THE RECOGNITION AND ENFORCEMENT OF FOREIGN INTERIM MEASURES IN SWITZERLAND

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I. Introduction

In a globalised world, few legal relationships are purely domestic. When a legal dispute arises, coordination among the various legal systems involved is therefore critical, in particular where time is of the essence and interim measures are

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required to maintain the *status quo*. Such measures may be required in Switzerland because this is where the assets that are subject to the dispute are located or where one or more of the parties, or third parties, involved in the dispute are based. In this context, two options are available to the party seeking interim measures: (i) request a Swiss court to issue interim measures in support of foreign proceedings, or (ii) request the enforcement in Switzerland of interim measures issued by a foreign court. The present article focuses on the latter scenario.

Obtaining Swiss interim measures may seem the more straightforward approach and help prevent issues at the enforcement stage. However, there may be good reasons for a party to prefer to request interim measures abroad and their subsequent enforcement in Switzerland instead. Depending on the circumstances, the foreign court seised of the merits may be more familiar with the case and, as a result, more inclined to order interim measures than a Swiss court. There are also practical and procedural benefits to centralizing the proceedings in the same jurisdiction as the main proceedings. Moreover, and probably most importantly, the type of interim measures envisaged may not be available under Swiss procedural law – for example, the equivalent of English Worldwide Freezing Orders (WFOs). Additionally, a foreign court may simply have powers, that a Swiss court would not, to issue interim measures that are more suited to the matter.[1]

The enforcement and execution of foreign interim measures in Switzerland remain, however, full of pitfalls. Although Switzerland adopted a unified set of rules regulating civil procedure in 2011 with the Swiss Code of Civil Procedure (SCCP), the judiciary and courts' organisation remain within the jurisdiction of the cantons. Accordingly, there are almost as many different interpretations of the SCCP as there are cantons.

This article aims to provide guidance on (i) the process for recognition and enforcement of foreign interim measures in Switzerland (see below II) and (ii) the execution of such processes (see below III). To this end, we will first describe the legal framework applicable to the recognition and enforcement of foreign interim measures in Switzerland, *i.e.* the process whereby a foreign decision acquires the effects attributed to it in its State of origin. We will then focus on the concrete

[1] In a 2018 judgment, the Vaud Court for Debt Recovery and Bankruptcy Proceedings refused to grant a Swiss attachment order requested by an applicant which had previously obtained a Worldwide Freezing Order (WFO) from an English court. The applicant could have sought enforcement of the WFO but surprisingly did not do so; instead, the applicant requested a Swiss (independent) attachment order on the basis of Article 271(1)(2) of the Swiss Federal Debt Enforcement and Bankruptcy Act (DEBA) on the grounds that the debtor was concealing her assets, absconding or making preparations to abscond so as to evade the fulfilment of her obligations. The court cancelled the attachment order granted by the first instance court, stating that the obtaining of an English WFO did not influence the separate findings on whether the debtor was concealing assets (Vaud Court for Debt Recovery and Bankruptcy Proceedings, 30 October 2018, Séquestre/2018/11, No 279). This example shows that even in cases where interim measures are awarded by a foreign court on the basis of the same set of facts in the same matter, Swiss interim measures may nonetheless be refused. This is despite the fact that the foreign interim measures could be recognised and take full effect on Swiss territory through recognition and enforcement proceedings.

execution of said measures in Switzerland, *i.e.* the implementation methods, and their coercive character. We will further address selected key issues often encountered in practice, as well as specific considerations on English WFOs.

As there is no universal definition of interim measures, which are sometimes referred to as "provisional measures", "protective measures", "conservatory measures" or "provisional relief", we will use in this article the generic term "interim measures" in the sense given by the Court of Justice of the European Union (CJEU; formerly the European Court of Justice). In *Reichert*, the court held that interim measures are taken to mean "measures which are intended to maintain a situation of fact or law in order to safeguard rights whose recognition is otherwise sought from the court hearing the case."[2]

II. The Swiss Legal Framework Regarding the Recognition and Enforcement of Foreign Interim Measures

The legal regime applicable to the recognition and enforcement of foreign interim measures will depend on the issuing court. The 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention)[3] will apply to the enforcement of interim measures issued by the court of a State that is a signatory to the Lugano Convention.[4] In contrast, interim measures issued by a court of another jurisdiction, absent a bilateral agreement between that jurisdiction and Switzerland, will be regulated by the 1987 Swiss Private International Law Act (PILA). The conditions and procedural modalities under each regime are further developed below.

[2] CJEU, 26 March 1992, *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v. Dresdner Bank AG*, C-261/90, ECLI:EU:C:1992:149, para 34. See also Official explanatory report on the Lugano Convention, by Professor Fausto POCAR, *OJ* C 319/1, 23.12.2009 (hereinafter, "the Pocar Report"), para 126.

[3] The Lugano Convention is the successor to the 1988 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (1988 Lugano Convention). The 1988 Lugano Convention and the Lugano Convention are parallel agreements to the 1968 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention) and Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), respectively. The Lugano Convention has not been further aligned with Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[4] Given that most decisions now fall within the scope of the Lugano Convention, this article will focus on the application of this Convention.

A. Enforcement of Interim Measures Issued by a Court of a Lugano Convention Contracting State

1. Conditions for Enforcement

Interim measures are not defined in the Lugano Convention,[5] but rather by national laws which are to be interpreted in light of the case law of the CJEU.[6] Accordingly, many types of decision qualify as interim measures.[7] The definition given by the CJEU in *Reichert*,[8] mentioned above, generally includes interim measures provided by Swiss law. However, a particular category of interim measures, namely those which take effect anticipating the decision on the merits ("*mesures d'exécution anticipée*"), raise certain practical issues and can only be recognised in Switzerland under stricter conditions (see below c).[9]

Interim measures rendered by the court of a State that is a signatory to the Lugano Convention are considered "decisions" under the meaning of Article 32 Lugano Convention.[10] As such, they are recognised and enforceable in Switzerland pursuant to Articles 38 to 56 Lugano Convention,[11] provided the related conditions are met as further detailed below. In particular, the decision must satisfy certain procedural safeguards, namely the respondent's right to be heard (see below a). The issuing court must also have jurisdiction: either on the merits of the case under one of the grounds laid down in the Lugano Convention or under national law,

[5] The experts in charge of the revision of the 1988 Lugano Convention intentionally chose not to define it (see the Pocar Report, paras 124 and 125); F. GUILLAUME/ N. PELLATON, Le séquestre en tant que mesure conservatoire visant à garantir l'exécution des décisions en application de la Convention de Lugano, in F. BOHNET (ed.), *Quelques actions en exécution*, Neuchâtel 2011, para 7.

[6] Pocar Report, para 126.

[7] See Commission of the European Communities, Communication to the Council and the European Parliament, Towards greater efficiency in obtaining and enforcing judgments in the European Union, 26 November 1997, COM [97] 609, para 23: "A comparative survey of national legislation reveals that there are virtually no definitions of provisional/protective measures and that the legal situations vary widely. The only convergence that can be ascertained is between the function of such measures, which is to secure the subsequent enforcement of judgments on the substance of a case (or their anticipated enforcement), organise factual situations or the parties' rights *pro tem* and safeguard all interests affected pending settlement of the dispute."

[8] CJEU, 26 March 1992, *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v. Dresdner Bank AG*, C-261/90, ECLI:EU:C:1992:149, para 34.

[9] Pocar Report, para 126 *in fine*.

[10] Swiss Federal Court, 22 October 2009, ATF 135 III 670, para 3.1.2.

[11] Swiss Federal Court, 30 July 2003, ATF 129 III 626 (*Uzan v. Motorola Credit Corporation*), concerning an English WFO; Swiss Federal Court, 22 October 2009, ATF 135 III 670, concerning a *sequestro conservativo*; CJEU, 21 May 1980, *Bernard Denilauler v. SNC Couchet Frères*, C-125/79, ECLI:EU:C:1980:130; S. KOFMEL EHRENZELLER, in F. DASSER/ P. OBERHAMMER (eds), *Kommentar zum Lugano-Übereinkommen (LugÜ),* 2nd ed., Bern 2011, Article 31, para 34; Pocar Report, para 130.

provided that there is a connecting link between the court and the subject matter of the measures sought (see below b).[12] It is also worth noting that some measures may qualify as interim measures in one jurisdiction even though they are in substance procedural measures or measures for the taking of evidence. These measures would not fall within the definition of a "decision" under the Lugano Convention and can therefore not be recognised and enforced.[13]

a) Minimum Procedural Safeguards and Right to Be Heard

In *Denilauer*,[14] the CJEU held that foreign interim measures will not be recognised and enforced under the Lugano Convention if they were delivered without previous notice to the respondent. Applying *Denilauer* in the landmark "*Motorola*" ruling of 2003, the Swiss Federal Court held that foreign interim measures could be recognised if the interim proceedings *might* have become contradictory before enforcement was sought in Switzerland.[15] In other words, the respondent must have been given the *opportunity* to object or appeal the interim decision before its recognition is sought in Switzerland.[16] The Swiss Federal Court has not specified the timeframe which should be given to the respondent to exercise his/her right to be heard before the applicant can seek enforcement of the foreign interim

[12] Pocar Report, para 126.

[13] In *St. Paul Dairy*, the CJEU held that "a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard is not covered by the notion of 'provisional, including protective, measures'" (CJEU, 28 April 2005, *St. Paul Dairy Industries NV v. Unibel Exser BVBA.*, C-104/03, ECLI:EU:C:2004:509). See also Vaud Court of Appeal, 8 December 2011, No 240, which left open the question whether a *mesure d'instruction in futurum* provided under French law would be enforceable under the Lugano Convention, but noting that a measure of *preuves à futur* (*i.e.* precautionary taking of evidence), as known under Swiss law, would not; J. ROUVINEZ, Le sort des mesures de preuve à futur du droit suisse dans le système de la Convention de Lugano, *Journal des tribunaux* (JdT) 2012/III, p. 219.

[14] CJEU, 21 May 1980, *Bernard Denilauler v. SNC Couchet Frères*, C-125/79, ECLI:EU:C:1980:130.

[15] Swiss Federal Court, 30 July 2003, ATF 129 III 626 (*Uzan v. Motorola Credit Corporation*); Swiss Federal Court, 1st March 2006, 4P_331/2005.

[16] A *decreto ingiuntivo*, which, under Italian law, is immediately enforceable, *i.e.* without the opportunity being given to the respondent party to challenge it before it becomes enforceable, is not a decision that can be recognised and enforced in Switzerland within the meaning of Article 32 Lugano Convention. To be enforceable, there must have been an opportunity for the defendant to be heard in contradictory proceedings (Swiss Federal Court, 21 August 2015, 5A_752/2014 and Swiss Federal Court, 8 April 2013, ATF 139 III 232; CJEU, 13 July 1995, *Hengst Import BV v Anna Maria Campese*, C-474/93, ECLI:EU:C:2001:647, paras 14, 19 and 20). By contrast, if the same type of interim measure is declared enforceable by the Italian courts "in the absence of opposition by the debtor", it can be recognised in Switzerland (Swiss Federal Court, 3 July 2012, 5A_48/2012).

measure.[17] This should be decided on a case-by-case basis and the court has wide discretionary powers in this respect.[18] For instance, a three-week deadline was considered sufficient,[19] but a five-working-day period insufficient.[20] As an illustration, in a 2017 decision, the Geneva Court of First Instance considered that the absence of formal service of an English decision to the respondent was not an obstacle to recognition and enforcement since the respondent had in fact received the decision, albeit not through formal channels. It had therefore, in reality, been given the opportunity to defend itself but had validly waived its rights.[21]

Denilauer, although well-established case law, has often been criticised for removing the element of surprise, as it prevents the enforcement of interim measures that have not yet been served on the respondent.[22] Other commentators consider that this notification requirement is unproblematic since the applicant can always request Swiss domestic *ex parte* interim measures (albeit under stricter conditions).[23]

b) Jurisdiction of the Foreign Court and the "Real Connecting Link" Requirement

To be recognised under the Lugano Convention, interim measures must meet a specific jurisdictional threshold. In *Motorola*,[24] the Swiss Federal Court held, in

[17] According to S. PHURTAG, the applicant must at least wait for the deadline for challenging the foreign decision abroad to pass before seeking recognition (S. PHURTAG *Vorsorgliche Massnahmen im internationalen Zivilprozessrecht*, Bern 2019, para 802; W. GERHARD, *Vorsorgliche Massnahmen bei fehlender Hauptsachezuständigkeit*, in *Vorsorgliche Massnahmen aus internationaler Sicht*, Zürich 2000, para 650); see also S. GIROUD, Do You Speak Mareva? How Worldwide Freezing Orders Are Enforced in Switzerland, in this *Yearbook* 2012-2013, p. 445.

[18] Swiss Federal Court, 7 January 2008, 5A_560/2007, para 3.3.2.

[19] Swiss Federal Court, 7 January 2008, 5A_560/2007.

[20] Swiss Federal Court, 1st March 2006, 4P_331/2005.

[21] Geneva Court of First Instance, 23 November 2017, JTPI/15321/2017; see also, Swiss Federal Court, 9 January 2019, 5A_711/2018, para 6.3.1.

[22] See D. TUNIK, L'exécution en Suisse de mesures provisionnelles étrangères : un état des lieux de la pratique, *Semaine judiciaire* (SJ) 2005 II, p. 325; see also the references cited in M. VEIT/ T. K. SPRANGE, Enforcing English Worldwide Freezing Injunctions in Switzerland – Denilauler, Van Uden and Mietz revisited, in *Business Law International* 2004, p. 409.

[23] Y. DONZALLAZ, *La Convention de Lugano du 16 septembre 1988 concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale*, Vol. 2, Berne 1996-1998, paras 2162 *et seq.*; D. FAVALLI/ T. AUGSBURGER, in C. OETIKER/ T. WEIBEL (eds), *Basler Kommentar Lugano-Übereinkommen*, Bâle 2011, Article 31, para 212.

[24] Swiss Federal Court, 30 July 2003, ATF 129 III 626 (*Uzan v. Motorola Credit Corporation*), para 5.3.2.

line with the *Van Uden* and *Mietz* decisions by the CJEU,[25] that foreign interim measures will be recognised and enforced in Switzerland: (i) if they are ordered by a foreign court having jurisdiction (concrete or virtual) on the merits under the Lugano Convention, or (ii) if they are ordered on the basis of Article 31 Lugano Convention, which enables a court that does not have jurisdiction on the merits to issue interim measures, provided, however, there exists a "real connecting link" between the subject matter of the measures sought and the territorial jurisdiction of the court before which those measures are sought.

Determining whether the foreign court issuing the measures had concrete or virtual jurisdiction (first scenario) may not be immediately apparent from its decision. Absent a specific reference in the foreign decision, the Swiss court enforcing the decision should determine whether jurisdiction can be established for the foreign court under the Lugano Convention.[26] However, difficulties may arise in practice. As an illustration, in a 2019 decision, the Geneva Court of First Instance refused to enforce interim measures rendered by the District Court of Hamburg and held that the German court "did not appear to have territorial jurisdiction to take such measures," as the order did not indicate on which provisions of domestic or international law the German court had based its territorial and substantive jurisdiction.[27] The Geneva court did not examine whether the foreign court had jurisdiction (concrete or virtual) to issue its decision. Given that the grounds for jurisdiction were not directly specified in the German interim measure decision, the Geneva court held that the measures were ordered under German law within the meaning of Article 31 Lugano Convention. As they dismissed the matter on other grounds, they did not examine further whether the "real connecting link" requirement was met. Practitioners should anticipate these issues by ensuring that the foreign court specifies the basis on which the interim measure order is issued or demonstrate the existence of such jurisdiction in their application for recognition and enforcement.

If issued under Article 31 Lugano Convention (second scenario), interim measures must meet a higher jurisdictional threshold to be recognised and enforced abroad. They must be based on a "real connecting link" between the jurisdiction of the issuing court and the matter.[28] The reference to a real connecting link should be understood as an invitation to the court seised to exercise with circumspection its jurisdiction pursuant to Article 31 Lugano Convention.[29]

[25] CJEU, 17 November 1998, *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line and Another*, C-391/95, ECLI:EU:C:1998:543, where the CJEU had to deal with the enforcement of Dutch interim measures that provisionally ordered the respondent to pay a contractual debt (*kort geding*); CJEU, 7 April 1999, *Hans-Hermann Mietz v. Intership Yachting Sneek BV,* C-99/96, ECLI:EU:C:1999:202.

[26] See D. TUNIK (note 22), p. 304.

[27] Geneva Court of First Instance, 19 June 2019, JTPI/9033/2019.

[28] CJEU, 17 November 1998, *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line and Another*, C-391/95, ECLI:EU:C:1998:543 and CJEU, 27 April 1999, *Hans-Hermann Mietz v. Intership Yachting Sneek BV,* C-99/96, ECLI:EU:C:1999:202.

[29] See D. TUNIK (note 22), p. 309.

c) "Early Enforcement" Interim Measures

So-called "early enforcement" interim measures are a certain type of interim measures which pre-empts the result of the decision on the merits; their purpose is to ensure performance of the right which is the subject of the dispute on the merits. The best-known examples are the *référé-provision* under French law and the *kort geding* under Dutch law. Such measures may be recognised and enforced in Switzerland under the Lugano Convention regime, but under stricter conditions than those governing other traditional interim measures.[30]

In particular, early enforcement interim measures can easily be recognised and enforced when the court issuing them has jurisdiction over the merits of the dispute under the Lugano Convention.[31] If issued on the basis of Article 31 Lugano Convention, early enforcement measures may only be implemented if additional conditions are met.[32] Such measures must be coupled with specific safeguards so that the *provisional* character of the measure can be ensured. This is required as the enforcement of such measures leads *de facto* to the enforcement of the claim on the merits. The order must therefore provide a guarantee to the respondent that the *status quo ante* will be restored if the claim on the merits proves to be unfounded.[33] If the *status quo ante* cannot be restored, the measure is not enforceable.

In practice, it may be difficult to determine whether a certain type of interim measure would qualify as an "early enforcement measure". Although, in the view of the authors, the decision is disputable, in 2019 the Geneva Court of First Instance took a clear position: it categorised a prohibition measure (on the sale of concert tickets) that was issued by a German court against a company located in Switzerland as an "early enforcement measure".[34] The Geneva Court considered that the German court had issued this decision on the basis of its own national law. As a result, the conditions developed by the Swiss Federal Court for recognition of early enforcement measures needed to be fulfilled. In that case, since the ban on concert tickets did not provide any guarantee or security in the event that the claim

[30] CJEU, 17 November 1998, *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line and Another*, C-391/95, ECLI:EU:C:1998:543, paras 46 and 47; CJEU, 27 April 1999, *Hans-Hermann Mietz v. Intership Yachting Sneek BV,* C-99/96, ECLI:EU:C:1999:202*,* para 42; Swiss Federal Court, 30 July 2003, ATF 129 III 626; Swiss Federal Court, 17 September 1999, ATF 125 III 451; D. FAVALLI/ T. AUGSBURGER, (note 23), Article 31, paras 56 *et seq.*; F. GUILLAUME/ N. PELLATON (note 5), para 10.

[31] D. FAVALLI/ T. AUGSBURGER, (note 23), Article 31, paras 56 *et seq.*; A. BUCHER, in A. BUCHER (ed.), *Commentaire romand, Loi fédérale sur le droit international privé (LDIP)/Convention de Lugano (CL)*, Bâle 2011, Article 31 CL, paras 43 *et seq*.

[32] These conditions were developed in the context of early performance of a contractual service (Swiss Federal Court, 17 September 1999, ATF 125 III 451, para 3a). Their applicability to other forms of early enforcement measures, such as a restraining order in the context of a tort claim, has never been decided to date by the Swiss Federal Court or by the CJEU.

[33] Swiss Federal Court, 17 September 1999, ATF 125 III 451, para 3b; Swiss Federal Court, 31 August 2007, 4A_80/2007; A. BUCHER (note 31), Article 31 CL, paras 43-46.

[34] Geneva Court of First Instance, 19 June 2019, JTPI/9033/2019.

was subsequently rejected on its merits, the prohibition measures did not allow a return to the *status quo ante* and could thus cause irreparable harm to the party against which the measures were directed. Against this background, the Geneva Court of First Instance refused to recognise the German order.

2. Procedure

The enforcement of foreign interim measures follows the usual (non-adversarial) procedure for recognition provided by Articles 41 *et seq.* Lugano Convention. Article 41 Lugano Convention gives an automatic right to the applicant to obtain an exequatur[35] of a decision, without being subject to examination of the general conditions for recognition set forth in Articles 34 and 35 of the Convention. Pursuant to Article 39(1) Lugano Convention, the request for recognition is to be submitted to the court or to the competent authority as indicated in Annex II of the Convention. For Switzerland, this will be the "cantonal enforcement court". Pursuant to Article 39(2) Lugano Convention, local jurisdiction is determined by reference to the respondent's place of domicile or by reference to the place of enforcement.

Article 40(1) Lugano Convention provides that "the procedure for making the application shall be governed by the law of the State in which enforcement is sought." The applicant must give an address for service within the area of jurisdiction of the court receiving the application (Article 40(2) Lugano Convention). The documents referred to in Articles 53 and 54 Lugano Convention, *i.e.* the original or certified copy of the decision[36] and the certificate using the standard form (set out in Annex V to the Convention), must be attached to the application.[37] No legalisation or apostille is required for original documents (Article 56 Lugano Convention). If the certificate cannot be produced in a timely manner, or at all, the court or other competent authority may, pursuant to Article 55(1) Lugano Convention, specify a time for its production, accept an equivalent document[38] or, if it considers that it has sufficient information, renounce the requirement for the document's production altogether. A translation of the decision and certificate is

[35] The exequatur refers generally to the procedure that aims to declare a foreign judgment enforceable before the actual enforcement; it encompasses the declaration of enforceability.

[36] The production of a photocopy is insufficient, even if the respondent does not dispute compliance with the original (Swiss Federal Court, 24 September 2009, 5A_241/2009, para 2.2).

[37] An applicant whose application is rejected for failure to produce one of these two documents may submit a new application with the missing document. In such cases, the decision refusing the exequatur has no *res judicata* effect (Swiss Federal Court, 9 February 2001, ATF 127 III 186).

[38] *E.g.* if the applicant can otherwise demonstrate the enforceability of the decision in the State of origin by means of a certificate (or stamp) affixed directly on the decision, from which it is apparent that it was not rendered by default.

not mandatory but may be requested by the court of the requested state (Article 55(2) Lugano Convention).[39]

According to Article 41 Lugano Convention, the enforcing court may declare the decision enforceable as soon as the formalities provided for in Articles 53 and 54 Lugano Convention are satisfied, without hearing the opposing party or examining the grounds for refusal (set out in Articles 34 and 35 Lugano Convention). The respondent may appeal the exequatur decision. In this instance, the authority hearing the appeal will examine, with full power of review (Article 327a(1) SCCP), whether there are any grounds for refusing recognition and enforcement. The time limit for appealing against the exequatur decision is one month if the respondent lives in Switzerland and two months if he/she is domiciled in another State bound by the Convention (Articles 43(5) Lugano Convention and 327a(3) SCCP). For an unsuccessful applicant, however, the deadline is only 10 days (Article 321(2) SCCP).[40]

3. Protective Measures in Support of the Enforcement

As soon as the decision is enforceable in the State of origin, "protective measures" may be requested in Switzerland, prior to obtaining a declaration of enforceability, pursuant to Article 47(1) Lugano Convention. Any measures ordered pursuant to this provision must in principle comply with Swiss law and its conditions – for example, the condition of urgency.[41]

Once the declaration of enforceability has been obtained, the party seeking enforcement is entitled to obtain "protective measures" in the State of enforcement pursuant to Article 47(2) Lugano Convention.[42] The declaration of enforceability of

[39] The Geneva courts do not seem to require a French translation (Geneva Court of Appeal, 10 February 2017, ACJC/146/2017).

[40] F. GUILLAUME/ N. PELLATON (note 5), para 6.

[41] Under the SCCP, the applicant for an interim measure has to establish the likelihood that he/she is entitled, on the merits, to the same relief which the requested interim measure is intended to protect (*i.e.* the likely existence of a valid cause of action on the merits); that there is an impending injury to the rights on which the applicant relies (condition of "urgency"); and that if no interim relief is granted, the detriment resulting from the injury may not be easily remedied ("irreparable harm"). In addition, the provisional measure requested has to respect the principle of proportionality and be appropriate in view of both parties' interests ("balance of interests"). Compliance with these criteria must be established *prima facie*. The threshold is thus lower than a requirement for full proof, but it nonetheless requires more than mere allegations. If these conditions are fulfilled, courts may order any interim measure suitable to prevent imminent harm.

[42] The measures based on Article 47(2) Lugano Convention must at least constitute "an effective and unconditional security measure", that is "independent of other material requirements such as a state of urgency". By contrast, Swiss law requires the existence of urgency (*Message relatif à l'arrêté fédéral portant approbation et mise en œuvre de la Convention de Lugano révisée concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, FF 2009 1497, p. 1532).

a decision rendered by the court of a Contracting State gives a "right" to the applicant to request protective measures available under Swiss law (Article 47(2) Lugano Convention),[43] but without having to comply with the conditions of Swiss law for ordering them.

In practice, interim measures requested in support of the exequatur (whether ordered on the basis of Articles 47(1) or 47(2) Lugano Convention), *i.e.* "exequatur measures", often overlap with the execution as such of foreign interim measures, *i.e.* with "execution measures". In a 2020 decision, the Swiss Federal Court addressed the interaction between exequatur measures and execution measures.[44] In particular, it noted that the very nature of a Swiss attachment order, granted on the basis of Article 47(2) and Article 271(1)(6) of the Swiss Federal Debt Enforcement and Bankruptcy Act (DEBA) in support of the declaration of enforceability of an Italian freezing order, had changed once the enforceability decision had become final. When the exequatur was confirmed, the attachment order took on the character of an interim measure based on Articles 33(1) and 38(1) Lugano Convention, which provide for the transposition of a foreign measure into an equivalent measure under Swiss law.[45] This example shows that the boundaries between the execution as such of interim measures and interim measures in support of an exequatur are often blurred. This sometimes leads to unfortunate and even contradictory reasonings from courts, which are difficult to apprehend.

B. Recognition and Enforcement of Interim Measures Issued by a Foreign Court Outside the Scope of the Lugano Convention

The aim of the Lugano Convention regime is to facilitate the recognition and enforcement of decisions within its territorial scope. It is therefore unsurprising that the Swiss regime for recognition and enforcement of foreign decisions is stricter for foreign interim measures, when such recognition and enforcement is not barred altogether.

1. Conditions for Enforcement

A decision rendered by the court of a non-Lugano Convention Contracting State can be recognised and enforced in Switzerland if the following conditions are met: (i) the judicial or administrative authorities of the State in which the decision was rendered must have had jurisdiction (Article 25(a) PILA); (ii) it is not possible to lodge an ordinary appeal against the decision, or the decision is final (Article 25(b) PILA); and (iii) there are no grounds for refusal under Article 27 PILA (Article 25(c) PILA).

[43] See F. GUILLAUME/ N. PELLATON (note 5), para 32.

[44] Swiss Federal Court, 7 January 2020, 5A_311/2018 and 5A_312/2018.

[45] Swiss Federal Court, 7 January 2020, 5A_311/2018 and 5A_312/2018, para 7.1.

The grounds for refusal under Article 27 PILA include: (a) incompatibility with Swiss public policy; (b) lack of proper service of the proceedings on the respondent according to the law of the respondent's domicile or place of habitual residence (unless the respondent had proceeded to the merits without contesting jurisdiction); (c) violation of fundamental principles of Swiss procedural law (in particular if the respondent was denied the right to be heard), or (d) *lis pendens* and *res judicata*.

The question as to whether foreign interim measures issued by the court of a non-Lugano Convention Contracting State should be considered "decisions" within the meaning of Article 25 PILA has long been disputed among scholars and still remains to be decided by the Swiss Federal Court.[46] The legislative work that led to the drafting of PILA did not specify whether foreign interim measures would be considered "foreign decisions" within the meaning of Article 25 PILA.[47] In its Explanatory Report, the Swiss Federal Council further stated that the PILA "does not deal with" the recognition of foreign interim measures.[48] Despite this historical background,[49] the majority of Swiss scholars now seem to consider interim measures to be "decisions" within the meaning of Article 25 PILA.[50] Some authors have also advocated a middle path, namely a differentiated approach based on the nature of the interim measures concerned.[51] To date, the Swiss Federal Court has left the question open[52] and cantonal case law is inconsistent on the issue. Geneva courts, which used to prefer a restrictive approach,[53] now seem to consider such interim measures enforceable decisions,[54] whereas the Vaud courts seem rather

[46] For an exhaustive summary of scholars' positions after the PILA entered into force, see L. GAILLARD, Les mesures provisionnelles en droit international privé, *Semaine judiciaire* (SJ) 1993, p. 147.

[47] *Ibidem.*

[48] *Message concernant une loi fédérale sur le droit international privé (loi de DIP) du 10 novembre 1982*, FF 1983 I 255, p. 320.

[49] S. PHURTAG (note 17), para 121.

[50] B. DUTOIT, *Droit international privé suisse, Commentaire de la loi fédérale du 18 décembre 1987*, 5th ed., Bâle 2016, Article 25, para 9; A. BUCHER (note 31), Article 25 PILA, para 24; O. VOGEL/ K. SPÜHLER, *Grundriss des Zivilprozessrechts und des internationalen Zivilprozessrechts der Schweiz*, 8th ed., Bern 2006, para 15a; S. GRUNDMANN, *Anerkennung und Vollstreckung ausländischer einstweiliger Massnahmen nach IPRG und Lugano-Übereinkommen*, Basel/Frankfurt am Main 1996, p. 97.

[51] See L. GAILLARD (note 46), p. 149, who proposed recognizing regulatory measures (*i.e.* measures aimed at provisionally settling a legal situation pending a decision), but not protective measures as such (*i.e.* measures aimed at ensuring the success of a subsequent compulsory execution). See also T. S. STOJAN, Die Anerkennung und Vollstreckung ausländischer Zivilurteile in Handelssachen, *Zürcher Studien zum Verfahrensrecht* 1986 No 72, p. 49. *Contra* S. PHURTAG (note 17), para 332.

[52] Swiss Federal Court, 18 March 2004, 5P.252/2003, para 3.3.

[53] Geneva Court of Appeal, 8 February 1990, *Semaine judiciaire* (SJ) 1990, p. 196. See D. TUNIK (note 22), p. 290; L. GAILLARD (note 46), p. 144 and 151.

[54] Geneva Court of Appeal, 28 February 2019, ACJC/294/2019, para 3.2; Geneva Court of Appeal, 10 March 2017, ACJC/264/2017, para 4.4.1.

hesitant.[55] Zurich courts initially accepted recognition in principle,[56] but they seem to have subsequently changed their position, although they have not specifically decided on this issue.[57]

As seen above, jurisdiction of the foreign court is the first condition for recognition (Article 25(a) PILA). This condition creates specific issues when enforcing interim measures. When the issuing foreign court has jurisdiction on the merits according to PILA, its jurisdiction to issue interim measures is established. The situation is different when the foreign court relies on a jurisdictional ground similar to Article 10 PILA (the Swiss legal basis for ordering Swiss interim measures in an international context). In such cases, in the authors' view, recognition should not be possible.[58] Indeed, Article 26(a) PILA notably states that a foreign court's jurisdiction is established if it results from a provision of PILA. However, except for Article 96(3) PILA (precautionary measures in relation to heritance law), the PILA does not contain any rule establishing jurisdiction of foreign authorities for issuing interim measures. These considerations lead to the conclusion that if the foreign court issuing the provisional order had no grounds for jurisdiction within the meaning of Article 26 PILA, its decision may not be enforced in Switzerland.

Another difference with the Lugano Convention regime is that, under the PILA, exequatur proceedings are adversarial; accordingly, exequatur cannot be granted without the respondent party having first been heard.[59]

2. Procedure

The application for recognition or enforcement of decisions rendered by non-Lugano Convention Contracting State courts must be submitted to the authority of the canton where the foreign decision is to be invoked (Article 29(1) PILA). Such request must be supported by (i) a certified copy of the decision in full (Article 29(1)(a) PILA), (ii) a confirmation that it is not possible to lodge an ordinary appeal against the decision or that the decision is final (Article 29(1)(b) PILA) and, in the case of a decision rendered by default, (iii) an official document

[55] Vaud Court of Appeal, 12 December 2013, JS13.003426-131791, para 3b, where the court held that the recognition of interim measures issued by a non-EU Member State court was "uncertain" and disputed amongst scholars.

[56] Zurich Court of First Instance, 11 July 1989, para 3, in *Blätter für Zürcherische Rechtsprechung* 1989, No 37 p. 126.

[57] See Zurich Court of First Instance, 23 October 2001, para 3, in *Blätter für Zürcherische Rechtsprechung* 2002, No 84, p. 257. According to PHURTAG, the position of the Zurich court refusing recognition of such measures also derives from a 2013 judgment of the Zurich Commercial Court (Zurich Commercial Court, 17 June 2013, HG050433) in which the court did not have to address the issue but specifically referred to a scholar against recognition, namely P. VOLKEN (see S. PHURTAG (note 17), para 327).

[58] See also D. TUNIK (note 22), p. 310; S. PHURTAG, (note 17), para 312.

[59] See D. TUNIK (note 22), p. 325; A. BUCHER (note 31), Article 29 PILA, para 6.

establishing that the respondent party was duly summoned and had the opportunity to enter a defence (Article 29(1)(c) PILA). However, the confirmation required by Article 29(1)(b) PILA is not mandatorily required. Where the information to be provided is apparent from other documents in the file, the requested authority may dispense with the production of the confirmation.[60]

Pursuant to Article 29(2) PILA, the party opposing recognition and enforcement shall have the right to a hearing and may introduce evidence.

III. Execution of Foreign Interim Measures in Switzerland

Where foreign interim measures meet the conditions for recognition and enforcement in Switzerland, they can be executed, which means they will be implemented in Switzerland pursuant to Swiss civil procedural rules;[61] indeed, the measures will only be implemented to the extent that they match the types of measure available under Swiss procedural law.[62] The translation of foreign interim measures into Swiss procedural law is however not unproblematic. In particular, foreign interim measures must be sufficiently determined.[63]

To help navigate this complex and sometimes obscure field of the law, we set out below the particularities of Swiss interim measures (see below A) and practical issues encountered when transposing foreign interim measures into equivalent Swiss interim measures (see below B). As noted, there is no decision of the Swiss Federal Court on the recognition and enforcement of interim measures issued by foreign courts outside the scope of the Lugano Convention. Unless otherwise specified, our analysis therefore focuses only on interim measures issued by foreign courts that fall within the scope of the Lugano Convention.

[60] Swiss Federal Court, 30 April 2010, 5A_840/2009, para 2.3.

[61] A. BUCHER (note 31), Article 38 CL, para 6; F. GUILLAUME/ N. PELLATON (note 5), para 7.

[62] Swiss Federal Court, 7 January 2020, 5A_311/2018 and 5A_312/2018, para 4.1.

[63] The Swiss Federal Court recently gave a reminder in an *obiter dictum* that foreign interim measures (*in casu* rendered by the court of a Lugano Convention Contracting State) can only be recognised and executed in Switzerland provided that they are sufficiently determined: "*Misure provvisionali sono pure suscettibili di essere riconosciute e dichiarate esecutive* […]*, a patto che la misura ordinata sia sufficientemente determinata*" (Swiss Federal Court, 7 January 2020, 5A_311/2018 and 5A_312/2018, para 6.2). See also S. GIROUD (note 17), p. 448.

A. Particularities of Swiss Interim Measures

Under Swiss law, it is generally accepted that interim measures fall into three categories depending on their function: (i) measures aimed at ensuring the success of a subsequent enforcement (protective measures), (ii) measures aimed at provisionally settling a legal situation pending a decision (regulatory or accompanying measures) and (iii) measures aimed at ensuring the preservation of evidence.[64]

With regard to the execution process under Swiss domestic law, Swiss law further distinguishes between non-monetary claims (*e.g.* specific performance) and monetary claims (*i.e.* payment of an amount of money). Whilst execution of non-monetary claims is governed by the SCCP, in particular Article 335 *et seq*., enforcement of monetary claims is regulated by the DEBA (Article 335(2) SCCP).[65]

Article 340 SCCP is the relevant legal basis for issuing protective orders in the framework of enforcement of non-monetary judgments but it does not list what types of interim measure are permissible. The interim measures can take the form of injunctions, orders to remedy an unlawful situation, orders made to registries or to third parties, etc. In particular, if the decision to execute provides for an obligation to act, to refrain from acting or to tolerate something, the enforcement court may (i) issue a threat of criminal penalty under Article 292 Swiss Criminal Code (SCrC),[66] (ii) impose a disciplinary fine not exceeding CHF 5,000, (iii) impose a disciplinary fine not exceeding CHF 1,000 for each day of non-compliance, (iv) order a compulsory measure such as taking away a movable item or vacating immovable property, or (v) order performance by a third party (Article 343 SCCP). If the decision relates to a declaration of intent, the enforceable decision takes the place of the declaration; if it concerns a public register, such as the land register or the commercial register, the court making the decision must issue the instructions addressed to the registrar (Article 344 SCCP).The parties may draw inspiration from Article 262 *et seq*. SCCP (which is the relevant Swiss provision for domestic interim measures) to identify the type of possible measures they may seek.[67] In practice, a common interim measure order that is requested is the registration of property rights in a public register, such as the Land Register. Interim measures can also be requested to prevent a party from disposing of company shares or moveable property (Article 265 SCCP).

[64] F. GUILLAUME/ N. PELLATON (note 5), para 8.

[65] In practice, the most common situation is that of an applicant wishing to secure a monetary claim by attaching the debtor's assets, such as bank accounts held in Switzerland. By way of an attachment order, the debtor or garnishee (the third party holding the debtor's assets, such as a Swiss bank) is prohibited, under the threat of criminal sanctions, to dispose of or transfer the attached assets (Articles 271 *et seq.* DEBA).

[66] Article 292 SCrC provides that: "Any person who fails to comply with an official order that has been issued to her/him by a competent authority or public official under the threat of the criminal penalty for non-compliance in terms of this provision is liable to a fine."

[67] J. PAHUD, *Le séquestre et la protection provisoire des créances pécuniaires dans le contexte interne et international*, Fribourg 2018, para 86.

It is also noteworthy that, by nature, interim measures provided under the SCCP are *in personam* measures, whereas attachment orders are *in rem* measures, which is an important distinction, as further developed below.

B. Practical Considerations

1. Mere Declaration of Enforceability

Sometimes the mere declaration of enforceability of the foreign interim measures may be sufficient for the applicant and there will be no need for further execution measures, *i.e.* concrete measures implementing the foreign interim measures. Indeed, foreign interim measure orders which have been recognised and declared enforceable in Switzerland take effect in the same way as if they had been rendered by a Swiss court. As an example, in a Geneva case concerning the recognition and enforcement of an English WFO, the applicant requested (and obtained) the exequatur of the order and the court's notification of the exequatur to the bank where the respondent's assets were located. The applicant was satisfied with the notification of the exequatur decision to the bank and did not request any accompanying protective interim measures.[68]

Zurich courts initially considered that a request for a mere declaration of enforceability would be inadmissible due to, inter alia, a lack of legal interest.[69] The Swiss Federal Court clarified this point in 2011 and held that a party benefiting from a foreign interim measure had a legitimate interest in obtaining a mere declaration of enforceability from a Swiss court, without requesting Swiss protective interim measures in support thereof.[70]

However, a declaration of enforceability may not always be sufficient to protect the applicant's rights, as no coercive measures prevent the respondent from violating the order. This is why, in practice, a request for a declaration of enforceability is often combined with a request for protective interim measures and/or a request that enforcement be ordered under the threat of criminal sanctions pursuant to Article 292 SCrC in the event of a breach thereof.

2. Measures in rem *or* in personam*?*

The transposition of foreign interim measures in Switzerland and the type of measures that can be ordered in support thereof will depend on the nature of the foreign interim measure. If the aim of the interim measure is to secure assets, it is essential to determine whether it would have an *in personam* effect, *i.e.* if it is aimed at a person, or an *in rem* effect, *i.e.* if it is aimed at the person's assets.

[68] Geneva Court of Appeal, 11 January 2018, ACJC/59/2018.

[69] Zurich Court of First Instance, 22 December 2010, EU100827. See also S. GIROUD (note 17), p. 445.

[70] Swiss Federal Court, 31 October 2011, 4A_366/2011.

Until 2017, there was a particular uncertainty as to which measures could be requested in Switzerland to support each of these types of measure. The Swiss Federal Court has now clarified this issue and provided a clear roadmap for decisions rendered by Lugano Convention Contracting States' courts.[71] Accordingly, *in personam* interim measures are transposable into Swiss law via the protective measures set forth in Article 340 SCCP[72] (*i.e.* the protective measures that the "enforcement court" may generally issue, if necessary without hearing the opposing party beforehand). By contrast, the Swiss Federal Court held that *in rem* interim measures rendered by Lugano Convention Contracting States' courts are transposable via a Swiss attachment order pursuant to Article 271(1)(6) DEBA. This decision is important in that it puts an end to divergent cantonal practices.[73]

3. The Threat of Criminal Sanctions under Article 292 SCrC

As noted, Swiss law provides the possibility of combining interim measures with the threat of criminal sanctions under Article 292 SCrC, which leads to a fine in the event of violation.

Prior to the entry into force of the SCCP, the Swiss Federal Court already held, in *Motorola*,[74] that it is, in principle, possible to order interim measures in support of the exequatur and to combine them with the threat of criminal sanctions pursuant to Article 292 SCrC. However, in that particular case, it considered that the formulation of the English WFO order allowing the spending of a certain sum for certain payments "in the ordinary and proper course of business" was not precise and specific enough to be subject to criminal sanctions in the event of violation.

Nowadays, cantonal courts generally admit such injunctions, provided that the foreign interim measures are sufficiently clear and determined.[75] Pending a

[71] Swiss Federal Court, 27 November 2017, ATF 143 III 693, para 3, regarding the recognition and enforcement of a Greek "conservatory attachment".

[72] The parties may draw inspiration from the catalogue of measures provided by Article 262 SCCP (injunction, order to remedy an unlawful situation, order to a registry or to a third party, etc., it being specified that the list is only indicative).

[73] Swiss Federal Court, 27 November 2017, ATF 143 III 693. This decision put an end to the practice of the Geneva courts, which, until then, refused to transpose a Lugano Convention Contracting State's court freezing order with *in rem* effect into a Swiss attachment order, arguing – in our view erroneously – that such measures were "conservatory" and not measures condemning to the payment of an amount, thus falling outside the scope of Article 271(1)(6) DEBA (Geneva Court of Appeal, 9 June 2017, ACJC/655/2017). In its decision, the Swiss Federal Court correctly underlined that the relevant question was whether the measure to enforce was an "enforceable" decision within the meaning of the Lugano Convention and not whether such measure was "conservatory" or "condemnatory".

[74] Swiss Federal Court, 30 July 2003, ATF 129 III 626 (*Uzan v. Motorola Credit Corporation*).

[75] Zurich Court of Appeal, 1st March 2013, RV120014; Zurich Court of Appeal, 2 April 2014, RV140001, para 2.1; Geneva Court of Appeal, 18 January 2018,

decision of the Swiss Federal Court to clarify the issue, a prudent approach requires to ensure that the foreign interim measure application contains an equivalent sanction to Article 292 SCrC and is as self-executory as possible so as to avoid issues of transposition.

4. A Single Code, Yet Multiple Cantonal Interpretations

In addition to the specific issues mentioned above, one important obstacle to the execution of foreign interim measures remains the lack of case law on this topic and the different approaches, if not contradictory views, taken by cantonal courts. Given the provisional nature of Swiss interim measures and the anticipated length of appeal proceedings, combined with the stricter threshold to appeal interim measures,[76] applicants rarely challenge cantonal decisions issuing such measures before the Swiss Federal Court. As a result, the Swiss Federal Court's case law is very scarce and the main body of case law comes from the cantonal courts, whose practice varies considerably among cantons. As illustrated by the examples set out below, the bulk of Swiss case law relates to the enforcement of WFOs, which is not surprising given their popularity in international litigation.

The interpretation of the conditions for admissibility of an application for execution of foreign interim measures is one example of divergent opinions among cantonal courts. The SCCP provides that a Swiss court shall consider such an application only if the conditions of admissibility are met, among which is the existence of a legitimate interest for the applicant (Article 59(2)(a) SCCP). Taking a very narrow view, Zurich courts have specifically considered this condition of admissibility to be a condition for the granting of interim measures under Article 47(2) Lugano Convention. They tend to consider that such interest is lacking if the declaration of enforceability for the foreign interim measures has the same effect as the protective interim measures requested in support of the exequatur.[77] The position may, however, be different if the foreign interim measures could only have their full effect in Switzerland when combined with specific Swiss protective interim measures, in addition to the declaration of enforceability.

By contrast, Vaud courts seem to grant protective measures more generously. In a 2016 ruling, the Vaud Court of Appeal rejected an appeal filed against a

ACJC/62/2018. The Geneva Court of Appeal granted an order under the threat of criminal sanctions in the following terms: "(…) a prima facie examination of the case shows that the sanctions under English law provided for by the Freezing Injunction have, as the appellant points out, no effect in Switzerland; the appellant's subsidiary conclusion that Article 292 of the Swiss Criminal Code should be applied is therefore justified on the basis of a super-provisional assessment".

[76] An appeal before the Swiss Federal Court against provisional measures is only allowed for the violation of constitutional rights (Article 98 Federal Court Act).

[77] Zurich Court of Appeal, 1st March 2013, RV120014, section II.

first instance ruling[78] that ordered protective measures in support of an English WFO containing an "Angel Bell" clause.[79] In a decision rendered *ex parte*, the court fully implemented the WFO by prohibiting the respondent from disposing of any of his assets in the amount of up to USD 335 million and requesting the local Land Registry to record a prohibition against disposal of certain real estate on its books. Interestingly, the court had no difficulty in transposing the Angel Bell clause into Swiss protective measures. This practice contradicts that of other cantonal courts, such as the Zurich courts, which refuse to transpose Angel Bell clauses owing to their imprecision and lack of determinability.[80] In the present case, the Vaud court did not hesitate to prohibit the respondent from disposing of his assets subject to some exceptions provided for in the WFO. More specifically, it ruled that the respondent was not prohibited from spending the amounts necessary for his current expenses, up to a maximum of CHF 30,000 per month, and a reasonable amount for his legal representation costs, up to a maximum of USD 1 million per month. The original English WFO provided for more exceptions. For example, it specifically provided that the respondent was not precluded from dealing with or disposing of his property in the ordinary course of business, subject to prior notice to the applicant. The Vaud court surprisingly ordered the above-mentioned interim relief *ex parte* without taking these exceptions into consideration.

In comparison, Geneva courts did not initially share the same hesitations or objections as the Zurich courts when accepting protective measures in support of foreign *in personam* interim measures. In several decisions rendered in 2009 and

[78] The first instance judge granted an order *ex parte* in the following terms: "Prohibits [Respondent] from disposing of any of its property or reducing the value of any of its property in any manner whatsoever up to an amount of USD 335 million and in particular the real estate and bank accounts listed in the English decision and orders the [Land Registry] to annotate a prohibition to dispose of the land in question. Declares that the injunctions provided for are issued subject to the exceptions provided for in the English Order of 1st July 2015, so that, provided that the legal representatives of the [Applicant] are informed of the source of the funds before any expenditure is made, the [Respondent] is not prohibited from spending the amounts necessary for its current expenses up to a maximum of CHF 30,000/month and a reasonable amount for its legal representation costs up to a maximum of CHF 1,000,000/month. Orders the above injunctions under the threat of a fine under Article 292 of the Swiss Criminal Code and states that the order is valid until a decision is rendered on the recognition and enforcement of the English Order of 1st July 2015."

[79] The "Angel Bell" exception forms part of the English Commercial Court standard form Freezing Order and reads as follows: "This order does not prohibit the respondent from dealing with or disposing of any of its, her or his assets in the ordinary and proper course of business, [but before doing so the respondent must tell the applicant's legal representatives]"; it aims to avoid the situation of a Freezing Order preventing a respondent from carrying out its ordinary business dealings.

[80] Zurich Court of First Instance, 22 December 2010, EU102419; Zurich Court of Appeal, 9 May 2011, NL 110006.

2013,[81] the Geneva Court of First Instance declared English WFOs enforceable and granted the requested prohibition orders against the respondents to prevent the disposal of their assets up to a specified amount. By contrast, in 2018,[82] the Geneva Court of First Instance rejected a request for protective measures in support of an English WFO, on the basis that a WFO, once declared enforceable, does not require a pairing with other measures in order to be immediately effective or prevent the loss of the protected assets. Although not specifically stated, it seems that, similarly to the Zurich courts, the Geneva Court of First Instance considered that interim measures are conditional on the existence of "a legitimate interest". The Geneva Court of Appeal confirmed the lower court's decision on this issue and refused to grant protective interim measures, but on another ground. The court surprisingly held that the attachment of the assets located in Switzerland – which was requested as a protective interim measure – would have to fulfil the conditions set forth in Article 271(1)(6) DEBA. It further considered that the lack of determinability of the WFO or its transposability into a Swiss attachment was a barrier to the granting of equivalent protective interim measures. The court noted in this regard that the WFO permitted access to the frozen assets under certain conditions, an exception which was "difficult to reconcile" with the requested attachment.

5. Lessons Learned Regarding the Execution of English Worldwide Freezing Orders in Switzerland

The English WFO is a powerful weapon in preventing respondents from disposing of their assets pending the resolution of an underlying dispute. However, a WFO is only as effective as its ability to be executed abroad. Practical considerations should already be kept in mind when applying for the WFO in England in order to best anticipate the possible obstacles at the enforcement stage.

As seen from the above-mentioned examples, many difficulties arise when implementing WFOs in Switzerland. The *in personam* nature of such measures is not an obstacle per se. Although Swiss attachment orders are not available, as they can only be ordered in support of foreign measures with *in rem* effect, the applicant still has the possibility to request, together with a declaration of enforceability, Swiss protective measures and/or a declaration that the WFO is enforced under the threat of Swiss criminal sanctions.

The difficulties lie in the fact that in practice, certain cantonal courts struggle to translate the *in personam* effect of a WFO into Swiss measures, especially when such measures provide for certain exceptions (such as Angel Bell clauses) and are not straightforward. Where the applicant knows from the outset that it intends to request the recognition and enforcement of the WFO in

[81] Geneva Court of First Instance, 19 January 2009, Case No C/566/2009; Geneva Court of First Instance, 2 April 2013, OTPI/545/2013; Geneva Court of First Instance, 17 October 2013, Case No C/21682/2013.

[82] Geneva Court of Appeal, 18 January 2018, ACJC/62/2018. See also Geneva Court of Appeal, 9 June 2017, ACJC/655/2017 regarding a German *Arrestbefehl*.

Switzerland, practitioners should be aware of the issues concerning the sufficient determinability of the measure in order to adapt, if possible, the wording of the WFO upfront and avoid, for example, the use of Angel Bell clauses which may, depending on the canton, be an obstacle to the transposition of the measure in Switzerland.

The practical difficulties described above may be worsened by Brexit.[83] The effects of Brexit are delayed until the end of the "transition period" which lapses on 31 December 2020, and the Lugano Convention will still apply in the meantime. English WFOs will continue to be enforceable in Switzerland pursuant to the Lugano Convention at least until 31 December 2020, but the legal regime which will apply after the transition period is as yet unknown. While unlikely, it is possible that England and Wales will lose the benefit of the facilitating legal framework provided by the Lugano Convention.[84]

IV. Conclusion

Interim measures are often critical to securing the successful outcome of a case and to ensuring that, pending a decision on the merits, the *status quo* is respected. Yet, ensuring the full effect of interim measures abroad is not straightforward.

As shown, foreign interim measures issued by a court of a Lugano Convention Contracting State can be recognised and enforced in Switzerland although, practically, the road is paved with obstacles. The road is even more complicated for foreign interim measures issued by courts of a non-Lugano Convention Contracting State, since there is still legal uncertainty as to whether such interim measures can be recognised and enforced under the PILA. More than thirty years after the entry into force of the PILA, it would be a welcome clarification if the Swiss Federal Court finally had the opportunity to settle this long outstanding issue.

Meanwhile, the Swiss Federal Court has provided a clear roadmap for the enforcement and transposition into the Swiss legal order of foreign interim measures rendered by courts of Lugano Convention Contracting States. Accordingly, an applicant can request protective measures set forth in Articles 340 *et seq.* SCCP in support of *in personam* interim measures, while interim measures with *in rem* effect are transposable via a Swiss attachment order pursuant to Article 271(1)(6) DEBA.

Despite the existing legal basis for obtaining protective interim measures in support of the exequatur of foreign interim measures, applicants are often denied

[83] A. LAYTON, Interim Measures in English Law and their Circulation, in this *Yearbook* , section VII.

[84] S. GABRIEL/ S. GIROUD/ B. MAURON/ V. MEEROVICH, Brexit: A New Era for Recognition and Enforcement of English Judgments in Europe or Turning Back the Clock? Lessons to Be Learned From the Swiss Example, in *Dispute Resolution International*, Vol. 13 No 1, p. 81.

the right to protective interim measures for lack of determinability of the foreign order or lack of interest to said measures. Given the different approaches taken by Swiss cantonal courts, it is therefore of the utmost importance to conduct a careful strategic analysis, in the first instance abroad when applying for interim measures, with a view to anticipating enforcement issues, and then also in Switzerland when choosing an enforcement court, so as to best take advantage of its particular practice. In view of the interests at stake in such matters, the complexity of the law and the scarcity of the case law, this field still promises interesting legal battles.