Interim Measures of Protection:
The Concurrent Jurisdiction of Courts and Arbitral Tribunals in Switzerland\(^1\)

by Saverio LEMBO and Vincent GUIGNET\(^2\)

BÄR & KARRER LTD, GENEVA

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\(^2\) Saverio.Lembo@BaerKarrer.ch, Vincent.Guignet@BaerKarrer.ch
A Introduction

The purpose of the present contribution is to address the issue of the concurrent jurisdiction of courts and arbitral tribunal when granting interim measures of protection under Swiss law.

Interim measures aim to protect the parties' rights before or during arbitration proceedings, to regulate the terms of an ongoing relationship, or to avoid frustration of the final award. They are sometimes called conservatory measures, provisional relief, or provisional measures, but it is always the same procedural mechanism which is considered.

When the parties have chosen arbitration as their dispute resolution mechanism, the following critical questions regarding interim measures of protection arise:

- Which body may grant interim relief – state courts or arbitrators?
- What is the relationship between orders of state courts and orders of arbitrators?
- Is it possible to exclude the jurisdiction of courts or arbitrators to grant interim relief?
- What are the forms of relief that an arbitral tribunal may grant and what are the prerequisites that must be fulfilled?

This paper will first consider the respective competence of courts and arbitral tribunals to grant interim relief under Swiss law (see below B), before examining the relationship between these two bodies (see below C) and the hypothesis of a contractual exclusion of courts' jurisdiction to grant interim relief (see below D). It will then present some practical considerations helpful to decide whether to apply to courts or to the arbitral tribunal (see below E). A brief analysis of the different forms of relief available under Swiss law as well as the prerequisites to be fulfilled will then be provided (see below F). Eventually, this paper will focus on the enforcement (see below G) and appeal (see below H) of interim measures of protection.

B Which body may grant interim relief – state courts or arbitrators?

This first issue regards the parallel jurisdiction of courts and arbitral tribunals.
I The answer provided by Swiss law

1 Domestic arbitrations

Historically, Swiss law on domestic arbitration denied arbitrators any jurisdiction to order provisional measures (former Art. 26 (1) of Concordat on Arbitration). Today however, the new Swiss Code of civil procedure (CCP) provides at its Art. 374 (1) that "the state court or, unless the parties have otherwise agreed, the arbitral tribunal can upon application by a party order provisional measures including orders relating to the securing of evidence."

The change is therefore from "no competence of the arbitral tribunals" to "some competence of the arbitral tribunal". The jurisdiction of the courts is thus not challenged by this evolution, and scholars agree to say that the jurisdiction of arbitrators, recognized by statutory provisions, is not exclusive and does not prevent that of the courts3. Certain scholars submit now that the courts cease to have jurisdiction to order provisional measures once the arbitral tribunal has been constituted4. This is, however, a minority opinion. The predominant view recognizes that the jurisdiction of courts and arbitral tribunals is parallel5.

According to Swiss law, parties to a domestic arbitration thus retain the possibility of directly applying to the courts without a detour via the arbitral tribunal.

2 International arbitrations

As far as international arbitration is concerned, Swiss law provides for the same solution: pursuant to Art. 183 (1) of the Private International Law Act (PILA), the jurisdiction of the courts is implied and the competence of the arbitrators to grant interim relief exists "unless the parties have agreed otherwise." Moreover, Art. 10 PILA and Art. 24 of the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano Convention) provide that Swiss courts have jurisdiction to grant interim measures even in cases where they do not have international jurisdiction over the merits of the dispute6.

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4 Andreas Bücher, "Le nouvel arbitrage international en Suisse", Bâle 1988, p. 74.
5 Poudret/Besson, § 618 and ref.
Finally, the Swiss Rules confirm the existence of a concurrent competence of the arbitral tribunal and the competent judicial authorities to take interim measures. According to Art. 26 (3) of the Swiss Rules, "a request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement." On the other hand, the concurrent jurisdiction of arbitrators is also foreseen by Art. 26 (1) of the Swiss Rules: "Arbitrators have in any event jurisdiction where the parties submit to arbitration rules which grant them the power to order provisional measures."

II The reasons for a parallel jurisdiction of state courts and arbitral tribunals

It is clear today that Swiss law recognizes a parallel jurisdiction of arbitrators and courts. One can ask what is the legal reasoning behind this parallel jurisdiction. For the majority of Swiss scholars, such an interaction is simply necessary to remedy the drawbacks of arbitral jurisdiction. The jurisdiction of courts might for instance be required because:

- An arbitral tribunal cannot order measures against third parties, if they are not bound by a jurisdiction clause;
- An arbitral tribunal has no power to enforce freezing orders under the Swiss Debt and Execution Bankruptcy Act (DEBA);
- An arbitral tribunal cannot provide for the immediate enforcement of its order. In case of urgency and risk of non-compliance, it might be more efficient to go directly to court.

On the opposite, the jurisdiction of arbitral tribunals might also be needed to implement a provisional regime which is often closely linked with the proceedings and the merits of the case. Indeed, where the arbitral tribunal has already extensively dealt with the case, it is advisable to address the arbitrators and benefit from their state of knowledge, rather than to apply to a state court who has little or no knowledge of the case.

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8 POUDET/BESSON, § 615.
9 POUDET/BESSON, § 605.
10 Markus WIRTH, "Interim or preventive measures in support of International Arbitration in Switzerland", in: Bulletin ASA, Bâle 2000, p. 44.
C What is the relationship between courts and arbitral tribunals?

Complementarity of courts' and arbitral tribunals' jurisdictions is one thing. The corollary of this is the risk of conflicts of jurisdiction and contradictory decisions.

What is the relationship between courts and arbitral tribunals? How are their respective orders articulated? Does Swiss law provide for principles to prevent risks of conflict of jurisdictions or of contradictory decisions?

There is no precise answer to these questions.

It is generally admitted that a decision on interim relief is provisional, and therefore does not benefit of res judicata effect. Thus, the revocation by arbitral tribunal of courts' order (or vice versa) is theoretically possible and admitted by a majority of scholars.\(^\text{11}\)

Most scholars consider, however, that in order to prevent conflicting decisions, arbitral tribunals and courts should decide that a party may not apply for interim relief before two instances at the same time.\(^\text{12}\) According to this reasoning, when a court or an arbitral tribunal dismisses a request for interim measures, the requesting party should not be authorized to seek again the same relief before the other body.\(^\text{13}\)

Some writers suggest limiting the various jurisdictions by applying the rules on lis pendens, and reach the conclusion that a court shall not assist in the enforcement of a measure ordered by an arbitrator where an identical measure has already been requested from a state court.\(^\text{14}\)

In any cases, scholars agree that arbitral tribunals may revoke provisional measures ordered by state courts when granting their final award on the merits.\(^\text{15}\)

The majority of Swiss scholars consider the ICC decision of 2 April 2002 as a framework for the relationship between orders rendered by state courts and arbitral tribunals. According to this decision, an arbitral tribunal cannot overrule the court decision when.\(^\text{16}\)

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12 VON SEGESSER/KURTH, p. 164.
13 Ibid.
15 POUDRET/BESSON, § 622.
- The party had already applied without success for identical interim measures before a state court;
- The first application for interim measures was based upon the same facts and evidence;
- The arbitral tribunal would apply similar standards when ruling on the request for interim relief as had the court (legal tests applied by two bodies are equivalent); and
- Procedural rights have been complied with.

On the opposite, an arbitral tribunal should be able to exercise its jurisdiction and overrule a court decision when:

- Factual circumstances have changed since the decision of the court or new evidence had become available; and/or
- The standards for making the decision and the legal tests are different, even if the state court had previously ruled on similar or even identical application.

An arbitral tribunal has therefore to examine in each case whether, under the law governing the arbitration, the topical circumstances justify to grant the measures sought. The findings by a state court, previously seized of the same application, may be different precisely because it examined the application by reference to a different law.

D Can the parties agree to completely exclude the jurisdiction of the courts to order provisional measures?

Sometimes indeed, parties just do not wish to have their dispute examined by state courts at all – even for interim measures of protection. There could be many reasons for that. One is the special interest the parties may have in the confidentiality of the proceedings (which is generally not protected in proceedings before state courts). Another reason to exclude the jurisdiction of State courts might be the parties' wish to concentrate the competence on one judicial body only, i.e. the arbitral tribunal, instead of facing the potential cumulative competence of several state courts in different countries.

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18 Ehle, p. 165.
19 Ibid.
20 Wirth, p. 41.
In sportive matters for instance, parties often agree to submit any dispute to the exclusive authority of the Court of Arbitration for Sport (CAS), with seat in Switzerland, applying its own Code of procedure. It is a good example of an advisable exclusion of the state courts’ jurisdiction: since the competitions organized by important federations take place in many different countries, it is necessary to implement a coherent dispute resolution mechanism that provide for a unique jurisdiction, in order to ensure the same rights to the clubs participating to the competitions.

The article R37 of CAS Code of procedure expressly provides that "in agreeing to submit to these Procedural Rules any dispute subject to appeal arbitration proceedings, the parties expressly waive their rights to request such measures from state authorities."

This clause raises the question of the validity of such an exclusion under Swiss law. While it is established that the jurisdiction of the arbitral tribunal can be excluded by agreement (Art. 374 (1) CCP; Art. 183 (1) PILA; Art. 26 (1) and (3) Swiss Rules), what about the jurisdiction of the state courts? Besides, can the parties agree to completely exclude the jurisdiction of the courts to order provisional measures, simply by referring to specific Rules?

Here again, considering the silence of Swiss law, the answer is controversial. While the majority opinion consider that an exclusion is possible\(^{21}\), other scholars postulate restrictions to such exclusion in order to avoid a denial of justice\(^{22}\).

To summarize the situation, agreements to exclude the jurisdiction of courts to order interim measures must be explicit and specific\(^{23}\). Parties can decide to incorporate such an exclusion in the arbitration clause, or do it separately before or after the commencement of the arbitral proceedings\(^{24}\).

Regarding the above example, the validity of the exclusion clause provided at Art. R37 of the CAS Code of Procedure was confirmed by a Swiss court ruling in 2005\(^{25}\). In that case, the Swiss court declined its jurisdiction and sent the parties to the CAS. However, a mere reference to the CAS Code of procedure in the agreement might probably not be regarded as sufficient by a state court in order to validly exclude the jurisdiction of the latter.

\(^{21}\) Poudret/Besson, § 615 and ref.; Wirth, p. 40.
\(^{22}\) Von Segesser/Kurth, p. 85.
\(^{23}\) Wirth, p. 41; von Segesser/Kurth, p. 85; Oetiker, p. 238.
\(^{24}\) Von Segesser/Kurth, p. 85.
\(^{25}\) Bezirksgericht Zürich, 16.08.2005, consid. 6.2 (not published), cited in Kaufmann-Kohler/Rigozzi, p. 381.
What are the relevant considerations when deciding whether to apply to a state court or to the arbitral tribunal for obtaining interim measures?

In the Swiss system, where courts and arbitral tribunals have full parallel jurisdiction to grant interim relief, a party seeking such relief may be able to choose freely between the arbitration tribunal and the competent court (such system is often referred to as a "free-choice model").

EHLE put together some criteria to be taken into consideration when deciding whether to apply to the arbitral tribunal or to the state courts for obtaining an interim measure:

- **Urgency**: when there is an immediate need for a decision and the arbitral tribunal has not yet been constituted, the application will obviously have to be made to the state courts (exception: when the arbitral tribunal consists of a sole arbitrator).

- **Compliance**: when there is a risk that the opposing party will not voluntarily comply with any order granted by the arbitral tribunal but rather ignore such orders, then it might be advisable to obtain relief from a court (an arbitral tribunal lacks the coercive power of the court).

- **Third Parties**: If third parties are involved or a measure against third parties is sought, only courts might ensure effective relief (difficulty of consolidation, limited jurisdiction of the arbitral tribunal).

- **Knowledge of File**: when interim relief is sought while an arbitration is ongoing and the facts or the technical or legal issues are rather complicated, it might be advisable to apply to the arbitral tribunal, which already extensively dealt with the case and its merits.

- **Know-How of arbitrators**: when the arbitration is ongoing, another reason to request interim relief directly to the arbitral tribunal is to benefit from the specific knowledge or experience of the arbitrators, often chosen for their specialization.

- **Confidentiality**: where the parties have a prevailing interest in keeping the existence of the proceedings confidential, they may want to have the arbitral tribunal exclusively deal with the matter.

- **Scope of Remedies**: the state courts' range of potential interim measures is narrower than that of an arbitral tribunal.

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26 EHLE, p. 167.
Forms of relief that an arbitral tribunal may grant and prerequisites that must be fulfilled

i) Domestic arbitrations

In domestic arbitration, the Swiss Code of Civil Procedure, duly interpreted by courts and scholars, specifies the kind of interim measures that can be granted, as well as the criteria to be fulfilled to obtain such measures (Art. 261 and 262 CCP).

Accordingly, Swiss scholars typically distinguish three categories of interim measures:

- Measures aimed to maintain the status quo (e.g. order to refrain to do something);
- Interim regulatory or declaratory orders (e.g. order declaring the status of a disputed legal relationship);
- Orders for provisional/temporary performance (their purpose is that when the relief is eventually granted by the final award, it has not already become obsolete).

ii) International and Institutional arbitrations

For international arbitration in Switzerland however, the law is silent. There is only one article on interim measures of protection in the lex arbitri, Art. 183 (1) PILA. This provision merely foresees the attribution of competence to the arbitrators, but does not say a word about the criteria to be fulfilled for granting interim measures. For institutional arbitrations, the same solution is provided at Art. 26 (1) of the Swiss Rules.

This solution leaves complete freedom to the parties to determine, in their agreement, the standards and criteria to obtain interim relief. If the parties have not agreed on such standards, then the arbitrator is free to determine them or to rely on the lex causae.

As a consequence, international arbitrators in Switzerland are free to grant interim measures of protection under different conditions as those provided for in Swiss domestic Law. However, Poudret/Besson point out a convergence of arbitral and judicial practice on this issue, and note that the criteria generally admitted by ar-

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27 Wirth, p. 33.
29 Ibid.
Arbitration tribunals are more or less the same as those provided for in Swiss domestic law:

- A request from a party;
- Prima facie jurisdiction of the arbitral tribunal to rule on the merits of the case;
- Reasonable chance of success on the merits;
- Urgency or impending injury to the rights of the applicant;
- Risk of substantial harm in the absence of protection;
- If ordered by the arbitral tribunal, provision of appropriate security.

Regarding the types of interim measures that can be granted by arbitral tribunals, Swiss arbitration law is silent. As a basic rule developed by arbitrators and scholars, arbitral tribunals may thus order whatever measures they deem necessary:

- To protect the rights of the requesting party from a prejudice that cannot be remedied by the final award; or
- To regulate the relationship between the parties during the arbitral proceedings.

Regarding the criteria to be fulfilled in order to obtain interim relief, the first source of information with respect to the kind of measures that may be granted is the relevant contract. If the contract is silent – as it is often the case – details regarding available measures may be found in the procedural rules applicable to the arbitration proceedings. If the procedural rules are silent as well, an arbitral tribunal can rely on the measures provided for by the *lex causae*. Eventually, a tribunal may order any measure provided by the law of the jurisdiction where the measure is to be enforced, whether this is Switzerland or a foreign jurisdiction.

Accordingly, we see that a Swiss arbitral tribunal has a wider competence with regard to the ordering of interim measure than a Swiss state judge. It can indeed order interim measures which are not provided for by Swiss law (this can however be problematic when parties turn to enforcement of such measures).

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30 *POUDRET/BESSON*, § 626.
32 Wirth, p. 33.
33 Ibid.
G  How to enforce arbitral tribunal’s orders granting interim relief?

In general, interim measures aim at directing a party to perform, or refraining from performing, a specific act. However, such orders by an arbitral tribunal are considered by scholars as "lex imperfecta", since arbitral tribunals lack the power to enforce their orders directly against the parties34.

Swiss law provides for a particular court support mechanism for provisional measures ordered by an arbitral tribunal (Art. 183 (2) PILA). This assistance provided by state courts should not be confused with the power of the latter to order such measures directly35. Indeed, pursuant to art. 183 (1) PILA, the support of the courts coexists with the possibility of applying directly to the courts for provisional measures36.

This mechanism of assistance to arbitral tribunals must also be distinguished from the enforcement itself, which includes the recourse to the police force and must be examined under the applicable domestic law or enforcement treaty. As a consequence, we will hereafter first focus on the assistance (see below I) provided by Swiss courts in connection with international arbitration with seat i) in Switzerland or ii) abroad and then briefly examine the enforcement (see below II) by Swiss courts of arbitral orders in connection with international arbitration with seat i) in Switzerland or ii) abroad.

I  Assistance by Swiss courts

i)  In connection with international arbitration with seat in Switzerland

Pursuant to Art. 183 (2) PILA, the arbitral tribunal having its seat in Switzerland may request the assistance of the competent court if a party does not comply with its order:

"If the party so ordered does not comply [with the interim measure of protection] voluntarily, the arbitral tribunal may request the assistance of the competent court. Such court shall apply its own law." (Art. 183 (2) PILA)

According to a literal reading of this disposition, the support of the state court must thus be required by the arbitral tribunal itself, and not by the party in whose

34 VON SEGESSER/KURTH, p. 80.
35 POUDRET/BESSION, § 635.
36 Ibid.
favor provisional measures have been ordered\textsuperscript{37}. However, despite the unambiguous language of art. 183 (2) PILA, it is generally accepted that the parties themselves may also apply for assistance directly to the court, possibly subject to approval of the arbitral tribunal, in order to avoid a confrontation between the arbitral tribunal and one of the parties in the court proceedings\textsuperscript{38}.

Regarding the jurisdiction of the court \textit{ratione loci} to enforce an arbitral order, the court chosen must be the court of the place where the measure is to be enforced in Switzerland (where the goods are/where the adverse party has its domicile or registered office) and not necessarily at the seat of the arbitral tribunal\textsuperscript{39}. If the place of enforcement is abroad, the possibility for an arbitral tribunal sitting in Switzerland to apply for assistance directly to a foreign court is to be determined in the light of the applicable law at the foreign place of enforcement\textsuperscript{40}.

In considering request for assistance in enforcing orders made by arbitral tribunal, a Swiss court will apply its own law and focus on two conditions\textsuperscript{41}:

- Whether there is a valid arbitration agreement; and
- Whether the arbitral tribunal has prima facie jurisdiction.

It is important to understand the proper nature of the Swiss court's decision when assisting the arbitral tribunal: the court's order is a decision in and of itself\textsuperscript{42}. As a consequence, the court may only grant measures that are authorized under its own rules of civil procedure. If the measure ordered by the arbitral tribunal does not correspond to any form of interim relief available under Swiss law, the court is required to adapt the arbitral tribunal's order so as to make it compatible with such law\textsuperscript{43}.

\begin{enumerate}
\item[ii)] \textbf{In connection with international arbitration with seat abroad}
\end{enumerate}

Swiss courts have jurisdiction internationally under Art. 24 of the Lugano Convention or Art. 10 PILA to rule on interim measures in general. According to the predominant opinion, this international competence also exists to provide assistance to an arbitral tribunal with seat abroad that has granted interim reliefs (Art. 183 (2) PILA)\textsuperscript{44}. However, considering the wording of Art. 183 (2) PILA, some scholars

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{37}] Bernard Dutoit, "Droit International Privé Suisse – Commentaire LDIP", Bâle 2005, art. 183 N 7.
\item[\textsuperscript{38}] Von Segesser/Kurth, p. 81; Poudret/Besson, §637.
\item[\textsuperscript{39}] Von Segesser/Kurth, p. 81.
\item[\textsuperscript{40}] Ibid.
\item[\textsuperscript{41}] Dutoit, art. 183 N 7.
\item[\textsuperscript{42}] Von Segesser/Kurth, p. 82.
\item[\textsuperscript{43}] Von Segesser/Kurth, p. 82; Dutoit, art. 183 N 7.
\item[\textsuperscript{44}] Poudret/Besson, § 637; Bücher, p. 74.
\end{itemize}
\end{footnotesize}
consider that such a jurisdiction exists under the condition that the foreign arbitration law also allows the arbitrators themselves to request the intervention of the courts.\textsuperscript{45}

Besides, a Swiss court will provide assistance to a foreign arbitral tribunal under the condition that the Swiss court would have jurisdiction to grant the interim measures if such application were made directly to it – meaning that the arbitral order must comply with Swiss law.

\section*{II Enforcement by Swiss courts}

\subsection*{i) In connection with international arbitration with seat in Switzerland}

Once a court has granted an interim measure of protection pursuant to Art. 183 (2) PILA, the Swiss court order is to be enforced in Switzerland through the procedures for enforcement of domestic decisions (Art. 335 ff CCP), including the use of the \textit{force publique} and/or criminal sanctions.\textsuperscript{46}

If the court order is to be enforced in another country, such enforcement depends on the applicable treaty or the local rules of civil procedure at the place of enforcement. Under the Art. 25 and 27 of the Lugano Convention, binding on Switzerland, interim orders rendered \textit{inter partes} by state courts are enforceable, even though arbitration is excluded from the scope of application of such convention.\textsuperscript{47}

\subsection*{ii) In connection with international arbitration with seat abroad}

According to Article 1 (2) of the Lugano Convention, arbitration is excluded from the scope of application of this Convention. Therefore, decisions on interim measures rendered by a foreign arbitral tribunal in Switzerland may only be enforced if they qualify as "awards" in the sense of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention).\textsuperscript{48}

Most of Swiss scholars seems to consider that the NY Convention is not applicable to interim measures ordered by an arbitral tribunal, even if they are in the form of an arbitral "award".\textsuperscript{49} The concept of an award under the NY Convention implies a final decision, which definitely and irrevocably determines the questions which it addresses: Art. 5 (1) (e) of the NY Convention refers indeed to the "binding" cha-
racter of the award, in the sense that it should not be possible to amend the order by a subsequent decision in the same proceedings. This provisional aspect is precisely an essential characteristic of interim measures of protection\textsuperscript{50}.

As far as international case law is concerned, the Supreme Court of Queensland had to rule on this issue and concluded that a US arbitral order granting interim measures of protection was not enforceable in Australia because "the reference to "arbitral awards" in the [NY] Convention does not include an interlocutory order made by an arbitrator, but only an award which finally determines the rights of the parties"\textsuperscript{51}.

This being said, the above solution is different if interim measures were ordered by the courts of a contracting State under the Lugano Convention, in connection with a foreign arbitration (Art. 25 and 27 of the Lugano Convention). It is generally accepted that such court orders may indeed be enforced in Switzerland\textsuperscript{52}.

Now, when the interim measures are ordered by a court of a non-contracting State under the Lugano Convention, it is disputed whether such orders may be enforced in Switzerland pursuant to PILA. The controversy focus on the interpretation of Art. 25 PILA, which provides that a foreign court decision will only be recognized in Switzerland if it is final or if it is no longer subject to any ordinary appeal\textsuperscript{53}.

**H Appeal against interim relief granted by arbitral tribunals**

An arbitral tribunal's order on interim measures is not a final decision and therefore is not open to appeal in accordance with art. 190 and 191 PILA.

The only exception is where a party can prove that the arbitral tribunal which granted interim measures has been improperly constituted or has wrongly accepted its jurisdiction (Art. 190 III PILA). In such circumstances, a party may file an action of annulment against an interim measure.

By contrast, Swiss court orders that enforce decisions on interim measures made by arbitral tribunals are subject to appeal under Swiss federal laws (Federal Tribunal Act – FTA)\textsuperscript{54}. Conditions of admissibility are however very restrictive (Art. 93 (1) (a) FTA), and grounds for complaint limited to violation of Swiss constitutional rights (Art. 98 FTA).

\textsuperscript{50} Ibid.
\textsuperscript{52} VON SEGESSER/KURTH, p. 83.
\textsuperscript{53} Ibid.
\textsuperscript{54} Ibid., at p. 86.
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