence of legal provisions, however, the trend seems to be in favour of allowing the parties to exclude the jurisdiction of state courts, upholding the wish of the parties to centralize all their disputes before the arbitral tribunal. This could result indirectly from a reference to institutional rules providing for a restricted access to state courts.[28]

§10.05 … AND THE GROUNDS OF SUCH JURISDICTION, WITH PARTICULAR REFERENCE TO EU LAW

The rules on jurisdiction of courts are not provided by arbitration laws but rather by the relevant private international law rules.

Looking at Europe, despite the well-known 'arbitration exclusion' from the Brussels regime (Brussels I-a in the latest version), the Court of Justice of the European Union (EU) included some, but not all,[29] provisional measures ordered by courts in aid of an arbitration within the scope of the uniform rules on jurisdiction. The famous *Van Uden* judgment is of particular interest in this respect. In that case, the Court of Justice held that even where parties have concluded an arbitration agreement, the request for an anticipatory measure (the Dutch *kort geding*, which is a kind of provisional payment) falls within the scope of the Brussels Regulation, provided that some (strict)

23. French New Code of Civil Procedure (n. 12) Article 1449, para. 1 (this choice, however, is balanced by the express reservation of the court's exclusive power to adopt *saisies conservatoires*); Italian Parliament Bill (n. 9) Article 1, para. 15.
24. English Arbitration Act 1996, §44, para. 5. This provision applies both in case of urgency and when it is not one of urgency: in the latter situation courts shall act only with the permission of the arbitral tribunal or with the agreement in writing of the parties: *see*, §44, para. 4.
25. *See*, Born (n. 3) 2320 (extensively on the decisions of various jurisdictions).
26. *See*, English Arbitration Act 1996, §44, para. 1; Donovan (n. 15) 213.
27. German law is a remarkable example of this category. *See*, Donovan (n. 15) 208.
28. *See*, *e.g.*, ICC Rules 2017, Article 28, para. 2 (provides that after the file has been transmitted to the tribunal, the parties may apply to courts for interim measures 'in appropriate circumstances' only); LCIA Rules 2010, Article 25, para. 3 (lays down even more restrictive rules, stating that after the constitution of the tribunal national courts are authorized to grant relief in exceptional cases and with the arbitrators' permission).
29. Measures aimed at preserving evidence seem to be excluded after the EU Court of Justice ruled that an order to hear a witness for the purpose of determining whether to pursue litigation is not a provisional measure. *See*, *St. Paul Industries NV v. Unibel Esser BVBA* (2005) ECR I-03481.

requirements are satisfied.[30] It is usually inferred from this decision that measures protecting substantive rights of the parties (in a civil or commercial matter) are covered by the scope of the Brussels Regulation, while measures ancillary to arbitral proceedings are not.[31]

The Brussels Regulation provides that provisional measures can be ordered not only by the courts with jurisdiction on the merits in light of the uniform rules of the Regulation but also by courts with jurisdiction based on national rules.[32] The former are deprived of the power to decide both on the merits and on provisional measures given the existence of an arbitration agreement. Though not very clearly the Court of Justice also seemed to exclude any empowerment of the courts of the seat of the arbitration on this ground.[33]

On the other hand, the 'national' jurisdiction was severely limited by the Court of Justice, in order to avoid bypassing EU uniform rules. In particular, in a famous passage of the *Van Uden* judgment, the Court of Justice held that there should be 'a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought'.[34] Such a link is usually found in the place where the assets are located, even if this concept is not easily applicable in relation to all forms of provisional measures (consider, for example, measures in personam).

What matters more here is that it is usually inferred from this limitation that the measures granted under the national rules of jurisdiction pursuant to Article 35 – i.e., the only available EU rules in case of arbitration – do not benefit from the liberal rules on the circulation of decisions laid down in Title III of the Regulation. Therefore, they have in principle a territorial reach and do not circulate freely within the EU.[35] This aspect has in the end been expressly confirmed by Article 1 litt. a) of the Brussels I-a Regulation.

30. *See*, *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line and Another* (1998) ECR I-07091, para. 49 (concerning Article 24 of the Brussels Convention but its reasoning is applicable also to Articles 31 and 35 of the subsequent Brussels Regulations and has been usually referred to all the categories of provisional measures).
31. *See*, Gilles Cuniberti, *Jurisdiction to Grant Interim Measures in Support of Arbitration: The Influence of European Law* (2020) 21 YB. Private Intl L. 225, 228; Alberto Malatesta, *Il nuovo regolamento Bruxelles I-bis e l'arbitrato: verso un ampliamento dell 'arbitration exclusion'* (2014) Riv. Dir. Int. Priv. Proc 5, 14 (stressing the 1991 March Rich judgment had already paved the way, holding that an ancillary action such as an application to appoint arbitrators falls within the exceptions and hence outside the scope of the Regulation. This distinction was indirectly later confirmed by Recital 12 of the Brussels I-a Regulation).
32. Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351 (Brussels I Regulation), Article 35.
33. Cf. *Van Uden Maritime BV* (n. 30) para. 24 ('Where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred the dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case for the purpose of the Convention'), and para. 25 ('In such a case, it is only under Article 24 that a court may be empowered under the Convention to order provisional or protective measures').
34. *Van Uden Maritime BV* (n .30) para. 39.
35. *See*, Cuniberti (n. 31) 234 f ('Provisional measures granted under Art. 35 may not benefit from the enforcement regime of the Regulation and are thus necessarily territorial, at least to the extent that they cannot produce effects in other member States without being enforced abroad').

Paradoxically, European interim orders are not subject to these strict requirements under the rules of private international law of non-EU countries, even if one can assume that their recognition and enforcement will also in any event be very difficult in these cases.

In conclusion, the authority of European judges to grant interim orders in support of arbitration is quite restricted and rarely effective outside the *forum*, at least with regard to the orders falling within the Brussels rules. From this point of view, one can see a certain degree of deference to arbitral tribunals: as they are competent over the merits of the case, they should not be excessively limited by concurrent jurisdiction of state courts.

§10.06 RECONSTRUCTING THE RATIONALE OF THE PRINCIPLE OF CONCURRENT JURISDICTION

As outlined above, the main policy issue is how a given legal system should organize the relationship between tribunals and courts.

In light of the legislative trends described above, two different models of allocation of authority can be identified: the first is based on the parity of the two jurisdictions (free choice model), the second is based on the priority of arbitral tribunals or, otherwise said, on the subsidiarity of the court intervention (court subsidiary model).

As discussed above, national laws, judicial decisions and most of the commentators are in favour of a primary role of the arbitral tribunals and have increasingly adopted or proposed restraints on the courts' authority. According to this approach, the arbitral tribunal would be the 'natural' judge to address interim requests, and courts should intervene only when the authority of arbitrators is limited or ineffective.

Though this reasoning is not in principle questionable, the interaction between private and public spheres deserves to be further explored. In doing so, the objectives to be pursued by the principle of concurrence should be clarified. In particular, what objectives should guide the coordination between concurring authorities and which factors must be taken into account in shaping the scope of their respective powers?

The following general rationales in favour of prioritizing arbitral tribunals are usually put forward.

First, the *efficiency of arbitration* in settling international commercial disputes as well as the *respect for party autonomy* are primary reasons to favour having arbitral tribunals decide on provisional measures. In this regard, one of the main goals of arbitration principles is to entrust arbitrators with as much of the dispute as possible. This goal, and ultimately the parties' will, should not be contradicted by judicial intervention.[36]

However, efficiency sometimes gives way to other needs because parties themselves have stronger interests in seeking relief directly from the courts. This typically occurs in the situations described above, such as when the type of relief requested is

36. Born (n. 3) 2322 (noting this position and criticizing it partly).

available only before courts or when it is uncertain whether an arbitral tribunal has the authority to order such relief, or when the tribunal has not yet been constituted or the mechanism to appoint an emergency arbitrator is unavailable or ineffective, or finally when a measure is required against a non-party to the arbitration agreement.[37] In these situations, there is no real concern of centralizing the application of provisional measures before one body. In such cases, there is no real overlapping jurisdiction between the tribunal and the courts. Only courts have the power to grant interim protection, provided that all the legal requirements, including the jurisdictional authority, are satisfied.

A second, more probing reason is the need *to protect the integrity of the arbitral process*. In this perspective, judicial interference with the arbitral process should be avoided. Commentators frequently note the fear that a judicial action can frustrate an arbitral decision.

One cannot deny that very often there are significant connections between an order for provisional measures and the decision on the merits, especially in cases of anticipatory requests.

Conflicting decisions on questions such as the likelihood of success on the merits (*fumus boni iuris*) can be puzzling to the parties and undermine the smooth functioning of the arbitral process or, at least, the prestige of arbitration proceedings.

Worse still, parties may attempt to circumvent arbitration clauses and jeopardize the final decision on the merits by seeking to get decisions on the merits from national courts rather than from the arbitral tribunal, or by seizing the authority of both.[38] On the other hand, judges themselves can be tempted to interfere excessively in the arbitration and to usurp the power of the tribunal.

These concerns are at the heart of our problem and must be carefully considered. It is, however, true that a party's attempt to circumvent the arbitration agreement by applying for provisional measures before a court should be regarded as a violation of the parties' obligation to arbitrate.[39] Furthermore, arbitrators can take into account the conduct of the parties and impose consequences for unjustified court interventions. Appropriate tools, such as liability claims before the tribunal itself or orders to waive a measure obtained from courts, may be available under some applicable laws.[40]

On the other hand, these reasons should be balanced against the need to *protect the parties* involved in an international arbitration.

There is no doubt that access to provisional measures can be crucial for the purpose of safeguarding this objective.[41] The availability of effective remedies in

37. *See*, Kaj Hobér, 'Courts or Tribunals?' in Sherlin Tung et al. (eds), *Finances in international Arbitration. Liber Amicorum Patricia Shaughnessy* (Kluwer Law International 2020) 206.
38. Gaillard (n. 3) 723 (an example is given whereby a court orders the continuation of works and the tribunal considers that to be unwarranted).
39. Born (n. 3) 2311, 2318 (stating that New York Convention, Article II para. 3 forbids court-ordered provisional reliefs that are intended to frustrate or circumvent the arbitral process).
40. On liability claims before the tribunal, *see*, Poudret (n. 3) 539.
41. *See*, Andrea Bonomi, 'Interim measures at the Crossroads of International Litigation and Arbitration: Some Remarks on Concurrent Jurisdiction and Cross-Border Enforcement' (2020) YB. Priv. Intl L. 137, 138 (stressing the relevance of the rights to access of justice and of the right to fair trail).

cross-border situations is indeed the main consideration for empowering a national court to intervene in support of the arbitration. For several reasons, it may be that parties are unable to obtain protection from the tribunal, but this should not result in a denial of justice. Also, the fact that a tribunal-issued provisional measure may be unenforceable, or at least not readily enforceable, should be taken into account when assessing the effectiveness of the protection afforded to parties. This aspect is somewhat neglected but should be at the core of the analysis.

§10.07 THE KEY ISSUE WITH THE (LACK OF) OF RECOGNITION AND ENFORCEABILITY OF INTERIM MEASURES

As a matter of fact, the features of interim measures (mainly their lack of finality and their temporary nature) make it difficult for them to be enforced.

This is sometimes true even in purely domestic situations. While decisions by a state court are easily enforceable, interim orders issued by arbitral tribunals are more problematic because not all legislatures have enacted specific rules on their enforcement.[42] Even where provided, approaches differ significantly from country to country, but in any event it is common that the scope of the relevant rules is limited to orders rendered by tribunals seated in the forum.[43]

Nor does the 1958 New York Convention on the recognition and enforcement of foreign awards help. According to prevailing views (though there have been rising trends to the contrary), its provisions are considered inapplicable to provisional measures as they can hardly be qualified as decisions finally resolving a dispute and hence, as 'awards'.[44]

In order to fill such gap and to harmonize the regime, the UNCITRAL Model Law was amended in 2006 and now provides for a recognition and enforcement mechanism for interim measures in Articles 17H and 17I. It is worth stressing that one of the relevant innovations covers foreign arbitrations because these rules apply 'irrespective of the country in which [an order on interim relief] was issued'.[45] This achievement has been welcomed by many commentators, but its success will depend on its adoption and implementation by a significant number of States. So far, most national laws are still silent on recognition and cross-enforceability. The issue is, thus, far from settled. On the other hand, it must be recalled that similar difficulties also arise with regard to interim orders granted by courts – as discussed above with reference to the EU regime:

42. *See*, Hobér (n. 37) 209 (this is the case in Sweden where measures ordered by arbitrators cannot be directly implemented within the legal system).
43. The two prevailing ways of making arbitral provisional measures effective within a legal system are the *exequatur* model and the court support model. *See*, Poudret (n. 3) 539. An exception to the domestic scope is given by the Hong Kong Ordonnance whose section 22B1 states that 'any emergency relief granted, whether in or outside Hong Kong, … is enforceable'; *see*, Hobér (n. 37) 209.
44. The debate is vast. On the reasons why the New York Convention is inapplicable, *see*, Poudret (n. 3) 546; Andrea Carlevaris, 'The Enforcement of Provisional Measures', in Fulvio Maria Palombino et al. (eds), *Provisional Measures Issued by International Courts and Tribunals* (Springer 2021) 307. *Contra*, Born (n. 3) 2303.
45. Model Law (n. 2) Article 17H para. 1.

they also often have a territorial reach, and their enforcement outside the country of origin is not easy.

Of course, the above difficulties can be reduced by voluntary compliance by the parties of the arbitral tribunal's orders. This is apparently not infrequent, possibly due to parties' fear of negative consequences in subsequent proceedings and in the final award. In any case, this is scarcely relevant from a strictly legal point of view.

Until there are further developments, these current restrictions give rise to practical drawbacks in international arbitrations where assets are likely to be located in a place other than the seat of arbitration if not dispersed across multiple countries.

In these cases, in order to obtain effective protection, these measures must be effective outside the country of the arbitral seat, but they are often not. Only a court, in particular a court in the state where the recognition or the enforcement is sought, can guarantee an effective protection.

In light of the above, in my view the concept of effectiveness of remedies should be given a broad meaning, not only in terms of the right to access to a tribunal and to obtain a decision, but also with reference to the recognition and the enforcement of such a decision outside the place of arbitration. As in most cases the arbitral remedy will not be enforceable, court-issued provisional measures should be available to parties as well. This is even more important considering the still-limited number of national legislations providing court-ordered measures in aid of foreign arbitrations.

§10.08 THE PRINCIPLES GOVERNING THE COORDINATION OF CONCURRENT JURISDICTIONS

At this juncture, it is worth drawing some conclusions and making some policy recommendations.

The above analysis shows that there are no reasons for arbitrators to prevail over courts when exercising jurisdiction. On the contrary, arbitral tribunals are not well equipped to provide effective interim protection in cross-border situations. The lack of cross-enforceability of their relief should be carefully taken into account when designing available remedies from courts: where judges sitting in a state other than the place of arbitration are required to act, in my view they should do so, to the extent that (a possible) arbitral order has no or little chances to be recognized and enforced in the country, even if the foreign arbitral tribunal is not yet seized.[46] Such a task cannot be precluded by any theoretical obstacle or practical difficulties, given that a similar prognosis is required by courts when faced with parallel litigation.[47]

To use the language of the English Arbitration Act, it can be said that in such situations, tribunals are 'unable' to act 'effectively' and a protection from courts is needed. Under these terms, one can agree that the double jurisdiction is provided in the

46. *See*, Besson (n. 3) 246 (raises this issue but denies its relevance).
47. *See*, Swiss Private International Law Act 1987, Article 9; Italian Private International Act, Law No. 218 of 31 May 1995, Article 7.

field of provisional measures for the benefit of the arbitral process and that the courts' power is limited to what is strictly necessary.

This conclusion is confirmed also by a structural analysis of the relationship between tribunals and courts. In this regard, it is useful to recall that concurrent jurisdiction in interim measures should not be considered in isolation but rather framed more generally in the principles governing the relationship between arbitration and domestic jurisdictions. In most legal systems, it is now firmly established that both give rise to a proper exercise of jurisdiction or, in other words, both are 'equivalent' means of resolution of disputes that do not overpower each other.[48]

If one prefers, the reference to a 'subsidiary' role of courts in granting interim measures can be maintained, provided that it by no means implies a hierarchy between arbitral tribunals and courts. Indeed, such language evokes some degree of 'superiority', suggesting that arbitrators are the 'prevailing' actors. In the context of the reciprocal exclusiveness of the jurisdiction at stake (arbitral and domestic), the superiority of the tribunal's jurisdiction over the court's is not justified.

Instead, rules on subsidiary jurisdiction of State courts must be understood as mere practical tools to ensure that parties have access to provisional measures. They prevent parties from being required to make their interim applications exclusively in one *forum* rather than in another.

§10.09 THE SOLUTION OF SPECIFIC PROBLEMS ARISING OUT OF CONCURRENT JURISDICTIONS: PARALLEL PROCEEDINGS, CONFLICTS OF DECISIONS, REVIEW OF ORDERS

In the absence of legal provisions, as is usual, the above general framework is helpful when the concurrent exercise of jurisdiction triggers some conflicts. Three categories of conflicts can arise: (i) pending identical proceedings regarding an interim measure before a state court and a foreign arbitral tribunal; (ii) conflicting decisions granting or denying the same relief; (iii) the revocation, annulment, and revision by courts of orders adopted by tribunal and vice versa:

(i) In the first scenario, the question arises as to whether one body should defer to the other. It is well known that the applicability of the lis pendens doctrine to international commercial arbitration is rather controversial because it relies on the premise that the two alternative fora are both competent to decide the dispute, whereas in the context of arbitration, assuming the agreement is valid, only the tribunal is competent.[49] Moreover, even accepting that this remark does not fit well in our field because

48. Though not so easily, the full equivalence between arbitration and state jurisdiction is recognized also fully under Italian law. *See*, Laura Salvaneschi, 'Dell'arbitrato', in Sergio Charloni (ed.), *Commentario del codice di procedura civile* (Zanichelli 2014) 10; Cass., 25 October 2013 No. 24153.

49. *See*, Francesca Ragno, *Lis Alibi Pendens in International Commercial Arbitration* (2018) Diritto del Comm. Intl 163, 175 (discussing the famous *Formento* judgment of the Swiss Federal Court and its criticism).

both tribunals and courts possess jurisdiction over requests for provisional measures, there are other reasons to set aside the lis pendens rule and its procedural exceptions based on the 'priority in time' rule – it is true that it does not fit well in the context of provisional orders, as the practice of international litigation under the Brussels I regime shows.[50]

Despite all these difficulties, there is still a need for a legal mechanism to avoid having the same claim before multiple adjudicatory bodies. Some authors support the priority of the arbitral tribunal as the forum which will resolve the merits of the case. Consequently, they oppose the idea of deferring to national court proceedings and, conversely, support the idea of suspending judicial proceedings even if the court's jurisdiction is seized first.[51] This would result in paying deference to arbitral authority, but would be contrary to the goal of putting tribunals and courts on equal footing (as far as interim relief is concerned). For this reason, some other scholars, more convincingly, suggest that substantive – non-strictly procedural – principles inspired by lis pendens should govern the issue. These authors propose a form of deference based on timing, whereby the second-seized body is able to reject the application for the same relief.[52]

An interesting example of this is given by German law. Section 1041 paragraph 2 Zivilprocessordnung (ZPO) introduced what has been defined as a '*mild form of lis pendens*'[53] by providing that a court may assist in the enforcement of a measure issued by an arbitrator 'unless application for a corresponding interim measure has already been made to a court'.

(ii) In relation to the second scenario, conflicting decisions regarding interim measures are probably more frequent than parallel proceedings, but the issues arising therefrom are essentially the same, even though they operate on a different plane.

In principle, decisions on provisional measures, even when adopted by national courts, cannot be regarded as *res judicata*, due to their inherently precarious character.[54] Hence, a conflict between arbitral orders and court

50. *See*, Lidia Sandrini, *Tutela cautelare in funzione di giudizi esteri* (CEDAM 2012) 383, 386; *see also*, Court of Justice of the EU, *Skarb v. Toto s.p.a., Vianini Lavori s.p.a.* (First Chamber, 6 October 2021), C-581/20, para. 60 (not available in English) where the Court held, without any reference to the rules on lis pendens, that by conferring to jurisdiction on the merits also the power to grant interim measures, Article 35 of the Regulation does not imply that jurisdictions from other member States are not competent to adopt similar measures, after that the first is seized with similar requests or has decided over them.
51. *See*, Born (n. 3) 3806; Donovan (n. 15) 239.
52. *See*, Besson (n. 3) 254 (evoking '*règles d'un bon ordre procédural*'); Carlevaris (n. 3) 110, proposing that an application addressed to an authority – be it a tribunal or a court – should be considered as a waiver to file a second identical request before the other.
53. *See*, Poudret & Besson (n. 3) 532.
54. On the peculiarity of res iudicata in international commercial arbitration, *see*, Luca G. Radicati di Brozolo, 'Res Iudicata – Chapter 7', in Pierre Tercier (ed.), *Post Award Issues: ASA Special Series No. 38* (JurisNet LLC 2011) 127. *See also*, Filip De Ly & Audley Sheppard, *ILA Recommendations on Lis Pendens and Res Judicata and Arbitration* (2009) 25 Arb. Intl 83 (Recommendation No. 3, establishes that, in order to have a preclusive effect, besides other

judgments may easily occur, given that a decision granting or denying reliefs from arbitrators is not strictly binding or preclusive as to a subsequent application to the courts and vice versa, and parties who receive an unfavourable decision from the first-instance decision-maker may be tempted to seek a second decision from the other decision-maker. Here again, some scholars and some awards tend to assert the primacy of the arbitral tribunal as the body with jurisdiction on the merits, in order to downplay prior decisions by courts. In some instances, a duty is imposed upon the courts to respect an earlier decision of the arbitral tribunal.[55]

However, apart from the impossibility of establishing a hierarchy between authorities, fairness dictates that earlier decisions, whether from tribunals or courts, should be entitled to a high degree of deference and that parties should in principle be precluded from subsequently obtaining similar relief (if previously denied) or a revision or even a lifting of an order previously granted.[56]

In my view, this direction is subject to two relevant exceptions: first, where a reconsideration of the grievance is justified by a change of circumstances between the time of the first application and the renewed one, and second, where the first application was dismissed on jurisdictional grounds only and not for substantial reasons.

(iii) Finally, in relation to reviews of prior orders, for the same reasons discussed above, the best position, in principle, is that courts should not control the measures adopted by arbitrators, and more specifically not revoke, annul, or alter the decisions taken by the arbitrators, by way of supervising authority,[57] except maybe when they are the courts of the seat. It is indeed uncertain whether the courts at the seat are even vested with such powers, but in my view, it is difficult to preclude them from exercising such power at least where such discretion is provided by the relevant applicable law. Additionally, state control could also have a further benefit, to the extent that its outcome decision amounts to a judgment rather than a mere order. As such, it will be more easily enforceable in other states according to international treaties, if any, or regional instruments, or national laws concerning recognition and enforcement of foreign judgments.

In the opposite situation, arbitrators should also not be able to revoke or alter a court order within the arbitral proceedings. However, sometimes things are more complicated.

---

requirements, an award will need to be 'final and binding and capable of recognition in the country of the seat of the subsequent arbitration').

55. *See*, Gaillard (n. 3) 723 and Donovan (n. 3) 239. *See also*, Born (n. 3) 3790 (upholding what he calls a 'sui generis approach').
56. Poudret & Besson (n. 3) 532; Carlevaris (n. 3) 111.
57. Poudret & Besson (n. 3) 533; Carlevaris (n. 3) 116. *Contra*, Gaillard (n. 3) 723; Donovan (n. 15) 539.

First, when a measure is adopted by courts before the constitution of the tribunal, some jurisdictions expressly allow the tribunal to reexamine the interim measures granted or denied by courts and to decide whether to uphold, amend or revoke them.[58] This approach appears to be very, if not excessively, pro-arbitration. In my view, it is acceptable under certain conditions: to the extent that courts themselves issue a temporary order conditioned on the constitution of the tribunal, or to its ratification of the provisional measure, and that such orders expire by the time the circumstance upon which they are based (i.e., the lack of a functioning tribunal) ceases to exist. Strictly speaking, it would not be a revocation or a revision but rather a prior act of self-restraint by courts, even if it substantially results in the tribunal's exclusive jurisdiction.

On a more general note, it is recognized that arbitral tribunals have the power to order a party to waive a measure obtained from a court. The best-known tools for this in practice are anti-suit injunctions (i.e., orders forbidding a party from commencing or continuing proceedings in a national jurisdiction), assuming that this is made in violation of the arbitration agreement. Though they are typically issued by courts from common law jurisdictions in which they originate, it is now settled that arbitral tribunals are also entitled, when needed, to direct the parties not to commence or continue judicial proceedings.[59]

For our purposes, it is worth recalling that anti-suit injunctions can also be granted against a party seeking interim measures before courts in support of its arbitration claims. The availability of the remedy should, however, be framed carefully and limited strictly to exceptional situations so as not to jeopardize the general prohibition upon arbitrators to revise judicial decisions. Specifically, it should operate to the extent necessary to prevent an application for provisional relief which turns out to be a determination of the substantive merits, and therefore in circumvention of the arbitration agreement.[60]

58. *See*, English Arbitration Act 1996, §44 para. 6 (providing that 'If the courts so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal (*omissis*)'). *See* also the 2012 decision of the Brazilian Superior Court, *Itarumã Participações S.A. v Participações em Complexos Bioenergéticos S.A.* – PCBIOS, Resp. No. 1, 297, 974-RJ.
59. On this topic, *see*, Emmanuel Gaillard, 'Anti-suit Injunctions issued by Arbitrators', in Albert Jan Van den Berg (ed.), *International Arbitration 2006: Back to Basics*, ICCA Congress Series No. 13 (Kluwer Law International 2007) 235.
60. This could be the case when, as is often, the applicable law of the place of the relief requires the establishment of a judgment on the merits to prevent the provisional measure previously obtained from becoming void. Two pending claims on the merits are indeed difficult to reconcile with parties' choice in favour of arbitration.