JURIS(&)PRUDENCE
IN PROVISIONAL MEASURES

BALANCING EFFECTIVE PROTECTION AND RIGHT TO DEFENSE IN THE EU JUDICIAL SPACE PERSPECTIVE

ANTONINO GERACI – GIOVANNI GRASSI – FRANCESCA LOMBARDI
ITALIAN TEAM

PERUGINO – PRUDENCE, JUSTICE AND SIX ANTIQUES WISEMEN – COLLEGIO DEL CAMBIO, PERUGIA (ITALY)

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Abstract: *It is often necessary for provisional measures to be demanded before a dispute has been settled with a final binding judgement. Such measures have existed for many centuries, but have often received less attention in the legal literature compared with judgements of a more lasting nature. Since the establishment of the European Union it has become necessary to set forth frameworks to govern the granting of provisional measures in cross-border litigation involving multiple Member States. Under European law, provisional measures of this kind were only partially regulated under the Brussels I Regulation. Therefore, particular rules has been provided by Brussels Recast with regard to* inaudita altera parte *or* ex parte *measures, i.e. measures granted without the debtor having been summoned to appear. However, this has been widely considered to be unsatisfactory with particular regard to the regime of circulation of this kind of measures among Members States. The analysis of three fields of application, drawn from the relevant "law in action" – ex parte provisional measures, provisional measures relating to arbitration and negative conflicts of competence to adopt provisional measures – shows a lack of effective judicial protection for the party who pleads cross-border* interim *relief. This project proposal explores how the Brussels Recast has attempted to improve this situation, and the ways in which it remains ineffective. A framework is proposed for using case-studies of cross-border litigation through Themis 2016 to resolve the remaining barriers to effective governance in the granting of cross-border provisional measures in European law.*

Introduction

Provisional and protective measures, such as an attachment or a provisional payment order, play a very important role in cross-border cases. Firstly because these proceedings are tipically more time-consuming than domestic disputes; secondly because cross-border disputes are also more likely to be at risk of the defendant trying to place obstacles for the enforcement of definitive judgements, for example strategically moving assets from one jurisdiction to another[1].

More in detail, this paper focuses on some issues concerning the regime of enforcement and circulation of provisional measures after the adoption of Regulation (EU) 1215/2012 (hereinafter, the "**Brussels I Recast**").

It is regrettable that sometimes the process of ensuring European harmonization of these judgements seems to be unsatisfactory. It is perhaps inevitable that *interim* and protective measures have received less attention by Courts and authors than those of a more lasting nature. Yet, given the importance of provisional measures and their significance for the actual execution of definitive judgements such as those involving cross-border litigation, it is necessary to face the various issues connected with the need of ensuring supranational frameworks for applying and enforcing them.

In the **first part** of the paper, **a particular attention is paid to *inaudita altera parte* or *ex parte* provisional measures**, which make arise some relevant issues from the perspective of the effectiveness of judgements and the right of the defendant to partecipate in the process, pursuant to art. 6 of European Convention on human rights; such issues will be faced going through the relevant european provisions after the Brussels I Recast and the main European Courts decisions in point.

In the **second part** of this paper, we summarize the state of art in the field of **recognition and enforcement of provisional measures related to arbitration proceedings**, in the light of the EU law provisions and the ECJ case law, with particular reference to the clarifications introduced by the Recital no. 12 of the Brussels Recast. We will then highlight the shortcomings of the current system, with special consideration to the risk of a lack of protection for a party pleading for the recognition and the enforcement of an arbitral award against a party domiciled in a different Member State.

The **third part** of the paper will consider the concrete and current risk of denial of justice that might occur in case of **negative conflict of competence**. To resolve these outstanding issues, this paper will argue for an alternative approach based on the Nice Charter.

1. **Ex parte *provisional measures*: *effectiveness of judgements and enforceabilty.***

Ex parte or *inaudita altera parte* measures, that is *interim* measures granted without previously

1 F. GARCIMARTIN, *The cross border effectiveness of* inaudita altera parte *measures in the Brussels I recast regulation: an appraisal*, in *The Brussels I Regulation Recast*, Oxford, 2014, p. 172.

summoning the debtor, play an important role in all domestic legislations. Infact, they entail a so-called "surprise effect" that prevents the debtor from disposing of its assets or from adopting tactics to frustrate the effectiveness of final judgements.

However, the fact that this kind of measures are adopted without previously hearing the defendant implies the need of a particular wariness towards balance between the claimant's interest to a prompt and effective decision and the counterpart's right of defence.

This charachteristic impacts on the regime of enforceability and circulation of these provisional measures among the Member States.

Pursuant to Brussels I Recast, provisional measures granted by a Court having jurisdiction on the substance of the matter can be enforced in different Member States complying with a simplified procedure[2].

Nevertheless, a particular regime still exists with regard to *inaudita altera parte* provisional measures.

Infact, on the grounds that the fundamental right of defence is under discussion, it may be difficult to allow the free circulation of this kind of measures without a procedure, such as the abolished *exequatur* procedure, that provides for the respect of the requirements set forth by each Member State for this kind of *interim* measures.

Also before the abolition of the *exequatur* procedure, the European Court of Justice adopted a very restricting position with regard to the enforceability and circulation regime of *ex parte* provisional measures. Infact, in the ECJ jurisprudence provisional measures delivered without ensuring the rights of defence of the party against whom they are directed are considered unable to benefit of the system of recognition and enforcement in other Member States provided by the European Regulation regarding cooperation in civil and commercial matters.

More specifically, the European Court of Justice, in *Denilauer v. Couchet Freres* case[3], came to the conclusion that *ex parte* measures are outside the scope of application of Chapter III of Brussels I Regulation and, therefore, did not benefit of the regime of free circulation and mutual recognition.

So, the concept of "judgement" used in the Regulation, according to the case law, includes only provisional and protective measures given after the hearing of the defendant and in a contradictory

2 Recital 25 of Bruxelles Recast clarifies that the notion of provisional and protective measures includes, for example, protective orders aimed at obtaining information or preserving evidence on the enforcement of intellectual property. rights. On the other hand, the aforementioned notion excludes measures which are not of a protective nature, such as measures ordering the hearing of a witness. With regard to the enforceability regime, the most important change is that Brussels Recast introduces a distinction between the provisional measures granted after the defendant has been summoned to appear and those which are, instead, granted without the defendant having been summoned to appear. In the first situation, the new Regulation ensures free circulation; the latter kind, instead, are not to be recognised or enforced unless the measure is served to the defendant prior to the enforcement.

3 ECJ, 21 May 1980, C-125/79, *Denilauer v. Couchet Freres*.

proceeding, with an effective participation of the defendant.

Moreover, in the *Krombach*[4] case, the Court itself stated that the infringement of the defendant's right to be heard is manifestly contrary to the public policy of the Member State in which the recognition is sought, arguing that the decision couldn't be enforced in this Member State.

Finally, it's useful to point out that also in *Gambazzi* decision the European Court of Justice enabled Member States to establish with a wide margin of appreciation wheter the proceedings before the original Court have been in conformity with the right to a fair hearing. In that decision, infact, the Court stated that the judge of the State where the decision should be executed can assess, in light of the public policy clause, whether the fact that the judge of the Member State where the decision is granted adjudicated without hearing the defendant constitutes or not a violation of the right of defence and fair trial principle[5].

For these reasons, *ex parte* measures did not benefit from the rules on mutual recognition and enforcement under the Brussels I regulation and from the ECJ decisions as well. Interested party, therefore, were allowed to obtain *ex parte* measures directly from the Member States where they produce effects, to preserve the above mentioned "surprise effect" of these orders[6].

This was the overall legal framework before Brussels I Recast Regulation.

In spite of several proposals made by the EC and aimed at guaranteeing the regime of free circulation also to *ex parte* measures[7], Brussels I Recast doesn't move away from the previous set, excluding *ex parte* measures from the scope of the Regulation and establishing that the Regulation "*does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear*".

This means that provisional measures ordered by a Court in a procedure to which the defendant hasn't previously been duly invited shouldn't be recognized and enforced under the Regulation in a different Member State (Recital 33 of Brussels Recast)[8].

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4 ECJ, 28 March 2000, C-7/98, *Krombach* v. *André Bambersky*.

5 ECJ, 2 April 2009, C-394/07, *Gambazzi* v. *DaimlerChrysler and CIBC Mellon Trust Company*.

6 This solution is actually upheld by the provision of art. 35 of Brussels I Recast Regulation, on the basis of which the "*Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter*".

7 European Commission pointed out the need to clarify the recognition and enforcement of *ex parte* measures suggesting that they should be recognized and enforced if the defendant subsequently had the opportunity to challenge the measure. Moreover, in its proposal the Commission provided for the recognition and enforcement of ex parte measures subject to certain conditions (art. 2.a).

8 Recital 33 of Brussels I Recast provides : "*Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation. However, provisional, including protective, measures which were ordered by such a court without the defendant being summoned to appear should not be recognised and enforced under this Regulation unless the judgment containing the measure is served on the defendant prior to enforcement. This should not preclude the recognition and enforcement of such measures under national law. Where provisional, including protective, measures are*

However, differently from the previous provisions, the new art. 2 (a) of the Brussels I Recast admits the recognition of *ex parte* measures if "*the judgement containing the measure is served on the defendant prior to enforcement*". To simplify the verification of this condition, the applicant of the measure is required to provide the competent authority with the proof of service of the judgement (Recast, art. 42.2.c).

It's clear that this solution balances contradictory and effectiveness of judgements giving priority to the right of the debtor to be at least informed of the existence of the proceeding. The direct consequence of this kind of approach is that the "surprise effect" typical of *inaudita altera parte* measures can't be ensured in absolute terms if the claimant aims to benefit of the free circulation of decisions regime provided by Brussels I Recast.

Two other relevant provisions must be mentioned on this subject: the already referred recital 33 and art. 40 of Brussels Recast, as both of them set forth two exceptions to the described regime.

Pursuant to Recital 33, the circumstance that the measure has been adopted out of a contradictory proceeding with the defendant "*should not preclude the recognition and enforcement of such measures under national law*". This means that provisional measures granted without the defendant having been summoned to appear can be enforced in different Member States as long as this is allowed under the applicable national law. Therefore, even if these measures cannot benefit of the simplified regime of circulation provided by Brussels I Recast Regulation, the claimant should obtain in any case the execution of such orders on the basis of most favourable national regimes[9].

Moreover, it is necessary to quote art. 40 of Brussels I Recast. According to this provision, "*an enforceable judgement shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State addressed*".

Therefore the claimant, after having obtained an *ex parte* measure, can directly ask (if this is allowed under the relevant national law) the issue of one or more of the provisional measures admitted in the requested Member State, without the duties of prior notification or communication set forth by Brussels I Recast. In other words, the claimant, even if is not admitted to enforce in a different Member State the *ex parte* measure issued in a different Member State, could obtain in the requested Member State – in compliance with the national provision – a measure that produces the same effects, without the restrictions provided by article 2 and 42 of Brussels Recast.

In this respect, it is useful to point out that the Italian Supreme Court, in a quite recent

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ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State".

9 F. GARCIMARTIN, *The cross border effectiveness of* inaudita altera parte *measures in the Brussels I recast regulation: an appraisal*, in *The Brussels I Regulation Recast*, Oxford, 2014, p. 182.

decision[10], has clarified that a provisional measure, issued in Belgium, consisting in the injuction to pay a certain amount of money if the defendand didn't comply with some specific prescriptions (so called *astreintes*) can be executed in Italy. The circumstance that the measure to be enforced was notified lately is not relevant. The defendant, indeed, was not absolutely compromised in the exercise of the right to defence since he had the opportunity to challenge the enforcement of the measure. There wasn't therefore any concrete violation or limitation of the defendant's rights.

It has been already underscored that Brussels recast provides that *inaudita altera parte* measures can be enforced in different Member States on condition that "*the judgement containing the measure is served on the defendant prior to enforcement*" (art. 2). We have also already highlighted how this provision may constitute a risk for the effectiveness of the measure, being the "surprise effect" jeopardised.

To ensure the free circulation of the measure, art. 2 only requests that the defendant has been summoned to appear. This means that even if the provision has been granted without a full consideration of any contradictions between the parties, it may still be enforceable in every Member State.

This kind of approach clearly deviate from the mentioned conclusions of the European Court of Justice on *inaudita altera parte* measures requesting, for the recognition of them in different Member States, that the defendant had the opportunity to contest the claimed measures in a contradictory proceeding. In other words, according to the European Court of Justice, there isn't any violation of defendant's right if the defendant was admitted to contest the adoption of the provisional measure before the enforcement of the measure itself. Only if this condition is satisfied, *ex parte* measure falls into the area of application of the Regulation.

According to the case law, therefore, the principle "*audi alteram partem*" must be satisfied before the order benefits from the mutual recognition and enforcement under the Regulation.

Conversely, according to Brussels Recast it is sufficient, to enforce the provisional measure, to serve the order to the defendant after (and not before) its adoption and, in any case, out of a contradictory proceeding. This would mean that Brussels I Recast has reduced the level of defendant protection in comparison with the European Court of Justice decisions. So, though the Brussels I Recast has expressly excluded *ex parte* measures from the scope of its Chapter III, it has not confirmed other aspects of the ECJ case law[11].

In other words, in the selection of choices between the opposed values of defendant's right and

10 Cass. Sez. Un., April 15, 2015 n. 7613.

11 F. GARCIMARTIN, *The cross border effectiveness of inaudita altera parte measures in the Brussels I recast regulation: an appraisal*, in *The Brussels I Regulation Recast*, Oxford, 2014, p. 183; N. NISI, *Provisional measures in the new Brussels I Recast, Cuadernos de Derecho* Transnacional, 2015, Vol. 7, Nº 1, pp. 128-141.

judgement's effectiveness, the solution adopted by Brussels recast is a "middle ground" one, compromising both the involved values. For these reasons such a choice is debatable: it doesn't offer a sufficient protection to defendant (as above clarified) and it doesn't seem a useful alternative to the claimant either because the "surprise effect" is lost, as the defendant will be informed in advance and will be, consequently, in the position to frustrate effectiveness of provisional measures[12].

Some of the drawbacks of the approach taken by Brussels I Recast are however removed by the abovementioned art. 35 of Brussels I: this special rule, in fact, offers an adequate alternative to the claimant who may always refer to this provision to obtain an *ex parte* measure under national law, in order to preserve the "surprise effect".

Art. 11 of Regulation (EU) No. 655/2014 of the European Parliament and of the Council that will apply from 18 January 2017 (hereinafter "**EAPO Regulation**") gives to the claimant the duty to obtain a bank account preservation order *inaudita altera parte* and without prior notice to the defendant. Pursuant to this provision, "*the debtor shall not be notified of the application for a Preservation Order or be heard prior to the issuing of the Order*". The EAPO Regulation, however, safeguards the debtor's right to a fair trial and his/her right to an effective remedy. The Regulation in fact enables him to contest the Order or its enforcement immediately after the implementation of it (remedies against the EAPO are disciplined in Chapter 4 of the Regulation).

Art. 11 of EAPO Regulation, therefore, allows a cross-border effectiveness of an *ex parte* preservation order without incurring in the limits set fort by Brussels I Recast Regulation. However, it will be possible to assess the real impact of this provision – with regard to the regime of circulation and enforcement – after EAPO Regulation will definitely enter into force. In any case, the provision will play a relevant role in the overall architecture of provisional measures in case of pecuniary claims.

In light of all the above, it is debatable if the overall set of provisions regarding circulation and enforcement of *ex parte* measures stated by Brussels Recast can be considered satisfactory.

The risk is that the above mentioned rules will hamper the circulation of judicial measures among the different Member States. The circumstance that the free circulation of the measure is ensured provided that the defendant has been summoned to appear (art. 2 of Bruxelles

12 In a critical sense with regard to the choices of Brussels I Recast, see C. HONORATI, *Provisional Measures and the recast of Brussels I Regulation: a missed opportunity for a better ruling*, (May 28, 2014). Available at SSRN: http://ssrn.com/abstract=2443137.

Recast), in fact, costitutes a relevant limit[13]. Moreover, the "middle-ground solution" adopted by Bruxelles Recast departs from the conclusions of the European Court of Justice in *Denilauer* decision, in a way that strongly reduces the rights of the debtor without giving to the claimant the possibility to benefit of the typical "surprise effect".

This doubt seems confirmed looking at Recital 33 of Brussels Recast. The practical consequence of this provision, in fact, is that the same provisional measures, when ordered unilaterally, may be enforced in some Member States, but not in others. This gives debtors an incentive to relocate their assets to jurisdictions with less liberal regimes.

2. Direct recognition and enforcement of arbitral decisions.

It's a proven fact that in the last years the use of arbitration as a dispute resolution tool has had a continuous growth through EU[14]. All the judiciary systems of the Member States allow the parties to enter disputes into an arbitration agreement – apart from certain subjects – and then to get a judicial recognition of the arbitration award.

If the dispute devolved to arbitrators has international implications, then the transnational recognition of provisional measures is a key factor for an effective protection of the substantive rights of the parties.

The following analysis of the current state of the art on this field will show why such effective protection is still missing in the EU system: in relation to this, we will try to draw some proposals for a further development in this matter.

According to Article 1(2)(d) of the Regulations EC 44/2001 and EU 1215/2012, the provisions therein «*shall not apply to arbitration*». An identical provision was included in Article 1(2)(4) of the Brussels 1968 Convention.

Recognition and enforcement of arbitral decisions are therefore outside the scope of application of such instruments[15]: in principle, the Member States are free to regulate this matter either by

13 C. HEINZE, "*Choice of Courts Agreements, Coordination of Proceedings and Provisional Measures in the Reform of the Brussels I Regulation*", in Rabels Zeitschrift, 2011, p. 615; M. NIOCHE, "*La décision provisoire en droit international privé européen",* Bruxelles, Bruylant, 2012, p. 198-201; e J.-F. VAN DROOGHENBROECK, C. De Boe, "*Les mesures provisoires et conservatoires dans le nouveau règlement Bruxelles I bis*", Bruxelles, Bruylant, p. 200-201.

14 Statistics about the major international arbitral institutions may be found on the following website: http://globalarbitrationnews.com/parties-preferences-in-international-arbitration-the-latest-statistics-of-the-leading-arbitral-institutions-20150805/ (U.R.L. visited on April 19th, 2016). The annual caseload has increased by more than 11% in the 2012-2014 period.

15 C-536/13, *Gazprom OAO*, Grand Chamber, 13 May 2015, not yet published.

internal provisions or by agreeing international conventions between them[16].

According to the *Jenard Report*[17], which accompanied the coming into force of the Brussels Convention, and to the *Schlosser Report*[18], drafted when the United Kingdom acceded the Convention, the exclusion covers all and any measures, whether final or provisional, issued by arbitrators. This interpretation is confirmed by the fact that the "judgement" capable of recognition is identically defined in all the instruments as «*any judgement given by a court or tribunal of a Member State*» (see Brussels Convention, Article 25; EC Reg. 44/2001, Article 32; EU Reg. 1215/2012, Article 2(a)).

With regard to the arbitral awards, the exclusion finds today a further explicit confirmation and clarification in Recital no. 12 of the EU Reg. 1215/2012, third paragraph, pursuant to which where a court of a Member State determines that an arbitration agreement is null, void or inoperative, this should be exercised «*without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.*»

The prevalence of the New York 1958 Convention over the Reg. 1215/2012, then, has been explicitly reaffirmed; however, Art. 71(1) in the EC Reg. 44/2001, which was previously in force (*This Regulation shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgements*) might be regarded as having the same effect[19].

In the light of the above, we may draw that the current structure of the EU civil judicial cooperation system does not provide for binding instruments of recognition and enforcement of arbitral decisions, since, at this regard, it merely recedes to the international conventions in force between the Member States. In particular:

- with regard to arbitral awards, the matter is governed by the New York 1958 Convention, ratified by all Member States.

This Convention requires courts of contracting states to give effect to arbitration agreements and to recognize and enforce arbitration awards from other contracting states, subject to certain and limited defences, essentially corresponding to those which apply to the recognition and enforcement of domestic awards. If the award is irreconcilable with a judgement, this necessarily precludes

16 In fact, all Member States are part to the the New York 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

17 From the name of its Belgian drafter, Mr. P. Jenard; OJ 1979 C 59, pg. 1 and ff..

18 From the name of the German Professor Dr. P. Schlosser; OJ 1979 C 59, pg. 71 and ff..

19 T.C. HEARTLEY, , *The Brussels I Regulation and arbitration*, International and Comparative Law Quarterly, 63(4), pg. 843-866.

recognition of the judgement[20].

However, although agreed to by all and every Member States of the EU, this is not a EU law instrument: the EU is not part of such Convention, and, consequently, the ECJ has no jurisdiction on it. There is no warranty that the New York 1958 Convention is interpreted uniformly throughout all the Member States.

As it has been clearly noted, «*the consequence of this is that an instrument which the courts of each Member State are free to interpret for themselves imposes a limit on the application of an EU measure, the Brussels I Regulation* [today, reference should be made to the EU Reg. 1215/2012].»[21].

- with regard to provisional measures, like any other arbitral decision they are excluded from the system of recognition established with the Brussels 1968 Convention and the EU Regulations, by virtue of the express exclusion mentioned above.

Moreover, the New York 1958 Convention does not apply to them, since it regards the recognition and enforcement of "arbitral awards" only: although the text of the convention does not provide for a definition of "arbitral award", this term is commonly interpreted as not including provisional or *interim* measures adopted by arbitrators[22].

As of today, there is no recognition system provided for either by the EU or by international law for measures of this kind: this utter defect relates, at least partially, to the fact that in several EU Member States the arbitration panels completely lack the possibility to adopt provisional measure (among others, Italy, where, according to art. 669-*quinquies* of the civil procedure code, provisional measures are adopted by the court which would be competent for the merits in absence of the arbitration agreement).

Understandably enough, such Member States have shown to be reluctant to bind themselves to enforce foreign arbitral provisional measures unknown to their legal tradition[23].

3. Recognition and enforcement of protective measures related to arbitral proceedings.

Since, as seen, the direct recognition and enforcement of arbitral provisional measures are outside the scope of the Brussels Convention and Regulations, the question shifts to whether recognition and enforcement of judicial provisional measures granted in aid of arbitration fall

20 ID., p. 853.

21 ID, p. 856.

22 «*An award* finally *settles the issues that it seeks to resolve.* […] *Decisions on provisional or interim measures. Because they are only issued for the duration of the arbitration and can be reopened during that time, provisional measures are not awards*» *ICCA's Guide to the interpretation of the 1958 New York Convention*, drafted by the International Council for Commercial Arbitration, pg. 17-18; similar views are expressed by Pietro Ortolani, Anti-suit injunctions in support of arbitration under the recast Brussels I Regulation, MPILux Working Paper 6 (2015), p. 13.

23 Jenard Report; OJ 1979 C 59.

within or outside such scope.

The matter refers again to the correct interpretation of the abovementioned "arbitration exclusion". Although it is commonly agreed that such exclusion is not limited to the recognition and enforcement of decisions adopted by the arbitration panels themselves, the actual extent to which it amounts has been subject to discussion and to a progressive definition in the case law over the last decades.

As starting point, we will take the (already mentioned) Schlosser Report[24], which was drafted when the United Kingdom acceded the Brussels Convention and accounts for two different interpretations purported by the contracting parties.

On one hand, the U.K. held that the exclusion should apply to all and any court proceedings on the matter covered by an arbitration agreement; on the other hand, the Member States considered that it applied only to proceedings specifically related to arbitration.

Although it seems to be very narrow, the difference is relevant, and will prove decisive in the solution of the matter at stake.

The Schlosser Report maintained the latter view and drew a list of these «ancillary proceedings», so closely related to arbitration to fall within the arbitration exclusion[25]. Notably enough, provisional measures granted in aid of arbitration are not included in the list.

Schlosser's account has been confirmed by the ECJ in two important decisions.

In the first of them, the *Marc Rich* case[26], the court stated that the proceedings before an English Court for the appointment of an arbitrator fall outside the scope of application of the Convention, by reason of the fact that «*in order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention*», then the Convention does not apply to such dispute[27]. Court proceedings may be deemed to be "ancillary" to arbitration when their subject-matter is an arbitration matter.

In the following *Van Uden* case[28], the court had the chance to decide whether a provisional measure (in the form of an *interim* payment order) granted by a Dutch court in aid of arbitration is or is not a measure "ancillary" to arbitration and, therefore, excluded by the application of the Brussels Convention.

Applying again the criterion mentioned above, the ECJ found that the subject-matter of such a

[24] *Supra*, *sub* 15.
[25] This list includes, for example, the appointment of arbitrators and the extension of the time limit to render the award.
[26] C-190/89, Marc Rich & Co. v Società Italiana Impianti, [1991] ECR I-3855.
[27] ID., par. 26.
[28] Case C-391/95, Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another. [1998] ECR I-7091.

provisional measure is not related to arbitration proceedings in themselves, but, instead, to the substantive rights of the pleading party. Provisional measures, therefore, do not fall within the arbitration exclusion as long as they refer directly to the right claimed by the party.

In the light of the above, the wording "provisional measure in aid of arbitration", which is commonly used in reference to measures such as that in the *Van Uden* case (and, for the sake of simplicity, is used in this paper too), may be misleading for the reader insofar as it suggests a connection between measure and arbitration, instead of between measure and substantive right claimed in arbitration.

A specific reference should now be made to the anti-suit injunctions adopted in protection of arbitration proceedings.

Although such injunctions are not – strictly speaking – provisional or interim measures, it is worth mentioning them in this paragraph since they implicate similar problems of interference with arbitration, along with serious issues of compatibility with the EU judicial cooperation system.

As defined by the ECJ, an anti-suit injunction is a judicial measure which consists in «*a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court*»[29]. Historically, they derive from common law tradition (in particular from the English legal system) and, as of today, they are still unknown in civil law countries.

Since, in case of disobedience, such measures threaten of serious penalties the infringing party, the ECJ case law has long since deemed them to be incompatible with the principle of mutual trust between the judicial authorities of the Member States. Therefore, whenever the Brussels Regulations apply, anti-suit injunctions may not be adopted and, *a fortiori*, may not be recognized and enforced in other Member States.

No exceptions are made for arbitration: the ECJ in the *Allianz* case[30] stated that anti-suit injunctions granted in backing of arbitration proceedings[31] do not fall short of the prohibition above mentioned, as long as they aim to prevent the commencing of judicial proceedings on matters which fall within the scope of application of the Brussels Regulations.

Eventually, the recent *Gazprom* case[32] allowed the ECJ to restate on the relationship between the "arbitration exclusion" and the prohibition of anti-suit injunctions.

The case regarded an arbitral award preventing a party from bringing certain claims before a

29 Case C-159/02, *Turner* v. *Grovit* [2004] ECR I-3565, par. 46.

30 Case C-185/07, *Allianz SpA and Generali Assicurazioni Generali SpA* v *West Tankers Inc.*, [2009] ECR I-00663. Especially in British literature, this judgment is also referred to as the *West Tankers* case.

31 *I.e.*, anti-suit injunctions prohibiting to commence legal proceedings before a foreign judicial court on the grounds that a valid arbitration agreement applies to the litigation.

32 *Supra*, under 2.

court of a Member State. The Lithuanian referring court considered it equal to an anti-suit injunction, and therefore suspected that, in the light of the above mentioned case-law, its recognition and enforcement could contrast with the EC Reg. 44/2001. The Court of Luxembourg disagreed on the premises and argued that such award may not be considered equal to an anti-suit injunction for the following two reasons: (i) it has not been adopted by a court and (ii) it is not backed by penalties against the infringing party.

Therefore, the ECJ precedents precluding the recognition and enforcement of anti-suit injunctions do not apply; the matter is covered by the "arbitration exclusion" included in EC Reg. 44/2001, and, therefore, the EU law neither precludes nor imposes such court to recognize and enforce such arbitral award.

4. Shortcomings of the current system: development issues.

As of today, the EU judicial cooperation system doesn't offer to the parties an effective transnational *interim* protection of the substantive rights devolved to arbitrators.

In particular, as seen above:

- provisional measures adopted by arbitrators are not eligible to be recognized or enforced neither under the Brussels Regulations nor under the New York 1958 Convention;

- provisional measures adopted by judicial authorities for matters covered by an arbitration agreement are recognizable and enforceable under the Brussels Regulations only insofar they directly protect the substantive right of the pleading party and are not related to arbitration.

With reference to the latter category, the *interim* protection offered by the system is in any case impaired in consideration of the following circumstances.

Firstly, as reckoned by the ECJ in the *Van Uden* case[33], when the parties have agreed an arbitration clause the provisional measures may be adopted by ordinary judicial authorities only on the basis of art. 24 of the Brussels Convention (first replaced by art. 31 of the Brussels Regulation and, then, by art. 35 of the Brussels Recast), since the courts of no Member States have jurisdiction on the merits. This precludes the possibility to grant any "worldwide" provisional measure, as the above mentioned provision confers every Member State jurisdiction only for provisional measures to be enforced in their territory.

Secondly, it seems arduous, in the light of the considerations above, to ensure an effective *interim* transnational protection solely on the base of the award in favour of the party winning in arbitration, without a re-evaluation of the case on the substance.

33 Par. 46 of the judgment.

In such circumstances, in fact, the first reference for the decision of the court would be the New York 1958 Convention, which does not provide for an *interim* enforcement of the award pending the recognition proceedings.

Moreover, the requesting party could not rely on the fact that, hypothetically, the award had been duly recognized before the court of the seat of the arbitration and, on such basis, ask the foreign recognition, backed by provisional measures, of the *exequatur* judgement under the Brussels rules.

At this regard, it is at least uncertain that such a judgement may be comprised in the definition of "judgement" of Art. 2 of the Brussels Recast Regulation, since it does not evaluate the merits of the case but, on the contrary, simply verifies the compatibility of the arbitral decision with the public policy of the *lex fori*, together with the compliance with formal requirements (actual requirements of recognition may vary according to the *lex fori*).

Nonetheless, the recent case-law of the ECJ (case *Gothaer*[34]) seems to purport an extensive interpretation of the recognizable judgement under the Brussels Regulation, including also the so called "procedural judgements", without any distinction being drawn according to the content of the judgements in question.

But, above all, such request for "indirect" recognition of the award, via the *exequatur* judgement emitted by the competent court, would probably elude the precedence of the New York 1958 Convention over the Brussels Recast Regulation, now explicitly affirmed in the Recital 12 of the Regulation. The Brussels Regulation would be applied to a matter (the recognition and enforcement of arbitral awards) explicitly excluded by its subject-matter.

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In the light of the above, it appears that the parties of an arbitration benefit only partially of the growing effectiveness of Brussels system of recognition and enforcement of judgements. This partial exclusion seems to derive from the (undoubted) complexity of harmonizing different Conventions and legal traditions, instead from a considered choice made by the EU legislator.

Then, as a further development of the matter, possible lines of intervention could be:

i. an amendment to Art. 35 of the Brussels Recast, so to permit the judicial adoption, pending arbitration, of "worldwide" provisional measures recognizable under Brussels Regulation. Taking inspiration from rules in force in some Member States, the competence to adopt such measures could be assigned to the court of the Member State which would be

34 C-456/11, *Gothaer Allgemeine Versicherung AG and others* v. *Samskip GmbH*, ECLI:EU:C:2012:719.

competent on the merits in absence of the arbitration clause.

ii. an implemented coordination between the New York 1958 Convention and the Brussels system, which could permit the effective adoption of provisional measures in favour of the party who prevailed in the arbitration proceedings, solely on the basis of the award, without any need for re-evaluation of the case on the merits.

5. The risks arising from conflicts of competence

Conflicts of competence can be either positive or negative, depending on which two or more courts both claim to have jurisdiction or reject to settle the dispute by declining it, according to their own procedural laws; in the latter case, the claimant is left unable to find a forum.

Unresolved positive conflicts lead to two different, contrasting judgments being issued on the same case. Even if a positive conflict is resolved, this is likely to cause lengthy delays for the claimant in obtaining justice, as well as increasing their expenses, while generating additional unnecessary work for the courts in questions. Negative conflicts instead lead to the risk of a denial of justice if left unresolved. Again, even if they are resolved there are likely to be delays and additional costs.

Because of the difficulties which occur when conflicts of competence arise, most legal systems have established frameworks to prevent them from happening in the first place, assuming, in other words, that prevention is better than cure.

This is also true of most European Member States, the legal systems of which carefully regulate where competence lies among their own courts to prevent either positive or negative conflicts. For example, in Germany and Austria, the judge who is first seized in a case is empowered to refer the matter to another judge if s/he believes that the jurisdiction properly belongs to them[35]. In the case of both these countries, this action is in fact binding. This avoids the risk of the second court declining competence on the grounds that it belonged to the first court after all, which would again lead to a denial of justice.

With regards to the treatment of jurisdiction under Italian law, Art. 41 of the Civil Procedure Code is relevant: "*Until the case is decided on the merits, in the first instance, each party may request to the Italian Supreme Court sitting* en banc, *to solve issues of jurisdiction under article 37 of the Italian Civil Procedure Code. The request shall be filled by motion, pursuant to article 364 of the Italian Civil Procedure Code and what follows and has the effect under article 367 of the Italian*

35 A. NUYTS, *Study on Residual Jurisdiction. Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations. General Report.Service Contract with the European Commission* JLS/C4/2005/07-30-CE)0040309/00-37, 2007 Brussels, Belgium, p.21.

Civil Procedure Code". Therefore, the Italian system for determining matters of jurisdiction differs from those of, e.g. Germany and Austria, as every judge interprets the rules in order to determine his or her own jurisdiction, and may not be bound by the decision of any other judge in this regard. Disputes over jurisdiction may however be resolved by the Supreme Court in a binding manner as described above, which acts to prevent conflicts of competence.

6. Conflicts of competence in international litigation.

As has been made clear, there are differences in the manner in which different jurisdictions govern how jurisdiction is determined. Because of this, negative conflicts can arise with respect to jurisdiction in matters of international legislation, if it not possible to seize any court that considers itself to have jurisdiction over the matter. For example, a case involving a citizen of one State resident in another might lead to justice being denied, if the state of residency applies a citizenship criterion while the state of citizenship applies a residency criterion[36].

In the most extreme case, a jurisdiction may avoid the risk of the denial of justice, even in cases which could not normally be tried in their own system, by making their courts available to be used as a *forum necessitatis*, which may extend to providing a court for cases involving international litigation. For example, if the court which would normally have jurisdiction cannot be accessed due to war, then under the law of the Netherlands, a Dutch court may act as a *forum necessitatis* for such a case[37]. The principle that "*where no other court is competent, every court is competent*" is therefore being applied. However, this offers only a partial solution to the matter. Under other legal systems, such as that of England and Wales, this is not possible, and case law suggest that valid links to the country of the court seized may be required. Therefore, even if negative conflict as strictly defined under ECHR Article 6(1) has been avoided, a "*restriction of the right of access*" can still be considered to have occurred[38].

The provision of *fora necessitatis* in certain legal systems within Europe does not therefore eliminate the risk of denial of justice during international litigation. Clearly, there is a need for a law to govern this eventually at the European Level in international litigation, equivalent to the systems already established to avoid such problems at national level. Unfortunately, as we now argue, such provision are currently lacking, and this has not been resolved during the Brussels Recast. Under Section 9 of the Brussels I Regulation, rules that regulated positive conflicts of competence that

36 R. D. BERLINGHER, *The Renvoi in Private International Law*, International Journal of Social Science and Humanity, Vol. 3, No. 1, January 2013, p.66.
37 L. R. KIESTRA, *The Impact of the European Convention on Human Rights* on *Private International Law*, Springer, 2014, p.105.
38 ID., p.104

might have arisen between the courts of different Member States were put in place, within Article 22: "*Where actions are related, the first duty of the court is to stay its proceedings. The proceedings must, however be pending at the same level of adjudication, for otherwise the object of the proceedings would be different and one of the parties might be deprived of a step in the hierarchy of the courts. Furthermore, to avoid disclaimers of jurisdiction, the court may decline jurisdiction only if it appears that the court first seized has jurisdiction over both actions, that is to say, in addition, only if that court has not jurisdiction over the second action. The court may decline jurisdiction only on the application of one of the parties, and only if the law of the court first seized permits the consolidation of related actions which are pending in different courts*"[39]. No such set of rules was however established to resolve any negative conflicts that might arise.

7. The need to resolve negative conflict at the European level.

Under Section 9 of the Brussels I Regulation, rules that regulated what might be termed positive conflicts were put in place. No such set of rules was however established to resolve any negative conflicts that might arise, despite the fact that these can and do also occur.

These may happen, in particular, when both the first and second courts seized do not consider themselves to have competence over the matter; or, likewise, because the Courts in question have not requested the European Court of Justice to provide an authentic interpretation of the European regulations, as it is only the court of last instance that is obliged so to do. However it has been noted that *"if the negative competence conflict results in the differing evaluation of the underlying facts according to the various national procedural rules of evidence, not even a reference to the European Court of Justice can fully exclude the risk of negative competence conflict"* [40].

As noted above, it is essential that any plaintiff has recourse to the law, and this fact is actually alluded to in ECHR Article 6, but has regrettably never been directly endorsed by any court judgement. Perhaps surprisingly, Brussels Recast has also failed to resolve this matter, by, for example, plainly stating that the court first seized may, if it considers itself to lack competence in the matter in question, refer proceedings, in a binding manner, to the court which considers to have this competence[41].

However, the extension of this kind of binding "transferral of competence" is not straightforward. In fact, the likelihood that – in cross-border litigation – it may involve a transfer of competence from the court of one Member State to that of another is challenging for several

39 Jenard Report on the Brussels Convention, OJ 1979 C 59, p.1

40 K. RUPRECHT, *Report on the Application of Regulation Brussels I in the Member States*, Universität Heidelberg, Study JLS/C4/2005/03, p.213.

41 ID., p.212.

reasons.

Firstly, it has already been established under Brussels I that the jurisdiction of a single State Court cannot be established by a decision made by a Court of any other Member State.

Secondly, an informed claimant might attempt to abuse the system, by launching their proceedings in a court with lack of competence in a matter but which allows a binding transfer to another court which offers a more advantageous forum for their interest. The participation of more Member States in the European Union will presumably only serve to increase the risk of this kind of "bad" forum shopping.

These complications might have been avoided if the Brussels Recast had taken a different approach towards resolving the initial lack of clarity in the granting of provisional measures.

It has been argued, for example, that Art. 27 of Brussels I could have been changed to state that only the court designated in a standard form could make a judgement regarding the jurisdiction[42]. In this model, "*any other court seized in disregard of this designation [would be required to stay] its proceedings irrespective of whether it was seized prior or subsequently to the court designated or whether at all the court designated is seized ("competence-competence")*" [43]. This would not offer a perfect solution either as it would oblige a party seeking nullity to first seize what had been designated by the void agreement, which must happen prior to the institution of proceedings with any other court[44].

8. The use of the Nice Charter to resolve negative conflicts on competence.

As the European law maker has failed to find a suitable solution to negative conflicts of competence, there is another way for the domestic court judges who deal this issue.

The second court seized to grant a provisional measure may directly affirm competence, instead of declining, on the basis that it would cause a denial of justice in breach of Art. 47 of the Nice Charter of Fundamental Rights of the European Union (hereafter "Nice Charter") ,which affirms the "*Right to an effective remedy and to a fair trial*".

Alternatively, this Court could spontaneously request the ECJ to provide an authentic and binding interpretation which excludes any possible denial of justice. In fact, pursuant to article 267 of the Treaty on the Functioning of the European Union "*Where a question [concerning the interpretation of European Law] is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give*

42 ID., p.216.
43 ID., p.217.
44 ID., p.217.

judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court".

Both of the aforementioned solutions are possible due to the fact that the Nice Charter has, after the adoption of the Lisbon Treaty[45], become a binding provision of the European Union[46].

This solution is different from the suggested applications of Art. 6 of the European Convention on Human Rights, because a violation of such provision cannot be claimed before the European Court of Justice, but only before the European Court of Human Right which is not an institution of the European Union. For this reason, as stated above, the second court, which was going to decline its competence, could refer to the ECJ only if the different evaluation of the competence existing between itself and the first court seized by the claimant depends on a different interpretation of European Law, such as the Brussels I and the Brussels Recast regulations.

The right to an effective remedy and to a fair trial, stated in art. 47 of the Nice Charter, could instead be considered itself as a parameter for assessing an interpretation of the relevant European Law of a nature that does not cause a denial of justice.

In other words, the ECJ will be requested to give a ruling even though the rules governing the jurisdiction has not been materially breached but nevertheless the application of those rules has led to a negative conflict of competence and therefore a denial of justice.

For example, it may happen that after a court has incorrectly claimed a lack of competence, a second may do so correctly, but cannot refer the matter back to the first. Hence, if the Brussels Recast was applied correctly by the second court, the outcome would in fact be contrary to European Law, as Art. 47 would be breached due to the resulting denial of justice.

It should be noted that the European Court of Justice has already declared void certain European Laws on the grounds that they breached the principles expressed in Art. 47 of the Nice Charter[47].

Precedents therefore exist for the use of the Nice Charter as a "determinative standard of review" for assessing the correct application of the European Law[48]. In the same way it should be possible, in the case of a negative conflict of competence leading to the prospect of a denial or justice, for a second court to stay the proceeding and begin a preliminary ruling to demand an

45 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

46 In accordance with Article 6(1) Treaty on the European Union, the European Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, "*which shall have the same legal value as the Treaties*". The provisions are still not binding for some Member States, see the annex attached to the Charter for more details.

47 Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke* and *Eifert*.

48 F. FONTANELLI, *The European Union's Charter of Fundamental Rights two years later, Perspectives on Federalism*, Vol. 3, issue 3, 2011, E-22; see also Case C-279/09 *DEB Deutsche Energiehandels-* und *Beratungsgesellschaft mbH*.

interpretation of the existing rules that avoids any breach of Art. 47.

However, as this procedure can be slow while provisional measures, by nature need to be treated in a prompt way, applications of this sort should be prioritized as an urgent procedure. A possible solution can be found in the provision stated in Art. 23(a)[49] of the protocol on the statute of the Court of Justice of the European Union, pursuant to which the "*Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure*".

As negative conflicts of competence can lead to a denial of justice, any matter of this nature shall be, by an amendment to the current Rule of Procedure, considered eligible for an urgent preliminary ruling.

The European Court of Justice would then need to promptly provide an interpretation which is sufficient to exclude a denial of justice for the relevant case.

The suggested solution to the issue of negative conflict, through the application of Art. 47 of the Nice Charter, would thus assign to the European Court of Justice a new general function as a court deemed capable of resolving negative conflict of competence across the European Union, a role which at the domestic level is often conferred upon the national supreme court.

In spite of the criticism that the Brussels Recast Regulation has met as regards provisional measures, its new rules have been welcomed by some authorities.

However, in other ways Brussels Recast has not improved upon the Brussels I Regulation as much as might have been hoped. For example, Brussels Recast has been suggested to provide a safeguard against forum shopping, but it has been argued above that this interpretation is not necessarily supported, and that obliging courts to recognize provisional measures from other jurisdictions – even if permitted – may actually increase the risk of forum shopping. At the same time, it has also been suggested that a serious and actual risk of denial of justice might also occur if courts decline to take competence upon themselves because of a lack of guidance.

To resolve these outstanding issues, this proposal has argued for an alternative approach based on the Nice Charter as described above. In order to establish a framework in which an approach of this kind might be developed, it will be necessary to explore cross-border studies which might be affected by these issues, for example through the current Themis 2016 competition.

49 Article inserted by Decision 2008/79/EC, *Euratom* (OJ L 24, 29.1.2008, p. 42).