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thesis: **«CONTEMPORARY ISSUES OF APPLYING OF INTERIM MEASURES/RELIEFS IN SUPPORT OF INTERNATIONAL COMMERCIAL ARBITRATION IN UKRAINE»**

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LIST OF ABBREVIATIONS

Geneva Protocol 1923	Geneva Protocol on Arbitration Clauses
Geneva Convention 1927	Geneva Convention on the Execution of Foreign Arbitral Awards
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Model Law of 1985	UNCITRAL Model Law on International Commercial Arbitration of 1985
Model Law of 2006	UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006
Law on ICA	The Law of Ukraine «On International Commercial Arbitration»
ICAC	International Commercial Arbitration Court at Ukrainian Chamber of Commerce
Law No. 2147a-19	Law of Ukraine «On amendment of Commercial procedural Code, Civil procedural code, Court for Administrative Court Proceedings of Ukraine and other laws of Ukraine»
FFA	Federal Arbitration Act of 1925
CPLR	Civil Practice Law and Rules
Arbitration Act of India	Arbitration and Conciliation Act of 1996
IAA	International Arbitration Act of 1994
SCJP	Swedish Code of Judicial Procedure
GCCP	German Code of Civil Procedure
BJC	Belgian Judicial Code

SCC	Stockholm Chamber of Commerce
SRIA	Swiss Rules of International Arbitration
	Hong Kong International Arbitration Center
UMAC	Ukrainian Maritime Arbitration Commission at the Chamber of Commerce and Industry of Ukraine
ACCP	Austrian Civil Code of Procedure

INTRODUCTION

Topicality: nowadays the international arbitration plays an important role in international trade and investment. Being a private dispute resolution, it now serves as one of the most effective means to resolve the disputes that have international character.

International arbitration owes its popularity due to its features that play important role for the participants in global trade, commerce and investment activities. As noted by Alan Redfern and Martin Hunter, with respect to the reasons why the arbitration is frequently chosen over other dispute resolution mechanisms, in one of the most comprehensive handbooks on international commercial arbitration, «*There are two reasons of prime importance: the first is neutrality; the second is enforcement*» [1, p. 28]. As noted authors further their idea, the enforcement in principle comprises of the well-recognized triad, that is that the arbitral award is binding, and the parties shall execute thereof [1, p. 28]. Further, that the award is non-appealable [1, p. 28]. Finally, the award may be recognized and enforced either at the seat of the arbitration or in foreign jurisdiction as the case may be [1, p. 29].

The enforceability of the award lies in the core of the international arbitration. As a consequence, no doubt that the law should provide for the mechanisms that may assist in preserving the enforceability of the perspective award whilst the dispute is pending between contesting parties. One of the most effective mechanisms is the interim measures of protection for being the measures applied to safeguard the integrity of the arbitral tribunal as well as the enforceability of the award.

To the contrary, in case the arbitration lacks such mechanism in the form of interim measures, the very effectiveness of the arbitration as dispute resolution mechanism is completely undermined. The parties to dispute will then be enable to disrupt the perspective arbitration award even long before the arbitration commenced or shortly thereafter. Therefore, without interim measures the survival of the

international arbitration as popular and, most importantly, effective mechanism of resolving the disputes at the international plane will be questioned.

Finally, the matter is complicated by the fact that the power to issue the interim measures is in general allocated between the courts and arbitral tribunals, thus causing a myriad of issues in relation to the competence of the domestic courts and arbitral tribunals to discharge the measures. Even more, the question of whether both dispute resolution bodies should have the power to discharge the interim measures, or the authority should be monopolized in the hands of one of them. To what extent the authority shall be divided and when the power to discharge the interim measures arise? How should the courts treat the interim measures issued by the arbitral tribunal whether foreign or not?

Based on the foregoing, the crux of the continuous research and analysis among the leading practitioners and scholars in the international arbitration is related to the interim measures of protection and in particular how and when they may be discharged. Not least important question is how the authority to discharge thereof should be divided between the courts and arbitral tribunals.

This master thesis in depth deals with theoretical and practical issues that arise when the matter goes to in the interim measures to assist the upcoming award of the arbitral tribunal. Consequently, *the main purpose* of this master thesis is to explore the theoretical as well as practical notions regarding the procedure for obtaining, discharging and finally enforcing the interim measures in support of the international arbitration.

Based on the foregoing, *the research tasks* may be distilled down as follows:

1. To found out theoretical and practical substantiation for the need of interim measures in international commercial arbitration;
2. To analyse how the power to discharge the interim measures should be allocated between the courts and arbitral tribunals;
3. To analyse at which stages of the arbitration and when the tribunal and courts may render the interim measures in support of the arbitration;

4. To analyse and identify the best ways to ensure the effectiveness of the arbitration via interim measures at each stage of the proceedings;
5. For this purpose, to analyse and identify how various arbitration laws and rules address the issue of the interim measures in support of the interim measures;
6. To identify the legislative amendments that should be made in the laws and arbitration rules that currently in force in Ukraine so that to make the arbitration in Ukraine more effective.

Against this background, *the object of this master thesis* is legal relationships that arise either prior to or during arbitral proceedings between various subjects involved in the dispute, including the parties to the dispute, arbitral tribunal and institution, courts in relation to the procedure for obtaining the interim measures and their subsequent execution. Further, *the subject matter of this master thesis* is procedural legal rules and laws that vest the parties with the right to make recourse to the arbitral tribunal or the courts in order to obtain the interim measures.

The author substantiates the research and conclusions related to the present master thesis based on the publications, articles and books of the practitioners and scholars from various nations in the international arbitration, including but not limited to: Yurii Prytyka, Gennadii Tsirat, Gary Born, Alan Redfern, Martyn Hunter, Jan Yesilirmak and others. Additionally, the author of this master thesis also analysed various arbitration rules including but not limited to: HKIAC, SIAC, Swiss, ICAC, ICDR, LCIA arbitration rules. To achieve the main purpose and research tasks the author also analysed the arbitration law of different countries including but not exclusively of Austria, Germany, USA, Belgium India, China.

The author employed the following methods so that to achieve the main purpose of this master thesis:

1. **Comparative method** – the author compares the procedure for obtaining the interim measures that exist in different countries so that to identify how,

when, to what extent the procedure to discharge the interim measures should be allocated between the courts and arbitral tribunals;

2. **The method of analysis and synthesis** – the author analyses the process and regulation of the procedure to obtain the interim measures from the courts and arbitral tribunals, to found out the best practices used on international plane with respect to this matter in order to implement thereof in Ukrainian realities;
3. **Dialectical method** – the author founds out the theoretical substantiation of the need in the interim measures in international arbitration, to identify and explore how Ukrainian arbitration laws, rules and courts practice regulate or deal with the interim measures employed in the international arbitration;
4. **Descriptive method** – the author piece together current foreign and Ukrainian regulation on the interim measures in the international arbitration including laws and arbitration rules.

Further, the author notes that the conclusions, research, and other results achieved in this master thesis is of particular significance for Ukraine. The international arbitration as it currently stands usually employed by the companies incorporated in or related to Ukrainian jurisdiction. It goes without saying, that for the time being the international arbitration especially in trade sector very frequently touches Ukrainian jurisdiction. Consequently, the improvements proposed by the author into Ukrainian legislation and arbitration rules serves the international arbitration in or related to Ukraine more efficient and effective with comparison to the current situation.

The author devoted to the main purpose three chapters including:

1. **Chapter 1** – herein the author analyses the theoretical substantiation of the necessity in the interim measures for the international arbitration, including the evolutionary regulatory approach by various countries with respect to this matter. The author also analyses the evolution of Ukrainian arbitration with respect to the interim in support of the arbitration;

2. **Chapter 2 –** the author devotes the said chapter to legal issues arising out from the procedure to obtain the interim measures prior to the commencement of the arbitral proceedings. The author compares the arbitration rules and laws so that to identify the best world practice and suggest corresponding amendments to be made into the arbitration law of Ukraine;
3. **Chapter 3** – the author of the master thesis analyses the regulation under the laws and arbitration rules of the various issues that inherently connected to the procedure to obtain the interim measures once the arbitral proceedings commenced and the tribunal has been formed. Herein the author analyses the practice of foreign jurisdictions and arbitral institutions. The author also analyses the arbitration law and rules of Ukraine and suggests the possible amendments to be made.

DISCLAIMER: the author of this master thesis has not analysed the various test being when assessing the application for the interim measures either before the courts or arbitral tribunals at each particular dispute. Neither the author's research and analysis cover the process to obtain the interim measures and legal issues arising out thereof in the investor-state dispute settlement.

CHAPTER 1.

GENERAL THEORETICAL BACKGROUND OF THE INTERIM MEASURES IN THE INTERNATIONAL COMMERCIAL ARBITRATION.

1.1. The need for the interim measures in support of the international commercial arbitration.

The international arbitration is a type of private system of alternative dispute resolution. It is a creation of the parties' will to resolve their dispute out of the court's ambit. Being a type of alternative dispute resolution, the arbitration cannot be effective without the legal mechanisms that will assist the arbitral tribunal in execution of its primary purpose to resolve the dispute, which ultimately will be transformed into the binding and final award.

In this context, one of such mechanisms that serve the abovementioned purpose is the interim measures issued either by the court or arbitral tribunal itself in support of the claim pursued by the party in the dispute in question. It is difficult to overestimate the importance of the interim measures in the international arbitration. The reason for this is quite simple – the arbitration is a private system of dispute resolution and, by its very nature, it lacks enforcement and executive powers that usually monopolized in the State's hands.

Against this background, it is the author's opinion that the master thesis shall begin with the analysis of the evolutionary development of recognition of the importance and need in the interim measures in international commercial arbitration. The understanding of the necessity in interim measures and appropriate regulation of this issue under the law is *sine qua non* for any further analysis and suggestions on the development of Ukrainian law.

At the outset, it has to be stressed that the development of understanding the need for interim measures in the arbitration started from the very birth of the international commercial arbitration. As Jan Yesilirmak in his in-depth handbook on

interim measures in international arbitration notes, during the different periods of time, the attitude of States towards the interim measures differed in progressive way, that is from obscure suspicious to honourable and more realistic understanding of important role the interim measures play in the international arbitration [2, p. 19-46].

At the beginning of 20th century, that is from 1920 to 1930, the basic governing treaties on international commercial arbitration were the Geneva protocol of 1923 and the Geneva Convention of 1927 [3; 4]. The importance of the aforesaid conventions for the international arbitration cannot be overestimated. In the words of Alan Redfern and Martin Hunter their appearance for the arbitration was «*landmark*» as being one of the first strives to subject arbitration under universally recognized rules [1, p. 6-12]. Still a closer look at the terms of the aforesaid conventions leaves without doubts that thereof do not address the interim measures in altogether [3; 4].

With respect to the domestic laws during the noted period and up until 1960, Jan Yesilirmak stresses out that major part of States did not vest their courts with the powers to assist the international arbitration by means of the interim measures [2, p. 36-39]. Nonetheless, as it is noted by the said author, in mid-1950 on different occasions the issue of the interim measures in international commercial arbitration had been analysed and discussed, whereas it was recognized that the arbitral tribunals could enlist courts' assistance in myriad forms, including by obtaining courts' the interim measures [2, p. 39-41].

Also, during this period, more precisely in 1958, the New York Convention had been adopted and concluded [5]. As it stems from the terms of the New York Convention its primary purpose is the enforcement of the arbitral agreements and awards [5]. Consequently, the terms of aforesaid convention do not address the issues related to the interim measures in arbitration [5].

Still, a number of practitioners and publicists in international arbitration argue that provisions of the New York Convention impliedly address some minor points as to the interim measures. For example, Professor Albert Jan van den Berg, who is leading publicist and practitioner in arbitration, argued that article 2 (III) of the New York Convention impliedly provides that the reference to the courts for interim

measures in support of the arbitration shall not be considered as the breach of the arbitration agreement applicable to the dispute [6, p. 144]. Further as was concluded by George Bermann, in his comprehensive comparative study, few jurisdictions consider that the New York Convention can be applicable with respect to the matter of the enforcement of interim measures (this issue with respect to emergency relief would be analysed in subsequent chapters of this master thesis) [7, p. 15].

Already in late 20th century, the climate in international arbitration became more arbitration friendly. As has been explained by Neil McDonell, the practitioner in arbitration, in his comparative study arrived to the conclusion that many States enacted the laws that empowered the arbitral tribunals with right to discharge the interim measures beyond the court's ambit and it was also recognized that the courts' power to issue interim measures existed independently (or in parallel) with the tribunal's right to grant the interim measures [8, p. 275-279].

During this period, that is in 1985, the UNCITRAL adopted the Model Law of 1985 [9]. Few articles were devoted to the interim measures in international arbitration [9]. Firstly, the article 17 lays down that the arbitral tribunal is vested with implicit authority (save as agreed by the parties otherwise) to discharge the interim measures [9]. Secondly, article 9 sets forth the principle that reference to the courts for interim measures cannot be considered as the breach of the arbitration agreement [9]. That is, the parties are vested with the right at any time during the arbitration to make recourse to the course so that to obtain the interim measures [9].

In 2006 the UNCITRAL revised the Model Law of 1985 and effected the amendments making it more arbitration friendly [9]. In article 17 H the courts are now empowered to execute the interim measures discharged by the arbitral tribunal [9]. Ultimately, the UNCITRAL Model Law of 1985 and 2006 made a great push toward the uniformity in the laws governing the international arbitration taking into account that as of now it was adopted in approximately 118 jurisdictions across the world [10].

Therefore, based on all the above noted trend in attitude to the interim measures in international arbitration, the author now concludes that there is a uniform

understanding on the important and even fundamental role of the interim measures in the arbitration. To put it in other words, the attitude to the need for interim measures in international commercial arbitration changed evolutionary. Nonetheless, the principal question remains open – why the international arbitration needs the interim measures?

It is the author's opinion that without interim measures the international arbitration will not stand a chance to completely fulfil its objective. To begin with, one of the objectives of the arbitration is the resolution of the disputes between the parties. Usually, the arbitral tribunal resolves the dispute by way of rendering final and binding award, which may be enforced in a number of jurisdictions. Suffice to say, the New York Convention has been signed and ratified by 168 States [11]. That is, the arbitral awards can be enforced in approximately 86% of all States in the world [11]. Thus, it is now universally agreed that one of the advantages of the international arbitration is enforceability of the award.

In this respect, Mr Gary B. Born, who is one of the most cited among practitioners and academics in international arbitration, aptly elucidated that

> one of the objectives of contemporary legal regimes for international arbitration is facilitating the enforcement of arbitration agreements and awards. In particular, both international arbitration conventions (particularly, the New York Convention) and arbitration legislation (particularly, the UNCITRAL Model Law) ensure that international arbitration agreements are more readily, expeditiously enforced and more broadly interpreted than forum selection clauses. This is consistently cited as a key benefit of international arbitration. [12, p. 9-10]

Another leading practitioner in international arbitration Ms. Margaret Moses, is also of the opinion that the enforceability of the award is one of the advantages of the international arbitration [13, p. 3].

This facilitates another question to be answered - what is the purpose of interim measures ordered in support of the claim before international arbitral tribunal? Generally, the purpose of the interim measures is to assist the adjudicatory body, for example arbitral tribunal, in resolving the dispute and to ensure that final award (or judgment) is capable of being enforced against the party that lost the case. Therefore, the interim measures play a vital role in ensuring the very efficacy of the dispute resolution mechanism. The aforesaid was explained by the Judge Sir Gerald

Fitzmaurice who, with regard to the power of International Court of Justice to order the interim measures, stated that «…*it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court—or of any court of law—being able to function at all*» [14].

The international arbitral tribunals also take the same approach as to the interim measures defining them as an instrument to ensure the successfulness of the award. Even more, they regarded the power to grant the interim measures as «*inherent*» as demonstrated by often-quoted decision of Iran-US Claims Tribunal in *E-Systems Inc v Iran* case (between the foreign investor and Islamic Republic of Iran) [15]. In this case, the government of Iran pursued the claim against the investor before the courts in parallel with the arbitral proceedings [15]. Considering this fact, the arbitral tribunal ordered Iran to stay of the proceedings before its national courts [15]. To substantiate the reasoning behind its order, the arbitral tribunal opined that it had an inherent power to issue interim measures in order to ensure the efficacy and safety of the proceedings as well as the full effectiveness of the award to be issued in the future [15].

The importance of the interim measures for international commercial arbitration was reaffirmed by UNCITRAL Working Group on Arbitration in one of its reports, wherein it concluded that «…*in some cases the very usefulness of the award for the winning party depended on whether the party had been able to enforce the interim measure designed to facilitate later enforcement of the award*» [16, p. 13].

To sum up, the interim measures serve to assist the arbitral tribunal in accomplishment of its primary duty and purpose – by way of effective proceedings resolve the dispute and render binding award that can be enforced against another party to the dispute.

The next issue is how the power to grant the interim measures shall be divided between the arbitral tribunal and the courts. In this respect, the first question to answer is whether the arbitral tribunal shall have the power to issue interim measures or only the courts shall have exclusive power to issue such measures?

As it is noted by Gary Born, there is almost universal agreement that arbitral tribunals shall possess the power to issue the interim measures [17, p. 2635-2636]. There are myriad of reasons to reach out the aforesaid conclusion and the few of them would be considered below.

As it was concluded by the International Law Association in one of its reports, the arbitral tribunals have the inherent powers to discharge the interim measures, because the arbitral tribunal by itself is the dispute resolution body and by essence shall possess the powers to ensure that its decision will be successfully executed [18, p. 8-9]. The ILA referred to the case of ICSID tribunal, that is *Libananco Holdings Co. Limited v Turkey* case, wherein the tribunal in investment dispute noted that it had the inherent powers so that to safeguard the efficacy of the arbitral proceedings [19]. With respect to the international commercial arbitration, the ILA also opined that the arbitral tribunals are also vested with inherent powers to discharge the interim measures [18, p. 8-9].

From the above, the author concludes, that the arbitral tribunals having the decision-making powers are also inevitably in possession of the mechanism to ensure that the result of their decision-making power, the award, will be enforceable.

Another argument proposed by practitioners is that the arbitral tribunal has an implied power, arising out of the arbitration agreement, to discharge the interim measures. For example, Mr. Loukas Mistelis and Stefan Kroll with reference argued that in principle the authority of the tribunal to apply interim measures is implied by very reason of either applicable arbitration rules or law, unless the parties come into agreement to abandon such powers [20, p. 587-588]. To the same end, Mr Gary Born concurs with the said approach toward the tribunal’s powers in this respect [17, p. 234-244].

Another reason is rather practical, than theoretical one. The arbitral tribunal should be in powers to order the interim measures because it may be considered as one of the most appropriate places where the party may seek for the interim measures. Mr Loukas Mistelis and Stefan Kroll explained that the arbitrators, being appointed specifically to resolve the dispute, are much aware of the facts of the case

and may apply the measure that would fit the facts of individual case and meet the parties' interest [20, p. 589-599].

Finally, another reason for justifying the existence of the tribunal's power to render the interim measure is that the parties will be more inclined to comply with such measures if ordered by the arbitral tribunal of their own choice. In simple words, it is in the parties' best interest to comply with the orders of the arbitral tribunal, since at the end of the day this decision-making body will render the award on the dispute.

This was at best explained by the UNCITRAL in its analytical commentary on Draft Text of the Model Law of 1985 [21, p 43]. In particular, it was suggested that most likely the parties would comply with measures ordered by the tribunal, or otherwise it may negatively affect their stand in the case [21, p 43]. That is, the tribunal, when deciding the case (for example, on quantum or allocation of costs), may take into account the parties' behaviour and, in particular, refusal to comply with interim measures [21, p 43].

The fact that the parties usually tend to voluntary comply with the interim measures ordered by the arbitral tribunal is supported by results of the survey conducted by Queen Mary University of London in 2012 [22, p. 2]. Pursuant to the said report, in majority of cases, that is in 62% of disputes, in international arbitration wherein the tribunals ordered interim measures, the parties obeyed with the thereof [22, p. 2].

In the author's opinion the above arguments are seemed to be credible and strong enough to justify the existence of the power of arbitral tribunal to order the interim measures. Nonetheless it does not mean that the power to order the interim measures shall be monopolized by the arbitral tribunal. There is a myriad of reasons to favour the argument that States' courts also should also be empowered to discharge the interim measures in support of the arbitration.

As has been already stressed elsewhere in this master thesis – the heart of the international arbitration is the parties' consent. It is a private alternative dispute resolution mechanism and by its very nature the arbitral tribunal may not possess the same powers as States courts. In this respect, Charles Falconer and Amal Bouchenaki

rightly pointed out that the parties to the dispute, for whatever reasons, may simply disregard the measures discharged by the tribunal [23, p. 190].

Another restriction is that the boundaries of tribunal's power as a whole are set out in the arbitration agreement, being the primary source where the arbitral tribunal derives its jurisdiction to resolve the dispute and, most importantly, the powers that it may employ. As such, it is difficult to overestimate the importance of the arbitration agreement for the arbitral tribunal given that the New York Convention in article V 1(a) set forth a separate ground for refusal in enforcement of the arbitral award if the arbitral tribunal lacked jurisdiction to handle the dispute [5].

It also implies that only the parties to the arbitration agreement are deemed to be bound by the decisions of the arbitral tribunal and, as a rule, shall immediately comply with thereof. Following the same logic, Mr Houston Lowry noted that the interim measures of the arbitral tribunal may not be directed against the third parties (non-parties to arbitration agreement) [24, p. 340]. As was rightly pointed out by Karen Cross, the arbitration practitioner, the non-availability of such interim measures may be crucial if, for example, the assets, shares of the perspective award debtor are in hands of the third party [25, p. 371-372]. In may be concluded, that without the court's assistance, in such cases the arbitral tribunal is simply left unarmed.

Further, no doubt that the arbitral tribunal cannot serve any type of interim measures it wants. In principle, the arbitral tribunal by its very nature differs from the courts. Against this background, in most cases the courts have more options with respect to the type of the interim measures that they can order. This creates additional restrictions on the availability of the interim measures that may be rendered by the arbitral tribunal.

This matter was capably explained by Mr. Alan Redfern, who stated that «*…however tolerant the system of law may be, the more draconian measures of protection which are becoming a feature of modem litigation are likely to remain within the reserved domain of the courts*» [26, p. 85-86]. As an example of such

measures, Mr. Alan Redfern enumerated Mareva injunction and Anton Piller order as one of the drastic interim measures available only to courts [26, p. 85-86].

Finally, at some point of time, the arbitral tribunal is simply unable to order the interim measures. In particular, as noted by Otto Sandrock, before the arbitral tribunal is properly composed (meaning all arbitrators are appointed), the party to the dispute is left with no choice but to apply for the court's assistance [27, p. 54-55]. As explained by this author in subsequent chapters, the arbitral tribunal may avail themselves of the relief discharged by the emergency arbitrator but not all arbitration rules provide for such mechanism, least speaking the enforceability of such measures is also under question [27, p. 54-55].

As a consequence, there are solid grounds to agree that the courts should also be vested with the powers to discharge the interim measures in support of the international arbitration.

Taking all the above facts in mind, the author of this thesis arrives to the conclusion that the evolution of understanding of the need in interim measures was progressively developed. Undoubtedly, both the arbitral tribunal and State's courts should be in power to order the interim measures. This being said, there is certainly the need in the interim measures.

1.2. Evolution of Ukrainian legislation on the interim measures in the international commercial arbitration.

Given that the purpose of this master thesis is to analyse present-day Ukrainian regulation on the interim measures and to suggest the possible amendments to be made in thereof, the author is of the opinion that analysis of the evolution of Ukrainian regulation is important. In other words, without understanding of the current state of affairs of the aforesaid regulation it is impossible to scrutinize the amendments to be made in Ukrainian legislation.

The primary source that governed the international commercial arbitration in Ukraine has always been the New York Convention which has been ratified by Ukraine in 1960 [28]. Although, as has been previously stressed, the New York Convention governs the enforcement of arbitral awards and agreements, it does not explicitly touch the issue of the interim measures at all [5].

Nonetheless the aforesaid convention set forth two groups of grounds for refusal in the recognition and enforcement of the arbitral award [5]. The first type includes the grounds for refusal which is exercised by the competent court upon the request of the award debtor (article V (1)) [5]. The second type includes the grounds for refusal exercised by the competent court on its own initiative, wherein no request is necessary of the parties to the dispute/enforcement proceedings (article V (2)) [5].

As to the regulation of interim measures in international commercial arbitration at national level, in 1994 Ukraine adopted the Law on ICA [29].[1] This is the arbitration law governing the international commercial arbitration in Ukraine [29]. In principle, the Law on ICA in altogether duplicates the provisions of the UNCITRAL Model Law of 1985 and partially implements some amendments of 2006 edition [29].

With respect to the interim measures in support to the claim in international commercial arbitration, the Law on the ICA accorded two articles [29; 9]. Given the importance of the courts' assistance to the international arbitration, the Law on ICA in article 9 permits the parties obtain the interim measures from the courts either during or prior to the arbitral proceedings [29].

The importance of the existence of such provision in the arbitration law cannot be overestimated. For example, Mr. Tsirat Gennadii, being Ukrainian academic and practitioner in international commercial arbitration, concluded that the principle settled in the article 9 of the ICA is a well-established rule in the international commercial arbitration [30, p. 201]. He also opined that the aforesaid article by itself is declaratory in nature, unless necessary implementations are made into procedural codes of Ukraine so that to vest the judiciary with the power to order the interim measures of the protection [30, p. 201].

[1] Hereinafter the author's translation unless otherwise expressly specified in this master thesis.

The author of this thesis concurs with this opinion. Whilst the article 9 of the ICA provides for general principle to preserve the courts' domain to order the interim measures, nonetheless it requires the State to amend its procedural laws and explicitly vest the courts with the said powers [9]. The careful analysis of the Model law of 1985 drafting history and, in particular, of the article 9, furthers the above conclusions [31, p. 17]. The drafters of the Model Law left open the question of courts' authority to order the interim measures for the States to regulate [31, p. 17].

Therefore, by adopting the Law on ICA, Ukrainian legislator set a cornerstone rule regulating the relationship between the courts and the parties to the dispute in international arbitration [29]. The next logical step for Ukrainian legislator should have been the amendment of Ukrainian procedural legislation that is the addition of courts' power to apply the interim measures. However, the procedural legislation remained silent on this issue for a long time. To be more precise, up until the arbitration reform in Ukraine that took place in 2017, the Civil Procedural and Commercial Procedural Codes did not vest the parties with the power to obtain the interim measures in support of the arbitration taken place in or out of Ukrainian borders [32].

In particular, the article 151 of the Civil Procedural Code vested the parties with the power to obtain the interim measures only during the litigation [33]. In the meantime, the Commercial Procedural Code treated the issue differently by the means of articles 43^1 and 66 empowered the parties to apply for the interim measures prior to or during the litigation [34].

Given that during this period courts were not empowered (at least explicitly) to order the interim measures in support of the international commercial arbitration, such state of fairs made the arbitration climate in Ukraine unpredictable. In particular, Ukrainian courts' attitude as to this matter varied significantly. As a result, the parties seeking to apply for the courts' interim measures in Ukraine were unaware about possible result of the application to the courts.

Against this background, the courts' practice at that time may be diverted into two groups. The first one is when the courts unequivocally recognized their power to

order the interim measures or did so implicitly and the second one quite to the opposite.

As an example, may serve the ruling of Commercial Court of Donetsk Oblast dated 31.01.2014 (case No. 905/613/14) wherein the court rejected to order the interim measures in support of the claim to be pursued in international commercial arbitration [35]. In this case, the party to the dispute over the non-delivery of the paid goods petitioned to the Commercial Court to order the interim measures in the form of the attachment of the goods [35]. The Commercial Court analysed the application and opined that the parties certainly were entitled to refer their disputes to the ICAC [35]. However, by concluding the arbitration agreement the parties did not waive their right to take action for the court's interim measures [35]. The Commercial Court scrutinized the possibility to order the interim measures and, by doing so, it implicitly approved that Ukrainian courts had the power to order the interim measures in support of the arbitration [35]. Nonetheless, the Commercial Court refused to order thereof since the applicant failed to comply with the requirements of the Commercial Procedural Code [35].

It should be stressed that the Commercial Court did not clearly explain the reasoning behind the conclusions as to the source for its authority to apply the interim measures [35]. Still, the author concludes that court's ruling favoured the provisions of the article 9 of the ICA [35].

To the second group of rulings may be devoted the ruling of Commercial Court of Donetsk oblast dated 29 April 2008 [36]. In this case, the applicant asked the Commercial Court to order the interim measures by arguing that the court had such power based on the article 9 of the Law on ICA already referred in this thesis [36]. To the contrary, the Commercial Court took an absolutely opposite view on the matter, that the aforesaid article did not bestow it with the authority to grant the interim measures in support of the international commercial arbitration [36]. Therefore, the Commercial Court did not discharge the interim measures [36].

The abovementioned ruling serves as a foothold for the author to make the conclusion that the courts practice was rather negative and erratic causing a myriad of

rulings with completely opposite conclusions on the possibility to obtain the interim measures from Ukrainian courts. In this respect, the author agrees with the conclusions made by Prusenko Halyna, an academic in international private law, who analysed the courts practice during the pre-reform period and elucidated that the courts' attitude to the matter at hand varied significantly on case-by-case basis [37, p. 49].

As a result, it can be concluded that before the reform of 2017 the parties were unable to obtain the interim measures from courts whether prior to or after the commencement of the arbitration proceedings at all, with some exceptions where the courts arrived at a different conclusion. Such a long-lasting standing of the arbitration law in Ukraine in no way positively contributed to Ukrainian perspectives to become a more arbitration friendly jurisdiction among other jurisdictions.

Now, turning to the second article of the Law on ICA that governs the interim measures in international arbitration. The article 17 of the Law on ICA, save that parties agreed otherwise, promulgates that the arbitral tribunal is empowered to order the interim measures that it deems necessary related to the subject-matter of the dispute [29]. Although such provision is progressive by itself, nonetheless Ukrainian arbitration law remains silent on the possibility to enforce such interim measures by Ukrainian courts [29].

Finally, the Law on ICA was subject to major amendments occasioned by the adoption of the Law No. 2147a-19, which may be considered as a positive development of the arbitration law in Ukraine [32]. In this respect, as was aptly elucidated by Olena Perepelynska, leading Ukrainian practitioner in arbitration, the reform was as a response to the deep-rooted discussions among academics and practitioners on the need for legislative breakthrough with respect to the arbitration law [38].

New amendments also pertained to the interim measures ordered in support to the arbitration proceedings [32]. In this vein, the legislative developments can be grouped up as follows.

First and foremost, the Law No. 2147A-19 vested the parties to arbitration with the powers to have recourse to Ukrainian courts with application for interim measures in support to the arbitral proceedings [32]. Now, to take an advantage from such protective mechanism, under part 3 of the article 152 the Civil Code of Procedure set forth that the party shall make an application to Ukrainian court of civil jurisdiction [39]. It must be stressed that under part 3 of article 149 of the aforesaid code, the application can be made only after the arbitral proceedings were commenced [39]. As a consequence, the arbitration law does not vest the courts with the power to discharge pre-arbitral interim measures.

Second, but not least important, the courts' powers to order the interim measures is the same to those set out for the disputes referred to the courts of civil jurisdiction [39]. Such an invariant approach allows the courts to avail of the results produced by year-to-year developed courts' practice. In particular, this relates to the test being used by the courts in deciding whether it is necessary to apply the interim measures, the procedure to cancel used interim measures and etc.

Pursuant to the paragraph 3.11. of the Explanatory Note to the Law No. 2147A-19 the abovementioned amendments were carried through so that to assist the arbitration by Ukrainian courts and promote the efficiency in the alternative dispute resolution [40, p. 5].

The aforesaid legislative changes in the arbitration law of Ukraine and their implementation in practice would be further scrutinized in subsequent sections of this master thesis.

In the meantime, the author would like to particularly articulate that whereas the legislator took into account the Model Law of 2006 in drafting the amendments into the ICA; nonetheless some important issues related to the interim measures were not covered by the reform, which can be briefly summarized below.

First, the Law No. 2147A-19 did not set up the mechanism for the enforcement of the interim measures issued by the arbitral tribunal with either foreign seat or seat in Ukraine [32]. As the result, the effectiveness of the tribunal's interim measures, left without assistance from the government's side, is under question [32].

Second, despite being vested with the power to order the interim measures in support of the commenced arbitration, the courts still do not have the power to preserve the rights of the parties to the dispute by ordering the interim measures before the convocation of the arbitral proceedings [32].

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CONCLUSIONS TO CHAPTER 1

At-present, it is uniformly agreed that the interim measures play a prominent role in assistance of the international arbitration to serve and fulfil its purpose – final dispute resolution between the parties in the form of binding arbitral award. In this respect, myriad of jurisdictions improved their national legislation so that to reinforce assistance to the international arbitration. Against this background, the national legislation of many states now lays down that both the domestic courts' as well as the arbitral tribunals themselves are vested with the authority to order the interim measures to secure the claim pursued in international arbitration. The aforesaid trend is explained by the fact that the arbitral tribunal as well as the domestic courts having powers to discharge the interim measures have corresponding advantages and disadvantages allowing the parties to use each particular forum in different individual cases. In altogether, there is a need in interim measures as their purpose and adequate regulation can ensure the efficacy of the international arbitration in each jurisdiction.

Ukraine on its part, whilst being the State that pursues the pro-arbitration status, made a serious step in improving its arbitration law to assist the international arbitration, in particular by the judiciary system. The Law No. 2147a-19 may be considered as the breakthrough development of the Ukrainian arbitration law by enlisting the courts with the powers to assist the arbitral tribunals, for example, by virtue of the interim measures [32]. All in all, the aforesaid law made Ukraine more pro-arbitral jurisdiction. Nonetheless, the arbitration law as it currently stands in Ukraine requires improvements and amendments by making opportunities to the

arbitral tribunal and parties to the dispute to obtain the most efficient assistance derived from arbitral tribunals and judiciary system of Ukraine.

CHAPTER 2.

THE INTERIM MEASURES ISSUED BEFORE THE COMMENCEMENT OF ARBITRAL PROCEEDINGS.

2.1. Interim measures issued by courts prior to the commencement of the arbitral proceedings.

2.1.1. Comparative study of foreign arbitration laws on court's interim measures.

One of the useful mechanisms existing within the ambit of the court's domain is the power to order the interim measures before the arbitral proceedings is commenced. As has been previously stated in this master thesis, the existence of such mechanism sometimes has prominence in support to the arbitral proceedings to be commenced.

As an example, may serve the situation, when one of the parties seeks to obtain the interim measures the soonest the possible, but the arbitral proceedings has not been commenced yet (in practice, it may take weeks to prepare necessary documents to initiate the arbitration proceedings). Or to make things worse, as the convocation of the arbitral proceedings take place by the notice of arbitration (or alike procedural document) served to all parties to the dispute, it may play as a trigger for contesting parties to take actions so that to undermine the enforceability of the future award. Against this background, the court's assistance may play crucial role in the arbitration that even has not started yet.

For these reasons, the author of this master thesis is of the opinion that the comparative analysis is needed in relation to the arbitration laws of various jurisdictions on the powers of the courts to issue the interim measures prior to the initiation of the arbitral proceedings. This analysis will play an important role for the arbitration law of Ukraine by serving as a foothold from which the suggestion as to the amendments in Ukrainian law will be made.

The analysis will cover jurisdictions of legal system existing in the world wherein the arbitration law allows the courts to intervene and grant the interim measures before the arbitration has started.

The starting point should be analysis of the accessibility of the pre-arbitration interim measures in the United States of America. The author notes, under consideration falls only the New York state and other states are not subject to the current analysis.

Although the arbitration (both domestic and international) is governed by the Federal Arbitration Act of 1925, still the states are entitled to adopt statutory law that governs the arbitral proceedings within their domain, unless the provisions of such statutory law contradict with the FFA [41, p. 37-38]. Given that the FFA does not govern the question of interim measures in altogether, the New York state implemented its own statutory regime [42].

The arbitration law of the New York is incorporated into the Civil Practice Law and Rules [43]. In particular, the article 75 serves as the arbitration law of New York and as noted by Alexandra Dosman and Clara Flebus, practitioners in arbitration, up until the of CPLR that took place on 2005, the aforesaid article did not vest the courts with the powers to order the interim measures in support to the international arbitration [41, p. 45-46]. Thenceforward, article 75 of the CPLR and, in particular, the section 7502 (c), authorizes specific courts to order the interim measures in support of the arbitration even taken place out of the country either prior to or after the commencement of the arbitration only if the arbitral award would be «*ineffectual without such provisional relief*» [43]. If the application for interim measures is taken prior to the commencement of the arbitration, then the deadline in 30 days is fixed for the applicant to commence the arbitral proceedings [43]. The aforesaid period of time may be decreased or increased if the party shows the so-called good cause (meaning the justification) [43]. Finally, if the arbitration is not commenced within the required period of time, then the interim measures «*shall expire and be null and void and costs, including reasonable attorney's fees, awarded to the respondent*» [43].

Pursuant to Mr. Fellas John's analysis, who is a practitioner (arbitrator and counsel) in international arbitration, the New York courts already exercised their authority provided under the section 7502 (c) of the CPLR [44, p.112-115]. As the courts' practice show, the article 72 duplicated other provisions of the CPRL that govern the litigation [44, p.112-115]. This, for example, relates to the test being used by the courts to apply the interim measures [44, p.112-115].

The closer look at the article 7502 of the CPLR makes the author of this master thesis to conclude that the state of the New York vested its courts with the powers to assist the international arbitration by means of the interim measures [43]. The mechanism, as was stated above, is pretty similar to those existing in litigation [44, p.112-115].

Somewhat similar, although not identical, approach is followed in the Republic of India. As a preliminary point, the arbitration law in India is governed by the Arbitration and Conciliation Act of 1996 [45]. In relation to the interim measures the Arbitration Act of India devoted section 9, governing courts' interim measures and section 17 (the interim measures ordered by the arbitral tribunal) [45]. The section 9 (1) grants Indian courts with the authority to order the interim measures before the arbitral proceedings have started [45]. Additionally, section 9(2) sets out ninety days for the applicant to bring in action the arbitral proceedings, which may be extended or reduced by the court [45]. Finally, as noted by Dushyant Dave, who is practicing arbitration in India, upon the expiration of the aforesaid deadline the interim measures automatically cease to be in force [46, p. 165].

Another jurisdiction that follows the same approach and vests the courts with the authority to discharge the pre-arbitral interim measures is Hong Kong. As the arbitration law in Hong Kong serves the Arbitration Ordinance [47]. In principle, Hong Kong is one of the States, which adopted the UNCITRAL Model law 2006 although, as will be seen later, with its own amendments and particularities [47]. The Arbitration Ordinance dedicates the section 45 to the issue of the court's ordered interim measures [47]. Interestingly, but the aforesaid section does not duplicate the

article 17(J) under the Model Law of 2006, which is specifically devoted to the court's interim measures [47].

Overall, the courts in Hong Kong are entitled to discharge the pre-arbitration interim measures. However, contrary to the arbitration laws of New York and India, nowhere in the Arbitration Ordinance it can be traced at all the deadline to bring an action in the international arbitration [47]. Still, as explained by Teresa Cheng, who is practicing counsel in arbitration, the courts in Hong Kong are nonetheless in power to fix the deadline for filing the case to arbitration or subject the interim measure to condition precedent meaning to the obligation to commence the arbitral proceedings, otherwise the interim measure in question will become ineffective automatically [48, p. 347].

The Arbitration Ordinance also is distinguished from other arbitration laws by fixing additional requirements for the courts to discharge the interim measures, that is section 45(5) requires that:

> a) the arbitral proceedings are capable of giving rise to an arbitral award (whether interim or final) that may be enforced in Hong Kong under this Ordinance or any other Ordinance; and
> b) the interim measure sought belongs to a type or description of interim measure that may be granted in Hong Kong in relation to arbitral proceedings by the Court. [47]

Another unique provision is non-appealability of the interim measures to the higher instances' courts in Hong Kong [47]. That is, the interim measures cannot be subjected to the appellate proceedings [47].

Finally, the interim measures can be obtained in assistance of either the arbitration that takes place in or out of the Hong Kong [47]. Yet, pursuant to Mr. Chris Parker, who is practicing lawyer in arbitration, the jurisprudence of the courts in Hong Kong evinces that the interim measures in support of arbitration seated outside of Hong Kong are applied with due care [48, p. 83].

Finally, the section 45 (4) preserves the priority of the arbitral tribunal to discharge the interim measures, that is the courts may reject to discharge the interim measures if the arbitral tribunal already handles the same request for the interim measures or/and the arbitral tribunal is more convenient forum for discharging the interim measures [47].

Ultimately, in Hong Kong it is possible to obtain the interim measures before the arbitration has been commenced, albeit it is not an easy burden if the matter concerns foreign arbitration. Whereas both the courts and arbitral tribunal have the right to discharge such measures, still the Arbitration Ordinance gives the prevalence to the tribunal's jurisdiction to order the security therefore making limited the courts' intervention during the arbitration.

Another jurisdiction that entitles the court to assist the parties to the dispute on pre-arbitration stage is the Republic of Singapore. For the sake of clarity, it should be stressed that in Singapore as the arbitration law serves the International Arbitration Act of 1994 [50].

Singapore preserves the arbitral tribunal's autonomy and promotes the principle of non-intervention by judiciary into the dispute resolution process handled by the arbitral tribunal [50]. The aforesaid conclusion can be derived from close analysis of the section 12A of the IAA, which sets forward the regulatory mechanism of the courts' authority to discharge the interim measures [50]. Under section 12(A) paragraph 5 the Singapore's courts can exercise their power to order the interim measures only if based either upon the parties' mutual consent in written form or with prior approval by the arbitral tribunal [50].

Section 12(A) paragraph 6 deals with the pre-arbitral interim measures which may be discharged in support to the arbitration taking place inside or outside of the Singapore [50]. With respect to the pre-arbitral interim measures, as noted by Robert Merkin and Johanna Hjalmarsson in their handbook on international arbitration the courts are allowed to intervene only in case of urgency and if the arbitral tribunal/institution cannot act or does not have the power to discharge such measures, for example, if the tribunal is not yet composed or the arbitration rules does not provide the option for emergency arbitrator [51, p. 70-72]. The authors further add that once the arbitral tribunal is seized with the matter (properly composed), the ordered measures become ceased and without any effect since the arbitral tribunal is in power to handle the case and deal with any emergent situation [51, p. 70-72].

Overall, the author of this master thesis arrives at the conclusion that Singapore's arbitration law vests the courts with power to discharge pre-arbitral interim measures albeit the autonomy of the arbitral tribunal is also preserved leaving thereof with exclusive powers to grant such measures.

Another State that assists arbitral tribunals with pre-arbitral interim measures is Sweden. As the arbitration law serves Swedish Code of Judicial Procedure [52]. Under Sections 1-3 of the Chapter 15 the courts are vested with the powers to discharge pre-arbitral interim measures [52]. The Section 7 fixes the deadline for the arbitration to be commenced, that is within one month from the date of the pre-arbitral interim measures and, if the proceedings are not convocated, the measure cease in effect [52].

As it can be derived from the SCJP, no additional requirements are set out for the interim measures being thrived by the party prior to the commencement of the arbitration [52].

A comparatively different approach is taken by Germany with respect to the interim measures to be discharged prior to the commencement of the arbitral proceedings. As the arbitration law in Germany serves the 10th book of German Code of Civil Procedure, which is a restatement of the UNCITRAL Model Law of 1985 with some pro-arbitration amendments [53].

The Section 1033 of the GCCP empowers the parties to avail of the pre-arbitral interim measures, whilst the Section 1025 makes it clear that the pre-arbitral interim measures relate to the arbitration with seat in foreign jurisdiction or in Germany [53]. Interestingly, but as noted by Richard Kreindler and Johannes Schmidt in the handbook in arbitration in Germany, the are only two types of interim measures available, that is seizure of assets and preliminary injunction [54, p. 135]. Still, the author of this master thesis notes, that the GCCP does not address the issue of the deadline for commencement of the arbitration [53].

The next country is Belgium, which has a slightly different approach as to the courts' interim measures at the pre-arbitral stage. The arbitration law serves as Part VI of the Belgian Judicial Code [55].

Articles 1035 – 1040 of the BJC vests the courts is Belgium to order the interim measures either before or during the arbitral proceedings notwithstanding of the seat of the arbitration [55]. The requirements to be satisfied so that to obtain the interim measures has been crystalized through the consistent judicial practice, as summarized by Niuscha Bassiri, in particular, the party has to prove that the emergency of the matter, that the arbitral tribunal is incapable to act effectively, and the risk of rigorous and irrecoverable detriment should the interim measure is not ordered [56, p. 256-264].

The BJC takes and interesting approach with respect to the deadline for commencement of the arbitration proceedings once the pre-arbitral interim measures are obtained from the courts [55]. As was concluded by Mr. Jos Decoker in his article the BJC neither requires the party to initiate the arbitration before taking recourse for courts' interim measures nor there an obligation to do so within certain period of time, because this question shall be fixed by the judges in each particular case [57, p. 88-89].

Ultimately, it can be concluded that the most developed jurisdictions enforced the arbitration laws that vest the courts with the authority to grant the interim measures albeit the arbitral proceedings have not been initiated yet. The reason for such right to exist is that the perspective arbitral proceedings are protected from the actions that may put in danger the effective enforceability of the arbitral award.

2.1.2. Ukrainian arbitration laws on court's interim measures issued before the commencement of arbitral proceedings.

As has been previously stated in this master thesis, the reform taken place in 2017 did not touch an issue as whether Ukrainian courts have the power to grant the interim measures before the proceedings started. Against this background, the CPC expressly provides the condition for obtaining the interim measures from the courts –

the commencement of the arbitral proceedings [39]. More precisely, the paragraph 3 of the article 152 of the CPC lays down that

> the application for interim measures in support of the claim, pending at the international commercial arbitration or domestic arbitral tribunal, shall, at the claimants' disposal, be filed to the court of appeal at the seat of international arbitral tribunal or domestic arbitral tribunal, location of respondent or its assets. [39]

Ultimately, there is an express provision under the CPC, making the requirement that the interim measures can be discharged only after the arbitral proceedings convocated as mandatory one [39]. On its face, Ukrainian courts are legally obliged to follow the terms of the CPC and discharge the interim measures subject to the condition that the arbitral proceedings are started [39].

For this purpose, the CCP in article 151 paragraph 7 enumerates the requirements in relation to the application for being filed appropriately [39]. The first one, is that the applicant shall provide the evidence that the proceedings have started (notice of arbitration, claim submissions etc.) [39]. Second, the evidence that the aforesaid documents have been duly served [39]. Finally, but not least important, the copy of the arbitration agreement [39].

As it can be derived from the aforesaid provisions of the CPC, the courts can be seized of the matter in relation to the interim measures only upon application of the party to the arbitration agreement with evidence that the arbitral proceedings have been already commenced [39]. In principle, the CPC does not recognize the courts' pre-arbitration interim measures [39].

The aforesaid conclusions are reinforced by the practice of Ukrainian courts. As an example, may serve the ruling of the Odessa Appellate Court dated 25.06.2020, wherein the company «Bannion Limited» applied for the interim measures to secure the claim pursued before the ICAC at UCC [58]. The applicant asked the court to attach movable and immovable property of the respondent in the arbitration [58]. Still, the court rejected to satisfy the application as there been no evidence that the arbitration has been commenced, that is the applicant did not provide the trustworthy evidence that the claim submissions were indeed filed and received by the arbitral tribunal (if any at all) before the ICAC at UCC [58]. Hence, the court took a strictly

literal approach as to the terms and provisions of the CPC, which expressly entitles the courts to discharge the interim measures only in already commenced arbitral proceedings [58].

Overall, the above ruling clearly demonstrates that Ukrainian courts strictly follows the provisions and requirements of the CPC of Ukraine wherein the interim measures can be applied once the arbitral proceedings have been commenced. It is author's opinion that under the CPC there is no room for manoeuvre wherein the courts can, as was before the reform of 2017, discharge the interim measure to secure the perspective claim in the international commercial arbitration.

Ukrainian Supreme Court also follows the same approach. As an example, may serve the ruling of the Supreme Court dated 3 January 2020, where the appellant filed an appeal on the interim measures discharged by Kyiv court of Appeal [59]. The Supreme Court upheld the interim measures and while doing so also analysed whether the dispute between the parties indeed exists and the case was referred to the international arbitral tribunal [59]. Hence, the author of this master thesis comes to conclusion that in principle the Supreme Court also takes the view that the interim measures may be obtained only after the proceedings started pursuant to the requirements of the CPC of Ukraine [59].

Such court practice plainly demonstrates that there is no room for argument that courts somehow may discharge the pre-arbitral interim measures of security. As a result, the parties to the arbitration agreement are left without precautionary mechanism that exists in many jurisdictions, that is to secure the claim that will be filed in perspective arbitral proceedings to avoid the risk of the arbitration being undermined due to the actions of the respondent taken long before or shortly after the arbitration is commenced.

This being premised, as the practice of Ukrainian courts evinces, the pre-arbitral interim measures are not available and the courts follows strict requirements of the CPC, that is the analyse whether the arbitration proceedings has been commenced and if not, reject to discharge the interim measures.

Noteworthy, but pursuant to the paragraph 2 article 149 of the CPC, the parties may obtain the interim measures either before the case has been filed to Ukrainian courts or during the litigation [39]. In the meantime, the CPC in paragraph 4 of the article 152 further sets forth that the applicant «*shall file the claim within 10 days*» to Ukrainian court [39]. Should the plaintiff fail to do so, then interim measures are ceased by the court [39].

Considering the importance of the pre-arbitral interim measures, the author proposes to amend the CPC of Ukraine and vest the parties to perspective arbitration with the right to obtain from Ukrainian courts the pre-arbitral interim measures. The proposed amendments are demonstrated in the Annex I to this master thesis. For ease of understanding, the author of this master thesis would like to briefly describe the reasons for the proposed amendments.

As a preliminary point, there are several practical issues regarding court's pre-arbitral interim measures, including concerning the deadline for submitting the claim to arbitration; the grounds for the court to refuse the application.

Regarding the first issue at hand the author takes the view that the deadline for submitting the claim should be 30 days, whereas the courts should be left with discretion to extend or reduce it. The said provision in principle will reflect the practical considerations of the arbitration. In some cases, it may take a few days for the legal counsellors to draft the necessary document (also known as Notice of Arbitration or Request for arbitration) to commence the arbitration, whilst in others much more.

For ease of understanding, the author would like to compare different arbitration rules with respect to the requirements for commencement of the arbitration proceedings. For example, under England Arbitration Act of 1996 and, more specifically, paragraph 3 section 14 thereof, the arbitral proceedings, unless parties agreed otherwise, commences upon the service of notice of arbitration to another party [60].

The drafting of the notice of arbitration is important because the service of the said legal document initiates the arbitration proceedings. While doing so, the legal

counsellor shall be aware of the requirements set out to the form and substance of such notices under the arbitration rules of administrative bodies. For example, the GAFTA Arbitration Rules No.125 in the paragraph 2 does not set out requirements as to the form and substance of the notice arbitration [61]. From the author's experience (as a practitioner in the GAFTA arbitration) it may take maximum a few days and minimum a few hours to draft the notice of arbitration depending on the complexity of the matter in questions and awareness of legal counsellors with the facts of the case.

In the meantime, the arbitration rules of the London Court of International Arbitration in article 1 set forth a myriad of requirements to be fulfilled in order to serve valid request for arbitration [62]. The requirements vary from formal to substantive ones thus requiring the legal counsellors of the party to arbitration to be much aware of the facts of the client's case, take much time to comply with all formalities to draft the request for arbitration etc [62]. From the author's experience, depending on the circumstances of each particular case, it may take at least a week to draft the request for arbitration under the LCIA arbitration rules.

The above clearly demonstrates that it is difficult to forecast at the legislative level the time needed to commence the arbitration proceedings because arbitration rules and laws differently address this issue. Based on the foregoing premises, the author is of the opinion that the courts' should the power to either extend or reduce the deadline for submitting the claim to arbitration, whilst taking into account the relevant facts including the arbitration rules and laws, the difficulty of the case and other circumstances as the case may be.

As to the consequences of the party being failed to commence the arbitral proceedings within required deadline the interim measures shall cease in effect similarly as regulated under article 158 of the CPC with respect to pre-litigation interim measures [39].

Now, the author of this master thesis would like to analyse the second issue that is the grounds for refusal of interim measures of security. The grounds for refusal

should be similar to those enshrined with respect to the pre-litigation interim measures under the CPC.

The final question is whether parties to the arbitration with foreign seat should be able to take benefit from possible courts' assistance seated in Ukraine. As was analysed elsewhere in this master thesis most of the arbitration laws vests the courts with the power to discharge pre-arbitration interim measures even in support of the foreign arbitration. Additionally, under paragraph 3 article 149 of the CPC, the courts may discharge interim measures in support of commenced arbitration even with foreign seat [39]. Consequently, there is no valid argument why different approach shall be taken in relation to the pre-arbitral interim measures employed by the courts.

Ultimately, the author arrives to the opinion that the CPC as it currently stands should be amended. The aforesaid changes should open the doors for Ukrainian courts assist the parties before the arbitration commenced so that to preserve the integrity of the arbitral tribunal and proceedings to be commenced. This would be a positive step toward Ukraine being recognized as more arbitration friendly jurisdiction. For the all the above reasons the author of this master thesis suggests the amendments to the CPC as enshrined in the Annex I to this master thesis.

2.2. Interim measures issued by the emergency arbitrator prior to the commencement of arbitral proceedings.

2.2.1. Comparative study of arbitration rules on the interim measures issued by emergency arbitrator.

As of now the international arbitration has the mechanism to obtain pre-arbitral interim measures from the arbitrator long before the arbitral proceedings have started even without the assistance of the courts. The aforesaid mechanism now is widely known as the emergency arbitrator proceedings. Ultimately, it is an innovative

mechanism that empowers the parties to obtain the interim measures from the specifically appointed emergency arbitrator.

The author is of the opinion that in-depth analysis of the arbitration rules and state practice is required before making suggestions to amend the arbitration rules and laws currently effective in Ukraine. Against this background, under detailed evaluation should fall the arbitral rules that have the procedure of the emergency arbitrator and the state practice regarding, in particular, the recognition and enforcement of the measures discharged by such arbitrators.

As has been already noted the emergency arbitrator is a relatively new phenomenon in the international arbitration. It first appeared in the ICDR arbitration rules of 1 May 2006, wherein paragraphs 1-2 of article 37 of the rules vested the administrator of the ICDR with the authority to appoint the emergency arbitrator within one day upon duly filed request of the party to the arbitration agreement [63, p. 77].

At the time, the article set forth very pro-arbitration provisions as to the procedure regarding emergency arbitrator. To start with, the aforesaid procedure is commenced upon the application filed by «*reliable means, but must include a statement certifying that all other parties have been notified*» therefore giving the party to the arbitration the right to start the proceedings swiftly should it prove to be necessary [63, p. 77]. Whereas the application is successfully filed, within one day the arbitrator is appointed and each party is informed about thereof [63, p. 77].

Importantly, paragraph 3 vested each party with the right to challenge the emergency arbitrator, although they had to exercise this right only within one day after they were informed of the appointment [63, p. 77]. The emergency arbitrator was authorized with wide powers [63, p. 77]. It could rule on its own jurisdiction, discharge, amend or vacate the emergency relief [63, p. 77]. The emergency relief may take form of «*interim award or of an order*» [63, p. 77]. As it was rightly pointed out by Guillaume Lemenez Paul Quigley the object and purpose of such term was to vest the emergency arbitrator with the powers to discharge such interim measures in the form of award that may be subsequently compulsory executed by

courts under the New York Convention [64, p. 67]. The author notes the major drawback of the rules - they did not fix any the deadline for emergency arbitrator to discharge the relief [63, p. 77].

Ultimately, under paragraph 6 the mandate of the emergency arbitrator exists until the arbitral tribunal is formed pursuant to the procedure as set out in the ICDR arbitration rules [63, p. 77]. Thenceforward, once the arbitral tribunal was formed it retains the authority to manage the case and, more importantly, to decide on the fate of the emergency relief [63, p. 77].

Another important provision that should be taken into account is the express statement that the parties to the arbitration agreement are free to take recourse to litigation in order to obtain the pre-arbitration interim measures irrespective of the availability of the emergency arbitrator procedure [63, p. 77]. The ICDR arbitration rules, having established the emergency arbitrator mechanism, also do not bar the parties to apply for courts' assistance [63, p. 77].

Overall, in 2006 the ICDR by making the amendments into their arbitration rules set in motion innovative mechanism, which is the pre-arbitral interim measures that can be obtained from the arbitrator rather than only from the courts. In principle, it implies that the parties can avail themselves of all advantages of the arbitration when trying to obtain the interim measures from the emergency arbitrator.

Current version of the ICDR rules on emergency proceedings faced a little, if any, amendments since the first version was implemented [65]. Still the ICDR rules fixed the time for filing the notice to commence the proceedings, that is the party has to file thereof «*concurrent with or following the submission of a Notice of Arbitration*», which explicitly bars the parties' rights to initiate such procedure before the arbitration started [65].

Many practitioners in the international arbitration agree that such a breakthrough in the ICDR arbitration rules had a huge impact on other arbitration institutions making them to implement further amendments in their arbitration rules. In this respect, Mr. Grant Hanessian and Alexandra Dosman aptly elucidated on the following:

> The first institution to incorporate «opt out» emergency arbitrator provisions into its rules was the international division of the AAA, the International Centre for Dispute Resolution («ICDR»). In the ICDR's 2006 rule revisions, emergency arbitration was available by default - although parties could of course elect to not apply the emergency arbitration provisions (set out at Article 37 of the 2006 ICDR Rules). In the course of the next ten years, virtually all leading arbitral institutions followed suit, with the result that the availability of emergency arbitration is now the norm. [66, p. 217-218]

In addition to the above, Mr. Martin Gusy and James Hosking, with respect to the ICDR arbitration rules opined that thereof «*can rightly claim to have been at the forefront of the wave of emergency arbitration provisions introduced earlier this decade*» [67, p. 61].

Hence, it can be rightly derived from the above mentioned that the mechanism of the emergency arbitrator, as it was founded in the ICDR arbitration rules, was a progressive development in international arbitration shaking the tide all over the world, which pushed other leading arbitral institutions to follow the example and implement in their arbitration rules the same procedure, although with some minor but significant differences.

Among other leading arbitral institutions that implemented the emergency arbitrator mechanism the author would like to mention the arbitration rules of the Stockholm Chamber of Commerce [68]. Similarly, as the ICDR arbitration rules, they set out a very detailed fast-track procedure regarding emergency interim measures [68].

In article 2 the SCC arbitration rules lays down similar procedure of the commencement of emergency proceedings, that is by application of the party to the arbitration agreement, although the rules thoroughly delineate the requirements for such application, as for example, to stipulate the summary of the dispute [68]. As noted by authors of the handbook on the SCC rules, from practical perspective, such requirements are not a mere legal technique, but serve so that to assist the arbitral institution as well as the emergency arbitrator with necessary information to arrange the proceedings swiftly and decide as to the necessity of the emergency interim measures [69, p. 184-186].

The time limits for the appointment of the emergency arbitrator are similar to those as set out in the ICDR arbitration rules. Interestingly, the SCC can refuse in such appointment should under circumstances that it «*manifestly lacks jurisdiction over the dispute*» [68]. As explained in the above referred handbook, the decision on the jurisdiction by the arbitral institution is made by its lonesome that is there is no specific threshold to be applied for making such decision [69, p. 188].

Perhaps crucial difference with the ICDR arbitration rules is that the SCC arbitration rules in articles 1 and 9 set forth that the application for the appointment of emergency arbitrator may be filed even before the arbitration proceedings started upon the condition, that the arbitral proceedings are commenced within 30 days from the moment when the emergency relief has been discharged [68]. This makes the mechanism of the emergency arbitrator relatively similar to that of the pre-arbitration procedure before the domestic courts.

In addition to the above, is that the article 9 also stipulates that the consent to the arbitration being administrated by the SCC does not only constitute the agreement to the emergency proceedings but also acceptance by the party of the binding nature of the emergency decision [68]. It has to be stressed, however, that the SCC arbitration rules does not make clear the consequences for the parties being failed to comply with the emergency relief, whereas at the first glance the author considers that such provision may serve as the waiver of the parties' right to challenge the validity thereof.

However, other practitioners in the arbitration have different point of view, for instance, regarding this provision, Ms. Patricia Louse Shaughnessy opined that one of the consequences may be adverse inferences

> On a practical level, given the limited mandate of the emergency arbitrator, the potential of negative inferences may have limited value. It may be more valuable for the party who obtained interim measures to seek to have a subsequent arbitral tribunal draw negative inferences from the other party's failure to comply with the decision of the emergency arbitrator. [70, p. 346-347]

Therefore, based on the above the author arrives to the conclusion that at least the adverse inferences and at maximum the waiver of the parties' right to challenge

and disobey the emergence interim measures is set out under the SCC arbitration rules.

Finally, under article 8 the emergency arbitrator is under duty to discharge the relief within 5 days once the case has been referred to the emergency arbitrator [68]. This serves as a contrast difference between the SCC and ICDR arbitration rules. The said time limit is short and fits the nature of emergency proceedings – the need in urgent relief.

Ultimately, all other provisions, with some exceptions in grammar, wording and essence, are in most places are similar to the ICDR arbitration rules.

The LCIA is another example of prominent arbitration institution that modified its arbitration rules and implements the emergency arbitrator proceedings. The current version of the LCIA of arbitration rules in the Article 9B vests the parties with to apply for emergency relief [62]. Regarding the mechanism of the emergency arbitrator, the LCIA arbitration rules set forth a myriad of provisions that in their majority differ from other arbitration rules [62].

To begin with, under paragraph 9.4. of the said rules the application to start the emergency proceedings can be filed only alongside with the request for the arbitration or «*at any time prior to the formation or expedited formation of the Arbitral Tribunal (under Articles 5 or 9A)*» [62]. Hence, it is practically impossible to commence such proceedings before the request has been forwarded onto the LCIA [62].

Another unique feature is fixed in paragraph 9.6. of the LCIA rules. In particular, before the emergency arbitrator even appointed, the arbitral institution analyzes the application and decides whether to uphold thereof and appoint the emergency arbitrator [62]. Nonetheless, the respective paragraph does not address any further to what extent the review is made by the arbitral institution. In this respect, as noted by Maxi Scherer and Lisa Richman in the handbook on the LCIA rules, the relevant criterion that the institution assesses is whether there is a «*case of emergency*» [71, p. 152]. As has been stated by the noted authors - such provision in the LCIA rules differs from other arbitration rules

> In granting such power to the LCIA Court, the LCIA Emergency Arbitrator regime distinguishes itself from other institutional arbitration rules, in which an Emergency Arbitrator is automatically appointed, as long as the relevant Emergency Arbitrator provisions apply and the required fee is paid. [71, p. 151]

The deadline for making the decision as to the fate of the application is not fixed, albeit the LCIA rules lays down that this issue has to be decided «*as soon as possible*», thus giving the institution a wide discretion regarding the deadline for deciding on the application [62].

For this reason, it may be concluded that the party's application may be dismissed prior to the emergency arbitrator being nominated.

Regarding the emergency arbitrator the author notes that under paragraph 9.7. of the rules the arbitrator has wide authority to ensure their ability to manage the proceedings as fast as possible, similarly to other arbitration rules analysed above in this master thesis [62]. Nonetheless, the emergency arbitrator has no more than 14 days to decide on the matter [62]. As with other arbitration rules the said deadline can be extended by the arbitral institution, whilst the LCIA arbitration rules goes further and vest the parties with the right to agree among themselves to prolong the aforesaid deadline [62]. In this respect, the author would like to note that from the practical point of view, this provision is very advantageous, given that sometimes the matter may be complex involving myriad of evidence making the parties, for the sake of completeness, to extend the deadline by agreement.

Another issue is the standard to be applied by the emergency arbitrator when deciding to discharge the emergency relief or not. It is considered that the standard is very burdensome and requires to prove that the matter constitutes emergent situation making the party to request for the emergency relief [71, p. 148-149].

Notably but in paragraphs 9.7.-9.8 the LCIA arbitration rules fixes that the emergency arbitrator can order the «*emergency relief*» without specification of any type of the measures that may be discharged [62]. Some authors argue that the aforesaid term is much broader than as provided in the rules of other arbitral institutions and, therefore, the emergency arbitrator under the LCIA arbitration rules

can order not only the conservatory or interim relief but any type of relief [71, p. 149].

Other matters dealt in the LCIA rules provides for pretty similar provisions in substance as compared with other arbitration rules that has been already analysed.

In continuance of the author's analysis, the ICC arbitration rules should also be analysed as this arbitral institution implemented its own emergency arbitrator mechanism that, somehow, takes a different approach to the subject matter of the present master thesis [72].

First and foremost, the ICC arbitration rules do not set out the right of the ICC to scrutinize whether the application is sufficiently substantiated (as under the LCIA arbitration rules) [72]. Interestingly, but in the article 2 the deadline for appointment of the emergency arbitrator is not fixed within mandatory terms, that is the ICC arbitration rules merely lays down that appointment shall be made «*within as short a time as possible, normally within two days from the Secretariat's receipt of the Application*» [72]. Considering that the emergency proceedings are characterized by swift proceedings without undue delay, it is not understood why such a little bit vague timeframe is fixed.

Further, under the article 1 of the ICC rules the parties are entitled to request in the application for either the conservatory or interim measures to be discharged by the emergency arbitrator [72]. That is, the authority of the emergency arbitrator does not extend to any relief, as, for instance, is noted elsewhere in the master thesis with respect to the LCIA rules [72; 62].

Now regarding the timing for submitting the application the author notes that article 29 of the ICC rules vest parties with the power to avail of the emergency proceedings before the arbitral proceedings has been commenced subject to the condition that the proceedings will be commenced within ten days [72]. Crucially, under article 1 of the Appendix, only the arbitrator is vested with the power to prolong the said deadline [72].

Another interesting issue concerns the challenge of the emergency arbitrator. Whereas the ICC arbitration rules in article 3 authorizes the parties with the right to

challenge the arbitrator, still the appropriate test for assessment of challenge, for example, justifiable doubts, is not provided [72]. At least it may be concluded that since the question whether there are sufficient grounds to challenge the arbitrator is within exclusive domain of the ICC, then the said issue is decided on case-by-case basis [72]. Nonetheless, the lack of express statement as for the standard for challenge may not be considered as well-suited trend in international arbitration in altogether.

Finally, comparing with other arbitration rules, under the ICC rules the emergency arbitrator is empowered to discharge the emergency relief only in the form of the order [72]. This may play a role in subsequent possible enforcement of such measures in some jurisdictions.

Ultimately, all other terms and provisions of the ICC arbitration rules regarding the emergency arbitrator, with some exceptions, are in substance much similar to other arbitration rules mentioned in this chapter.

One more arbitral institution adhered to the emergency arbitrator proceedings is the SIAC and, in particular, the Schedule 1 thereof [73]. The SIAC arbitration rules and its similarities with the arbitration rules of other institutions are analysed below.

The main characteristics of the emergency proceedings under the SIAC arbitration rules may be characterized as follows. First of all, under paragraph 1 of the Schedule the party is entitled to seek the appointment of emergency arbitrator only in parallel with the request for arbitration or after thereof is filled [73]. Further, the SIAC arbitral institution likewise under the LCIA rules undertakes the preliminary assessment of the application and decides whether to appoint the emergency arbitrator or not [73].

Significantly, but the SIAC arbitration rules does not make it clear how and in which way the arbitral institution analysis the application for being admissible [73]. In this respect, John Choong and Mark Mangan, in their handbook on SIAC rules, noted that «*the obvious key criterion is whether the matter can or cannot wait until the constitution of the tribunal. Non-urgent matters will not justify the appointment of an emergency arbitrator*» [74, p. 244].

Another distinguishing feature is the paragraph 1 of the Schedule fixes that «*The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority*» [73]. Comparing with other mentioned rules, the SIAC rules expressly disarm the parties' right to set aside the decision of the emergency arbitrator [73].

The closer look through other terms of the SIAC arbitration rules lead the author of this master thesis to the conclusion that in substance they are not in any difference with already analysed arbitration rules [73].

Another arbitration rules that should be under consideration in this master thesis is the Swiss Rules of International Arbitration of Swiss Chambers' Arbitration Institution [75].

The provisions of the Swiss Rules set forth contrasting terms regarding the emergency proceedings, if compared with majority of other arbitration rules. To start with, under article 43(3) of the rules, the application may be submitted before the arbitral proceedings were commenced upon the condition that thereof are commenced within ten days [75]. Importantly, but the said deadline can be extended by the SCAI «*in exceptional circumstances*» [75]. The Swiss rules therefore sets high threshold for allowing the extension, which make a great contrast with other arbitration rules as has been aptly noted by Ms Sandra De Vito Bieri in the handbook on the arbitration in Switzerland [76, p. 463].

Further, article 43(2) fixes the grounds for the application to be rejected by SCAI (prior to the appointment of the emergency arbitrator). More precisely, the aforesaid grounds include, in particular, that «*there is manifestly no agreement to arbitrate*» or it is «*more appropriate to proceed with the constitution of the arbitral tribunal and refer the Application to it*» [75].

From the author's point of view, the first ground is clear and prices, whereas the second one requires clarification so that to understand what cases it does include. Ms Sandra De Vito Bieri suggests that such ground covers the situations, for example, when the party files the application, albeit the arbitral tribunal is in a moment to be properly constituted [76, p. 463]. As a result, the author concludes, that

the aforesaid grounds may involve the situation which are not so urgent ones and the waiting the arbitral tribunal to be composed will not prejudice the party's right anyway.

And finally, the Swiss rules does not address the issue of the non-appealability of the emergency relief [75]. The article 43(8) set forth only that relief has the same power as interim measures, that is it may be discharged in the form of the award and thus improves the chances of the enforceability of the relief under the New York Convention (this will be analysed in subsequent sections of the master thesis) [75].

Another arbitral institution that empowers the parties to obtain emergency relief is Hong Kong International Arbitration Center. The Administered rules of the HKIAC in Schedule 4 regulates the proceedings for appointment of emergency arbitrator [77].

The main features of the HKIAC rules regarding the emergency arbitrator may be enumerated as follows. First and foremost, the Schedule 4 in paragraph 1 set forth that the application for appointment of emergency arbitrator may be submitted at any time but latest before the arbitral tribunal is constituted [77]. As a consequence, the emergency relief may be obtained even before the commencement of the proceedings [77].

Similarly, as other rules the HKIAC arbitration rules lays down that the HKIAC preliminary asses the application and then makes the decision to proceed with appointment of emergency arbitrator or not [77]. This being said, HKIAC rules provides for similar safeguard mechanism, albeit the scope of the assessment being made is unclear from the first sight [77]. This matter, however, has been resolved in practice as Michael Moser and Chiann Bao in their handbook apply elucidated as follows

> In practice, if the application complies with the requirements listed in paragraphs 2 to 4 of Schedule 4, HKIAC will accept the application and proceed to the next step of the proceedings. HKIAC will not, however, determine whether the applicant has satisfied the requirement of urgency to justify its application for emergency relief—this is a matter to be determined by the emergency arbitrator once he or she has been appointed. [78, p. 136]

In simple words, the HKIAC merely checks out that all formal requirements for the application have been satisfied and only then will decide to proceed further. All other matters are within exclusive domain of the emergency arbitrator.

As for the status of the emergency arbitrator, comparing with other arbitration rules the author notes that the Schedule 4 in paragraph 7 puts forward more grounds for challenge of the emergency arbitrator, which may be summarized as follows: lack of impartiality and independence; lack of necessary qualifications agreed by parties; arbitrator is unable to perform his duties or fails to act without undue delay [77].

Regarding the procedure, Schedule 4 in paragraph 12 set forth that the arbitrator shall render the emergency relief within 14 days save to the extent otherwise has not been decided by the HKIAC or agreed between the parties to the dispute [77]. For the purposes of possible enforcement, the arbitrator is vested with the power discharge emergency relief in whatever form the arbitrator deems necessary (order, award etc.) [77].

Regarding the issue of compliance with and carrying out of the emergency relief by the respective party, the paragraph 16 provides that by agreeing to apply the HKIAC arbitration rules the parties also agree that the emergency relief is binding and therefore shall be executed forthwith [77].

Regarding other issues, in principle, the HKIAC rules lay down in essence pretty similar provisions.

Ultimately, after having analyzed the terms of the above noted arbitration rules, the author arrives to the conclusion that the rules provide the following uniform terms with respect to the emergency proceedings.

Firstly, the fast-track proceedings entitling the parties to obtain the relief as fast as possible while fixing the deadlines for discharging the emergency relief may be extended [62; 65; 68; 72; 73; 75; 77].

Secondly, the rules provide the arbitrator with wide powers to handle the matter without undue delay, albeit the parties' right to present the case is safeguarded because the emergency arbitrator should provide each party the opportunity to present their case [62; 65; 68; 72; 73; 75; 77].

Thirdly, the rules address the form in which the emergency relief should discharged. Various approaches are taken but this matter is provided in each analyzed arbitration rules [62; 65; 68; 72; 73; 75; 77]. Further, the emergency reliefs are subject to amendment or dismissal by either the emergency arbitrator or arbitral tribunal [62; 65; 68; 72; 73; 75; 77].

Fourthly, the emergency arbitrator may be challenge by the parties. [62; 65; 68; 72; 73; 75; 77] The challenge proceedings do not stop the emergency proceedings thus preventing any dilatory tactics being used by the parties [62; 65; 68; 72; 73; 75; 77]. Additionally, the emergency arbitrator, as a rule, cannot act as an arbitrator in the dispute with respect to which the emergency relief was discharged [62; 65; 68; 72; 73; 75; 77].

Finally, the arbitration rules treat differently the issues that inherently within the domain of arbitral institutions [62; 65; 68; 72; 73; 75; 77]. Some rules vest the institution with the right to make preliminary assessment and decline in application for emergency relief whilst others not reserving this authority in full to the arbitrator [62; 65; 68; 72; 73; 75; 77].

2.2.2. The enforcement of the interim measures discharged by the emergency arbitrator.

Turning to the second issue that should be analysed in the present section is how the interim measure discharged by the emergency arbitrator shall be enforced. The author of this master thesis is of the opinion that so that to suggest any amendments in the arbitration law of Ukraine, it is beneficial to make a preliminary comparative study regarding the approaches as to the enforcement of emergency relief.

There are various approaches regarding the regulation of the said matter. The first one is to expressly regulate the enforcement in the arbitration law. The second one, is to enforce the emergency reliefs as the arbitral awards.

As an example of the first approach should be mentioned Singapore. Under the section 2(1) of the IAA the emergency arbitrator falls within the definition of the arbitral tribunal [50]. This being said, the IAA put the emergency arbitrator at the same level of treatment as common arbitral tribunal [50]. By doing this, the emergency relief, being discharged by the arbitral tribunal, may be enforced in the Singapore [50].

Somewhat the same approached is followed by Hong Kong. The Arbitration Ordinance devotes sections 22A and 22B regarding the emergency relief [47]. In the said sections the AO provides for the definition of the emergency arbitrator and details the enforcement procedure [47]. The emergency relief is enforced as an order of the court [47].

Currently, for the best authors' knowledge there no other States that addressed this matter under the guise of law. With respect to the second approach that is the enforcement of the emergency relief based on the New York Convention. Before the author will provide for examples of such enforcement, it is necessary to analyse the theoretical background regarding the possibility to apply the New York Convention to emergency reliefs. Therefore, the important question to answer – whether the emergency relief is an award within the meaning of the New York Convention.

However, the author notes that the New York Convention does not lay down the definition of the «award» in altogether [5]. At least, the article V(1)(e) of the New York Convention provides that only binding award is enforceable, whilst convention puts no other requirements on the table [5]. However, most practitioners in the arbitration concur that for the award to binding number of criteria shall be satisfied. The aforesaid requirements were aptly summarized by Prof. Stefan Kröll «*the following three core elements of an award in the sense of the New York Convention can be distilled: (1) a decision by an arbitrator, (2) which is binding and (3) final*» [79, p. 96].

With respect to the first criterion, it was aptly argued Fabio Santacroce that the emergency arbitrator may be qualified as the arbitrator [80, p. 292-293]. From the author's opinion this is not a mere theoretical conclusion, but also a practical one.

The above analysed rules of the arbitral institutions give the emergency arbitrator the same powers as the arbitrators who decides the dispute, that is to rule on the jurisdiction, to hold the hearing, to manage the case and most importantly to discharge the binding reliefs [62; 65; 68; 72; 73; 75; 77].

Nonetheless, the most controversial issue that still serves as the subject for continuous debates is whether the emergency relief should be considered as «final» decision of the arbitrator for the purposes of enforcement under the New York Convention. What does finality mean for the purposes of enforcement and how it can be defined?

Regarding the aforesaid issue, the International Council for Commercial Arbitration within the context of enforcement of the arbitral award defined the finality criterion as quoted below:

> An award is a decision putting an end to the arbitration in whole or in part or ruling on a preliminary issue the resolution of which is necessary to reach a final decision. An award finally settles the issues that it seeks to resolve. Even if the tribunal would wish to adopt a different conclusion later, the issue cannot be reopened or revised. [81, p.17]

In principle, the aforesaid understanding of the finality is uniformly shared by various practitioners in the arbitration [82, p. 476-478; 83, p. 99-101]. Another issue that logically follows is whether the form of the relief matters. Does the fact that the emergency relief is issued in the form of award plays any role in assessment of finality?

It is aptly noted among practitioners in the arbitration that title/form of the decision does not play a vital role, if any at all, in assessment whether the decision is final. For example, the practitioner in international arbitration Dr Dirk Otto in this respect noted that «*the label attached to a decision is not always decisive; it is the substance that counts. For example, courts have occasionally interpreted «orders» by arbitration tribunals to be awards, provided they are final decisions on an issue*» [84, p. 158].

The quoted above opinion seems to be credible especially in light of the fact that this is the content of the decision which always predicates the legal consequences

thereof, that is the parties' obligations (for example to compensate damages etc.) and rights.

Given that the content has a dominant role in determining the finality of the decision, the author considers it necessary to briefly analyse the practice regarding the finality of the emergency relief alongside with the interim measures ordered by the arbitral tribunal.

As a preliminary point, there are different approaches as to whether the interim measures/emergency relief can be considered as «final» decision of the arbitrator. The first approach is that they are not final and cannot be enforced.

Ultimately, the courts voice up different grounds in refusing or granting the permission to enforce the interim measures/emergency reliefs. For example, in Switzerland, First Civil Law Court in the decision of 13 April 2010 and, more specifically, in para 2.3.3. of the decision summarized that the interim measures cannot be enforced as awards since they are not final, whilst stressing out that treating interim measures as awards will be «dangerous» [85].

As another example may serve decision of Australian court in *Resort Condominiums International, Inc v. Bolwell* case of 1995 noted that whilst interim measures are binding the parties, nonetheless such decisions «*which may be rescinded, suspended, varied or reopened by the tribunal which pronounced it is not 'final' and binding on the parties*» [86]. Although in this case the court dealt with the interim measures, nonetheless the author stresses out that emergency relief similarly may be modified and revoked by either the emergency arbitrator or the arbitral tribunal itself [86]. Therefore, the decision of Australian court may very well fit the conclusion that the emergency relief is not enforceable under the New York Convention.

As an example of jurisdictions that have more lenient approach may be the US courts. Pursuant to William Bassler, who was a district court judge of New Jersey, came to the conclusion that there were two cases in the USA wherein the courts dealt with the enforcement/set side proceedings of the emergency relief, whilst the issue of finality was deeply scrutinized the judges [87, p. 45-48].

The first case is *Yahoo! Inc. v. Microsoft Corporation*, wherein the court was seized of the setting aside procedure of emergency arbitrator's relief appointed by the American Arbitration Association [88]. One of the arguments that applicant put concerned the matter that the emergency relief is not final and, therefore, is not capable of being confirmed (recognized) as it was not the award for the purposes of the FAA [88]. The judge gave a short shrift to this argument, whereas it was ruled that the parties had a clear intention for the emergency relief to be enforceable which could be stemmed from the terms of the contract in dispute [88]. Hence, the judge confirmed the relief thus elevating up to the same nature as the awards [88].

Another case cited is *Chinmax Medical Systems v. Alere San Diego*, wherein the courts seized with the same matter – setting aside proceedings [89]. The judge tailored the same position as Australian court in *Resort Condominiums International, Inc v. Bolwell* case, that is the application to set aside the relief were not upheld because thereof was not final and subject to possible further review, modification, or vacation of the award [89].

Therefore, the above decisions evince still inconsistent position among the US courts too. Nonetheless, there is still judgment that enforced emergency relief. Whilst, this approach may be advantageous, the author agrees with the opinion that the implementation of domestic legislation covering the enforcement of the emergency relief is far better approach then any others due to the following reasons.

First and foremost, it is difficult to recognize the emergency relief as final award. As provided in the rules analysed above, the emergency relief may modified and cancelled by the emergency arbitrator or the tribunal [62; 65; 68; 72; 73; 75; 77]. Further, the emergency reliefs, being similar to the interim measures serve the function of preserving the status quo to provide assistance in arbitration. Therefore, the author is of the opinion that the emergency relief is not final award.

Secondly, such approach provides legal certainty and wipes out any possible inconsistences that inherently exists in the courts practice. The domestic legislation provides an opportunity to regulate the matter, subject to possible additional amendments by the legislator.

With the above analysis and conclusions in mind the author will elaborate on possible improvements to be made in Ukrainian practice and legal regulation regarding the emergency arbitrator.

2.2.3. Arbitration rules of ICAC and UMAC at CCI of Ukraine and emergency arbitrator – the need for development.

Currently there are two arbitration institutions that administer the dispute resolution that is the International Commercial Arbitration Court and the Ukrainian Maritime Arbitration Commission at the Chamber of Commerce and Industry of Ukraine.

Both arbitral institutions adopted arbitration rules of 2020 edition [90; 91]. The terms of both arbitration rules are pretty identical with some exceptions [90; 91]. Importantly, but the ICAC and UMAC rules do not set forth the mechanism of the emergency arbitrator [90; 91]. Instead, they provided that the interim measures of protection before the arbitral tribunal is constituted may be discharged by the ICAC President (administrative authority) upon the receipt of the petition from any party (respondent or claimant) [90; 91].

The ICAC and UMAC rules does not restrict the ICAC President in type of the interim measures to be discharged [90; 91]. Similarly, as with the emergency arbitrator, such interim measures may be changed or cancelled either by the ICAC President and subsequently by constituted arbitral tribunal [90; 91]. The ICAC and UMAC rules does not set forth any other provisions as to the powers of the President with respect to the interim measures [90; 91].

Against this background, the said mechanism for pre-arbitral interim measures is ineffective. For example, Mykhailo Soldatenko, who is a practitioner in international arbitration, aptly enumerated the most crucial drawbacks of the ICAC arbitration rules in this respect which may be summarized as follows [92].

First, the ICAC President is not an arbitrator [92]. Consequently, President's interim measures are not enforceable under neither Ukrainian law nor the New York Convention [92]. Second, it follows then that the ICAC President may not be challenged due to the lack of impartiality and independence etc [92]. Third, the ICAC President may have no enough time to discharge the interim measures (due to their workload inherently existing in their administrative position), which may be crucially in cases of emergency [92].

Ultimately, the author of this master thesis sides with the commentaries made by Mykhailo Soldatenko. Besides, the author would like to make few additional notes regarding the drawbacks currently existing in the ICAC arbitration rules and the UMAC rules, being similar, as well.

First, the rules do not set forth the deadline for the ICAC President to discharge the interim measures, bearing in mind inherent emergency in applications for pre-arbitral interim measures [90; 91].

Second, the procedure for obtaining the relief from the ICAC President is not regulated at all. As a consequence, the procedural rights of the parties may be prejudiced thus comprising due process violations [90; 91].

Third, the arbitration rules does not provide for the conditions to be satisfied (the test) in order to obtain the interim measures from the ICAC President [90; 91].

With all the above in mind, the author arrives to the conclusion that analysed mechanism for pre-arbitral interim measures as it currently stands in the ICAC and UMAC rules is ineffective and inadequately regulated. This is the foremost ground for the author to conclude that the ICAC and UMAC rules shall be amended and set forth the emergency arbitrator mechanism taking into account the best practice and experience of other major arbitral institutions. The proposed mechanism of emergency arbitrator to ICAC and UMAC rules is set out in the Annexes 2 and 3 respectively to this master thesis. The amendment is summarized as follows.

Firstly, the author took note of the practice and proceedings of the arbitration under the ICAC and UMAC rules thus piecing together innovative regime with old rules that govern the proceedings.

Secondly, the amended rules provide for the clear-cut details of the emergency proceedings taking into account the need for creating the fast-track proceedings.

Thirdly, the rules provide similar terms which are present in most already analysed rules, that the forms of the emergency relief and its validity, the applicability of the emergency proceedings rules etc.

Finally, the author does not provide for the costs being paid for the emergency proceedings and any other issues related to thereof. This is issue that has to be dealt by the respective arbitral institutions.

2.2.4. Enforcement in Ukraine of interim measures issued by emergency arbitrator.

In this section the author analysis the practice of Ukrainian courts in relation to the enforcement of the emergency reliefs. The understanding of the approach taken by the courts is prerequisite for making further suggestions as to the development of Ukrainian arbitration law.

Currently, there are only two rulings of the Supreme Court in relation to the enforcement of the emergency relief. The most recent one is the ruling of Civil Cassation Court of Supreme Court dated of 14.01.2021 in the case No. 824/178/19 [93]. The Supreme Court was seized as appellate court over the judgement rendered by Kyiv Court of Appeal wherein the court of appeal rejected to enforce the emergency relief discharged by emergency arbitrator Mr Joe Tirado [93].

For the sake of clarity, the author wishes to briefly describe the facts of the aforesaid dispute. In short, the dispute related to claim of Russian investors (Vnesheconombank) who owned the shares of Prominvestbank against Ukraine under Russian Federation – Ukrainian Bilateral Investment Treaty dated 1998 for purported violations thereof [93]. The claim was occasioned by attempt of Ukrainian authorities to sale the aforesaid shares at the auction in order to enforce the award rendered in investment dispute between Ukrainian investor and Russia [93]. Given that the

auction allegedly affected investors' rights, they moved the SCC arbitration against Ukraine [93]. The investors also obtain the emergency relief which in principle barred Ukraine from taking any further actions related to the sale of shares at the auction and, thus, the enforcement of completely different awards rendered in investment disputes [93].

The Kyiv Court of Appeal in its ruling of 20 September 2019 rejected to enforce the said emergency relief due to three main grounds [94]. First, the bilateral investment treaty was concluded on 1998 incorporating, among others, the SCC arbitration rules currently existing at the time (albeit the edition was not specified), whereas the emergency arbitrator mechanism was created in subsequent editions of the aforesaid rules [94]. Second, that the respondent (Ukraine) was not properly informed and could not present its case as it was informed about the proceedings during public holidays in Ukraine [94]. Finally, the relief could not be enforced because it would disrupt the enforcement of completely different arbitral awards [94].

Overall, the Supreme Court upheld the judgment of Kyiv Court of Appeal and while doing so made following important conclusions [93]. First, the fact that the Russian – Ukraine BIT did not incorporate the edition of the SCC arbitration rule did not mean that the parties wanted to exclude the subsequent editions thereof [93]. Second, Supreme Court found that the procedure as laid down under the SCC rules was followed by the parties and institution, whereas the respondent was duly notified and received the extension [93]. Finally, the Supreme Court sided with the reasoning of the court of appeal and found that the enforcement of emergency relief would violate the public policy regarding the enforceability of the courts' judgements, given that the enforcement of the arbitral awards in other investment disputes were pending [93]. For this reason, the Supreme Court found no reason to enforce the relief [93].

Importantly, but in this case Ukrainian courts assessed the matter under the New York Convention [93]. The Supreme Court did not consider that the subject matter of the dispute was emergency relief and not arbitral award [93]. Although such attitude may be considered as arbitration friendly, the practitioners should be cautious in making any conclusions with respect to this issue given that the practice of

Ukrainian courts may radically change, whilst sometimes they have no understanding of the possible issues arising out of the alike disputes.

The second case concerns the ruling of the Supreme Court of Ukraine dates as of 2 November 2016, wherein the court review the decisions of the court of first instance and court of the appeal, which enforced the emergency relief discharged by emergency arbitrator pursuant to the SCC rules arising out of the dispute between JKX OIL & GAS PLC and Poltava oil-gas company under the Energy Charter Treaty [95].

When assessing the matter, the Supreme Court of Ukraine once again applied the New York Convention. However, the court found that the enforcement of the emergency relief would contravene to the public policy of Ukraine [95]. For these reasons, the court found that the relief could not be enforced [95].

Nonetheless, once again the Supreme Court applied the New York Convention to enforcement of the emergency relief with no hesitation and without analysing the issue of finality of the emergency relief [95]. This is the second case wherein the Supreme Court completely ignored this issue [95].

The commentaries of practitioners with respect to this ruling varied. For example, Olga Hamama noted this trend as being positive showing the readiness of Ukrainian courts to enforce the emergency reliefs [96 p. 314-315]. On the other hand, Olena Perepelynska with respect to the practice of Ukrainian courts on the enforcement of the emergency award noted, that such courts' attitude inherently includes many drawbacks as the emergency reliefs are not final [97].

The author concurs with opinion of Olena Perepelynska. As has been already stated elsewhere in this master thesis, the emergency relief may not be considered as final award. In the meantime, the practice of Ukrainian courts by itself is not demonstrative as it any point of time the courts may take completely opposite view on enforceability of the emergency reliefs especially because the courts has not dealt yet with legal question whether emergency relief is indeed final award under the New York Convention.

By these reasons, the author of this master thesis suggests the amendments being made into the arbitration law of Ukraine. The author proposes to include the emergency arbitrator in the definition of arbitral tribunal as provided in the Law on ICA. By doing so, the interim measures would be subject to enforcement regime also proposed by the author. The said amendments are attached in the Annex 1 of this master thesis.

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CONCLUSIONS TO CHAPTER 2

Currently, the most prominent arbitral institutions have implemented in their arbitration rules the mechanism of emergency arbitrator. The said innovation vests the parties to the dispute with a right to obtain the interim measures long before the proceedings commenced or/and the tribunal has been formed. The emergency arbitrator competes with the courts, which for a long-time preserved the monopoly to discharge the pre-arbitral interim measures. The experience of the arbitral institutions is of particular importance and serves for the suggested amendments to be made in the arbitration rules existed in Ukraine.

The mechanisms of the pre-arbitral awards as set out under the ICAC and UMAC arbitration rules is ineffective as it has various inherent flaws making such pre-arbitral interim measures unfruitful. Consequently, the author suggests amending the aforesaid rules, in particular, with respect to the powers of the ICAC and UMAC President to discharge the pre-arbitral interim measures. The author proposes to amend the rules and create the mechanism of the emergency arbitrator. The author also proposes the approach for enforcement of the emergency relief taking into account further amendments proposed by the author that is the enforcement of the interim measures by Ukrainian courts.

Further, many pro-arbitral jurisdictions entitle the courts to order the interim measures long before the arbitral proceedings commenced. From the practical point

of view, such pre-arbitral interim measures ensure the parties' interests that may be disrupted before the proceedings started. No less important is the impact on the integrity of the arbitral tribunal that is courts' pre-arbitral interim measures assist the arbitral tribunal which has not been formed yet.

Currently, Ukrainian arbitration law does not vest the courts with the powers to discharge pre-arbitral interim measures. This seriously prejudices the effectives of the arbitration taken place in or outside of Ukraine. For these reasons, the author suggests amending arbitration law of Ukraine as it currently stands and entitle Ukrainian courts with the power to order pre-arbitral interim measures.

CHAPTER 3.

THE INTERIM MEASURES ISSUED DURING THE ARBITRAL PROCEEDINGS.

3.1. Interim measures issued by courts during the arbitral proceedings.

3.1.1. Comparative study of foreign State's law on enforcement of the interim measures discharged by the arbitral tribunals.

In this section the author intends to analyse the legislation foreign States regarding the court's power to enforce the interim measures discharged by the arbitral tribunal. The author pieces together the best practices regarding the enforcement of the interim measures. Against this background, the author suggests analyzing two jurisdictions being Austria and Germany. The analysis of the arbitration law of the noted states will assist the author in suggesting the amendments being made in the arbitration law of Ukraine.

To start with the author wishes to analyse the arbitration law of Austria, which arbitration law comprises of the Austrian Civil Code of Procedure [98]. Under the section 585 of the ACCP empowers the parties to obtain the interim measures from the courts [98]. As it stems from the provisions of the said section, the parties cannot waive their right to have recourse to the courts [98].

Perhaps most interesting for the purposes of the present master thesis is the enforcement of the interim measures issued by the arbitral tribunal. Under section 593 of the ACCP the courts are empowered to enforce the interim measures ordered either by the tribunal seating in or outside of Austria [98].

The courts are vested with powers to refuse in enforcement of the interim measures if one of the following condition is present [98]: the similar grounds as to those provided under the article V of the New York Convention regarding any interim measures whether discharged outside or within Austria [98]; if discharged

interim measure is unknown for Austrian courts and the modification thereof is not requested by the applicant [98]; the arbitral interim measure conflicts with the interim measures either by Austrian courts or foreign courts (if thereof is requested or issued earlier) [98].

Consequently, Austria empowers its courts to recognize and enforce arbitral interim measures [98]. The rules as to the enforcement is pretty similar to the enforcement of the awards under the New York Convention, albeit the ACCP set forth additional grounds for refusal taking into account the issues that may arise during the enforcement of interim measures [98].

Another jurisdiction that establishes a little bit similar approach as to the interim measures is Germany. In particular, section 1041(1) of the GCCP set forth that the arbitral tribunal may order the interim measure of protection, albeit the legislation do not set out the legal standard to be applied when assessing the need in such measures [53]. The tribunal is in power to request the applicant to provide for counter security [53]. The aforesaid tribunal's power is dispositive, that is the parties by agreement may debar the tribunal from being intitled to apply such measures [53].

The section 1041 (1) vests the courts with the authority to enforce the interim measures [53]. Still the said section does not set forward the grounds for refusal in enforcement [53]. However, as noted by Richard Kreindler and Johannes Schmidt, prominent arbitrators in Germany, the German courts has the margin of appreciation in assessment of whether to discharge the interim measures or not [99, p. 137-141]. It is also noted by authors that the courts will not enforce the interim measures discharged by the tribunal which lacks the jurisdiction or if the measures contradict the public policy or if the interim measures are clearly illegal or with obvious mistakes [99, p. 137-141].

Similarly, as in Austria, the German courts are vested with the powers to change the interim measure or cancel thereof [99, p. 137-141]. The interim measure may be changed, for example, if it is unknown for the courts of Germany (as in Austrian jurisdiction) [99, p. 137-141].

Consequently, the author arrives to the conclusion that the arbitration law of Germany set forward basically the same approach as in Austria regarding the enforcement of the interim measures.

3.1.2. Ukrainian arbitration law and practice on court's interim measures and enforcement of the interim measures discharged by the arbitral tribunal.

In this subsection the author analyses the practice of Ukrainian courts when analyzing the applications for interim measures as well as Ukrainian legislation with respect to the matter at hand. The author underlines two issues that currently exist in Ukrainian practice, that is inconsistent and flawed courts practice with respect to the court-ordered interim measures and lack of the enforcement mechanism for the interim measures ordered by the arbitral tribunal.

Regarding the first issue, as has been stated elsewhere in this master thesis, the Ukrainian courts are vested with the powers to discharge the interim measures in support to the commenced arbitral tribunal proceedings (article 149(3) of the CPC) [39]. No specific test is established for the courts as to decide for the need in interim measures [39]. Still paragraph 2 of the noted article sets forth that the interim measures may be discharged when

> absence of interim measures may seriously infringe in or prevent execution of the court judgment or effective remedy of or restoration of violated or disputed rights or interests of the claimant for the protection of which the claimant applied for or intends to apply for. [39]

The aforesaid provision set forth rather vague terms for discharging the interim measures [39]. Therefore, it is in principle the courts that shaped the law and determined how it applies with respect to the interim measures. Below, the author provides examples of different rulings of courts when deciding on discharging of interim measures.

The first ruling that falls within the scope of author's analysis was discharged by Kyiv Court of Appeal on 07.08.2020, wherein the applicant applied for the interim measures of security in support of the claim pursued in the international arbitration

[100]. The dispute concerned non-delivery of paid goods (EUR127,050.00) under the contract for sale of medical face masks [100]. The applicant effected an advance payment for the goods, which has never been delivered, whilst the respondent completely ignored the applicant numerous demands to perform the contract [100]. For the Applicant, these circumstances were enough to successfully obtain the interim measures [100].

Nonetheless, the court, having analysed the facts of the matter, noted that the application for interim measures may not be based on assumptions, but should be based on clear evidence of danger that the execution of judgment will be hindered or prevented [100]. It is thus for the court the evidence as presented by the applicant was not enough to uphold the application [100].

From the author's point of view the ruling of the court is substantiated by the fact that the mere non-performance of the contract by the party and even avoidance to perform thereof by itself as a rule almost in all cases may not serve as evidence that the enforceability of the arbitral award will be prevented or hindered.

Another case was adjudicated by the same court in the ruling of 21.04.2020 [101]. In this case the applicant requested the court to discharge the interim measures by means of arrest of the respondent's property and bank accounts [101]. The applicant argued that the respondent failed to fulfil its duties under a loan agreement (the amount of claim – EUR199,885.46) and did not paid off its debts for a very long period, that is 2 years [101]. For the applicant, these facts allegedly served as solid grounds to believe that the respondent having bad financial condition would further avoid the performance of the contract and, in particular, the award to be rendered in the arbitration [101].

Ultimately, the court discharged the requested interim measures of protection and in doing so it relied on two main factors, that is the amount of the claim and non-performance of the contractual duties by respondent [101]. The said conclusions of the courts by itself contravene with the ruling analysed above whereas almost identical factual backgrounds of the case were adjudicated differently [101].

There are also some cases adjudicated by the Supreme Court. As an example, may serve the ruling of 3 January 2020, wherein the court revised the ruling of the Kyiv Court of Appeal that had discharged the interim measures in the form of the arrest of the respondent's bank accounts and other assets [102]. The dispute arose out of the failure by the respondent to fulfil its duties under the contract for sale of the commodity [102]. In particular the respondent accepted the commodity but failed to pay the price thereof [102].

The Supreme Court upheld the decision of the lower court by confirming that there were enough grounds to discharge the interim measures of protection [102]. The Supreme Court found it sufficient that the respondent did not have any immovable property, failed to fulfil its duties under the contract, whereas the sum in dispute was approximately EUR2,681,533.03 [102]. For the foregoing reasons, the Supreme Court did not revoke the interim measures and found them to be appropriate so that to secure the claim pursued by the applicant in the arbitration [102].

The author founds this decision particularly interesting taking into account that the Supreme Court provided for the factors that may be taken into account when discharging the interim measures [102]. Albeit it is quite puzzling why the Supreme Court did take into account the fact that the contract was not performed when assessing the case (the fact that inherently present in any dispute, that is non-performance of the contract) [102].

Perhaps the most ground shaking precedent where Ukrainian courts discharged the interim measures concerned the so-called Soft Commodities case [103]. For the sake of brevity, the author of this master thesis would like to make the brief outline of the facts of the case [103]. The applicant, being Softcommodities Trading Company Sa, with the respondent entered into the contract for sale of commodity (Ukrainian grain) [103]. The overall quantity to be delivered constituted 2500 mt of the goods, which were stored in the warehouse at one of Ukrainian ports [103]. Respondent in this case executed partial delivery of the goods [103]. In the meantime, the respondent did not intend to deliver the outstanding balance being 1500 mt [103]. After a while, the applicant initiated GAFTA arbitration and became aware of the fact

that the quantity of the goods reduced to 1.290.39,00 [103]. Therefore, the applicant had a suspicion that the respondent was trying to dispose of the goods in order to undermine pending arbitral proceedings [103].

For these reasons, the applicant applied to Odessa Court of Appeal for there to obtain the interim measures of protection by means of arrest of the remained goods and imposing the bar on some third parties to dispose of the goods (port authorities etc.) [103]. The Odessa Court of Appeal discharge the requested interim measures and in doing so the court agreed with the applicant that there was a danger of the goods being disposed by the respondent [103]. The court, however, did not provide any further reasoning for the ruling applied and this occasioned some confusion in the arbitration community [103].

The said ruling provoked much discussion among the practitioners, especially with respect to the court's reasoning. For example, Sergii Zheka, who is a practitioner in international arbitration in Ukraine, with regard to the aforesaid decision, noted that Odessa Court of Appeal:

> when imposing interim measures, did not perform a thorough enough analysis of all the pros and cons of the interim measures and whether such measure are justified taking into account the provisions of the supply contract in question, the financial situation of the parties, their obligations to third parties and other aspects of the case. [104]

Similarly, Kateryna Shokalo, Ukrainian practitioner in arbitration, aptly mentioned about the lack of reasoning serving as a negative tendency for future court practice by stating that «*the court did not provide sound reasoning to offer a clear guidance for future applications*» [105].

As noted above, the author of this master thesis concurs with the said conclusions, because the Odessa Court of Appeal simply devoted few small paragraphs forming the reasoning for discharging the interim measures of protection.

Nonetheless, the respondent brought the case to the appeal – the Supreme Court, which had a chance to shed some light regarding the interim measures in this case [106]. The respondent in the appeal argued that the Odessa Court of Appeal was not in power to analyse the dispute which is subjected to English law (under one of

the GAFTA contracts) whilst the non-performance of the contract by itself may not serve as the ground for the interim measures being applied [106].

The Supreme Court, however, disagreed with the respondent's position on the matter [106]. In this respect the court made two important conclusions [106]. The first one is that while assessing the application for interim measures, the courts of Ukraine may not analyse the substantive issues of the case [106]. Second, in passing the court stressed on then existed threat that that the execution of the perspective arbitral award may be infringed or being effectively prevented because the amount of stored goods reduced [106]. Nonetheless, the Supreme Court also did not provide a clear-cut roadmap for future court practice [106].

In the meantime, the author notes that the small number of cases analysed above demonstrate that the courts predominantly take pro-arbitral approach when deciding on interim measures. However, the practice of the courts still proves to be inconsistent for the courts in identical disputes render completely different rulings. The only possible way to solve the issue is for the Supreme Court to provide the guidance for the lower courts thus creating the precedent for further consistent court practice.

Another issue that remains open is the enforcement of the arbitral tribunal's interim measures by Ukrainian courts. As has been noted by the author elsewhere in this master thesis, currently Ukrainian law does not provide for the mechanism of the enforcement of interim measures. Nonetheless, on one occasion Ukrainian court dealt with the enforcement of the interim measures. This case will be analysed below.

The only known for the author precedent was decided by Kovelskyy city court of Volyn Oblast in ruling dated 2 October 2015 case No. 159/4966/15-ц [107]. In this case, the arbitral tribunal administrated by German Arbitration Institute discharged the interim measure by ordering the arrest of all respondent's assets and goods which formed subject matter of the dispute [107]. The claimant in arbitration made recourse to the court with request for enforcement of the aforesaid measure [107]. The court took very creative approach, that is instead of enforcement of the interim measure the court issued its own measures of security [107]. In doing so, it relied on then in force

article 394 of CPC of Ukraine, which vested the courts with power to discharge the interim measures in support of the enforcement proceedings of the arbitral award [107]. The court provided no reasoning for such albeit creative, but wrong approach. This is because the article did not govern the enforcement of the interim measures [107]. Therefore, through the lenses of law the ruling was wrong.

The abovementioned case clearly demonstrates the problems that may further arise if not regulated appropriately by means of law. For these reasons, the author of the master thesis suggests amending current legislation and expressly vest Ukrainian courts with the power to execute the interim measures issued by the arbitral tribunal.

Ukrainian practitioners and scholars already proposed the way out from the situation that currently exists. For example, Yurii Prytyka in his article devoted to this issue proposed to implement the article 17 H of the UNCITRAL Model Law of 2006. In particular, Yurii Prytyka noted that

> For this purpose, it is necessary, first of all, to anticipate a provision in legislation, according to which, an interim measure resolved by a court of arbitration is deemed to be binding and is enforced by the national court, regardless of the country in which it was decided in the absence of any grounds for the enforcement of such measure. [108, p. 156]

The author sides with the above noted proposal. As a consequence, the author suggests amending the legislation by implementing the article 17 H of the UNCITRAL Model Law of 2006 which in full regulated the issue of the enforcement of interim measures [9]. It has to be stressed that aforesaid version of the model law was implemented by approximately 35 States, as it is evidenced from the survey conducted by UNCITRAL Secretariat, which shows the trend of the States to make steps toward the recognition and enforcement of the interim measures [10].

In short, the article 17 H sets forward that the court shall enforce the interim measures issued by the arbitral tribunal with foreign or domestic seat [9]. The grounds for refusal in enforcement, revocation and modification of the interim measures are in principle the same as, for example, set forth in the legislation of Germany and Austria analysed elsewhere in this master thesis [9]. The author is of the opinion that the implementation of the law will wipe out any issue that naturally lies in the legal gaps like this in Ukraine.

The project of the amendments into the procedural legislation is attached herein in the Annex 1. The author proposes the amendment based on the UNCITRAL Model Law 17 H taking into account the particularities of the Ukrainian procedural laws that does not change the procedure for enforcement in essence. The enforcement of such legislation will eliminate any possible issues that arise whenever alike legal gaps exist. In particular, it concerns possible inconsistent court practice (in Ukraine the court's decisions do not form legal precedent).

3.2. Interim measures issued by the arbitral tribunal during the arbitral proceedings.

3.2.1. Comparative study of foreign arbitration rules on interim measures issued by arbitral tribunals during the arbitral proceedings.

In this sub-chapter the author intends to briefly analyse the terms of various arbitration rules as to the powers of the arbitral tribunal to discharge the interim measure. The understanding of how the rules provides for the tribunal's power in this respect will serve as the foothold for the suggestions directed to improvement of the arbitration rules applied in Ukraine.

To begin with the ICC arbitration rules. The rules in the article 28 devotes two paragraphs with respect arbitral tribunal's interim measures [72]. In principle, the rules preserve the autonomy of the parties by vesting them with the powers to opt out the tribunal's powers to discharge the interim measures [72]. Where this is not the case, the tribunal possess very broad powers as to the types of the measures being possible to discharge [72]. To put it simple, it is empowered to «*order any interim or conservatory measure it deems appropriate*» [72]. From the author's opinion, the aforesaid provision is advantageous for the tribunal as it gives thereof the space for manoeuvre in applying the necessary measures which correspondents to the facts of each particular case.

Interestingly, but, albeit with some exceptions, the rules preserve the powers to discharge the measures in the hands of the arbitral tribunal. That is, only in «*appropriate circumstances*» the interim measures may be obtained from the courts if the case has been forwarded onto the tribunal [72]. Although the ICC rules provides no clarity when such circumstances arise, but some authors suggest that the aforesaid circumstances exist, for example, when the law of the seat bars the tribunal from doing so [109, p. 158]. Such provision seems to be a reasonable approach to ensure the monopoly of the tribunal's powers, taking into account its inherent flaws (for example, lack of coercive powers), and do not deprive the parties of effective means to protect their rights by having recourse to the courts.

Further, the ICC rules set forth the consequence in case the application for the interim measures is made to the courts. In brief, the party does not lose its right to pursue the claim and the arbitral tribunal preserves its authority to discharge the interim measures [72].

Finally, the article 28(1) left margin of appreciation with the arbitral tribunal to decide whether the measures shall be the order or award, whilst it is mandatory to substantiate the grounds for the tribunal's decision whatever they may be [72]. As it was noted elsewhere in this master thesis, the advantage of such term is, in principle, questionable.

Turning to another arbitration rules in the list for consideration, that is the SCC rules. The aforesaid rules follow the same logic as the ICC rules, that is based on the article 37(1) the arbitral tribunal similarly has broad powers to order any type of measures, albeit the rules do not provide for any restriction as to the recourse to the courts [68]. The only distinguishing feature is that article 38(2) lays down the test to be satisfied for the tribunal to discharge the so-called security for costs [68]. From authors experience the reason for such strict provision being used is that the security for costs is very severe interim measure of protection causing serious consequences for the party to arbitration – bar to pursue the claim/counter-claim in ongoing dispute should no security is provided. This consequence is expressly provided in the article 38(3) [68].

In essence, the SCC rules has much in common if compared with the ICC rules. Nonetheless, it should be noted that the autonomy and wide discretion of the arbitration tribunal is echoed through the terms thereof.

The similar approach, albeit with some differences is followed in the LCIA rules. The rules provide for that the arbitral tribunal may discharge any type of interim measures, thus vesting the tribunal with very broad powers [62]. Interestingly, but the LCIA rules does not address the issue as to the form of the interim measures, although it is argued by the practitioners that the tribunal under the aforesaid rules still may discharge the measures in any form it deems necessary [71, p. 276].

The distinguishing feature of the LCIA rules is that the tribunal may exercise its power only after the parties to the dispute presented their case [62]. This is, of course, not unlimited provision given that the parties have only a «*reasonable opportunity*» [62]. Perhaps, the reason for such term being used is very simply - to create the balance between the right to be heard and the proceeding without undue delays. However, as it is explained by practitioners in the arbitration the aforesaid provision was implemented so that to bar the tribunal from applying the measures *ex parte* [71, p. 263-264].

Similarly, as the SCC rules the tribunal may order security for costs and if the party failed to honour the tribunal's order, then it may affect its right proceed further with the claim or counter claim as it may be in the case [62]. The LCIA rules also bars the party from having recourse to the courts after the tribunal is constituted save to the extent the «*exceptional cases*» are present [62]. The said test is considered to be higher than even those set out in the ICC rules [71, p. 280].

All in all, the LCIA rules provides no significant difference with other rules albeit with some unique features presented.

There are also two arbitration rules that provide unique provisions. The first one is the Swiss rules. The said rules in principle addresses the matter similarly as already analysed rules with exception to one provision [75]. However, in article 26(3) the rules expressly vest the tribunal with the power to discharge the interim measures

ex parte [75]. Neither of the arbitration rules mentioned in this master thesis expressly provide for such powers. Perhaps, such a negative trend with respect to the *ex parte* proceedings may be explained by current widespread hesitancy to give in the arbitral tribunal such powers [75].

The aforesaid was aptly noted by Prof. Dr. Hans Van Houtte, who in his article explained a myriad flaws and complex issues inherently present in the *ex parte* proceedings before the arbitral tribunal for the interim measures [110, p. 86-95]. In the meantime, as it was noted in the survey of the Queen Mary University of London already mentioned elsewhere in this master thesis, only 51% of the respondents favoured the tribunal's powers to discharge the interim measures *ex parte* [22, p. 2, 16].

Still, the approach with respect to the *ex parte* proceedings taken in the Swiss rules vanguards the procedural rights of the parties involved in the arbitration [75]. The first safeguard mechanism is that such proceedings in case of «*exceptional circumstances*» [75]. Whereas it is not defined what may fall within such circumstances, still in practice the party may be in need for *ex parte* so that to take advantage of element of surprise which may be essential in certain cases, for example, to prevent another party from taking steps to disrupt/make the interim measures ineffective by means of moving assets out of the company [75].

Secondly, in such circumstances the tribunal discharges the interim measures in the form of the procedural order. As it is noted by Cesare Jermini and Andrea Gamba, this affects the possible enforceability of such order:

> Hence, unlike interim measures which can be established in an interim award (Art. 26(2)), *ex parte* interim measures may only be issued in the form of a procedural order. This has an impact on the issue of enforcement, since procedural orders are not enforceable under the New York Convention (Art. 26 N 19). [111, p. 299]

Finally, and most importantly, all other parties to the arbitration, including those against which the interim measures have been discharged, has the right to present their case [75]. Having done so, the arbitral tribunal is in powers to amend or even cancel discharged interim measures [75].

All in all, the SCAI arbitration rules arms the parties to obtain the interim measures *ex parte*, whereas the rights of other parties are balanced [75]. The author of this master thesis favours such approach. On the one hand, the parties may then make recourse to the arbitral tribunal for the *ex parte* interim measures with no need to seek assistance from the courts [75]. On the other hand, such *ex parte* procedure does not seriously prejudice the rights of other parties [75].

Another example of the rules with unique provisions are the HKIAC rules [77]. Herein the rules expressly provide for the test being applied by the arbitral tribunal in order to assess whether to discharge the interim measures or not [77]. This test is identical as provided under article 17A of the UNCITRAL Model Law of 2006 [9].

It may be argued that the aforesaid specification of the test being applied by the arbitral tribunal serves the purpose to fit the parties' expectations and make the arbitration proceedings predictable and the arbitral practice coherent. Nonetheless, the effectiveness of such approach still remains questionable, given that the arbitral tribunals should be given with wide powers regarding the types of the interim measures that they can discharge.

To sum up, all arbitration rules under author's analysis vests the arbitral tribunal with the powers to discharge the interim measures. Albeit in some respects the approach taken by the arbitral tribunals in relation to some matters is different, nevertheless among the arbitration rules there is uniformity with respect to this issue. As such, the arbitral tribunals are empowered with the wide authority and autonomy to handle the matter and discharge the interim measures best suitable for the case.

3.2.2. Ukrainian regulation on the interim measures issued by the arbitral tribunal during the arbitral proceedings.

On its part, the ICAC and UMAC arbitration rules in the article 25 regulate the powers of the tribunal to discharge the interim measures [90, 91]. Under paragraph 1,

the tribunal has wide powers, that is no limitation may be traced with respect to the type of the interim measures that may be adopted by the tribunal [90, 91].

In comparison with other arbitration rules, the ICAC and UMAC arbitration rules set forth the procedure for interim measures in greater detail [90, 91]. The party seeking the interim measures shall apply to the arbitral tribunal with a petition. As it may be derived from the content of the rules the petition shall be in written form and signed by the representative of the party [90, 91].

The ICAC and UMAC lay down the conditions that should be satisfied to allow the tribunal to discharge the interim measures [90, 91]. In particular, it is set out that

> The interim measures shall be commensurate with the declared claims and be applied only in the case where the applicant documentarily substantiated the necessity of their adoption taking into account the link between the specific measures to secure the claim and the content of claims, the circumstances on which the Statement of Claim is based and the evidence that is submitted in support of filed application. [90, 91]

Based on the above, the author arrives to the conclusion that the rules set out three-step test, that is the proportionality of the measures with the claim [90, 91]; the necessity of the measures in question [90, 91]; the link between the measures and claim pursued in the arbitration including the evidence that substantiate the application and claim submissions [90, 91].

The aforesaid test is much different from that applied in the UNCITRAL Model Law of 2006 [9]. In the meantime, it is difficult to trace how this test is applied in practice given that the ICAC and UMAC does not publish the rulings upon the petition for the interim measures and there is no published up to date decisions. For example, in the case No. 31 dated 22 April 2009, the applicant sought the arrest of the respondent's assets [112]. The arbitral tribunal, given that it does not have the powers, *sensu stricto*, to arrest the assets, discharged the interim measure by prohibiting the respondent to dispose of its moneys at the bank accounts in amount corresponding the amount of the claim pursued [112]. Still, no brief statement of arguments and defence submissions as well as the tribunal's reasoning was published. Nonetheless the author does not see any reasons to amend the test fixed in the ICAC and UMAC rules.

Further, under the ICAC and UMAC rules the interim measures may be amended/changed or cancelled under certain circumstances [90, 91]. Firstly, the arbitral tribunal has such powers «*upon the reasonable request of either party*». Secondly, if the party against which the interim measures was discharges offers and provides the counter-security in one the forms specified in the rules [90, 91]. In the first case the tribunal preserves the discretion whether to uphold the application to amend or cancel interim measures [90, 91]. Such situations may arise when the necessity in interim measure cease to exist. In the second case, the counter-security by itself «*is the basis for changing the interim measures within the time limits requested by the party*» [90, 91]. This is a unique provision which in essence does not, at least explicitly, specified in other rules [90, 91].

Finally, the rules set forward the guarantees to preserve the rights of the party against which the interim measures are discharged. Firstly, when discharging the interim measures, the arbitral tribunal by its lonesome or upon the application of the party oblige the applicant for interim measures provide for the counter-security [90, 91]. Secondly, should the measures prove to be unnecessary the losses of the party may be compensated either via the counter-security or in case there is none upon the application of that party [90, 91].

As in all other arbitration rules mentioned in this master thesis, the ICAC and UMAC recognizes the parties' rights to have recourse to the courts so that to obtain the interim measures.

Nonetheless, the aforesaid arbitration rules are not ideal and, of course, was subject to criticism. For example, Prusenko Halyna analysed the ICAC arbitration rules edition of 2014 and proposed number of amendments to be made in thereof [37, p. 49]. Whilst most of the said amendments now are present in current edition of the rules, nonetheless some other have been omitted. For example, the noted author proposed to enumerate the non-exhaustive list of possible interim measures that may be discharged by the arbitral tribunal, which seems to be quite similar to those noted in the UNCITRAL Model Law of 2006 [37, p. 49].

The author of this master thesis notes that the there is no need to implement the ICAC and UMAC arbitration rules in the way proposed by Prusenko Halyna. The current edition of the rules vests the arbitral tribunal with wide authority as to the type of the measures that may be discharged during the arbitral proceedings [90, 91]. In the meantime, the proposed amendments may restrict the tribunal's powers in some cases, when there is indeed the need in unique measures to be applied due to specific circumstances of the case.

Regarding the amendments that should be made in the arbitration rules, the author would like to suggest the following. First, to regulate the form in which the interim measures may be discharged by the arbitral tribunal. The interim measures may be discharged in any form deemed to be necessary be arbitral tribunal. In fact, the arbitral tribunal, when assessing the matter, may decide whether it is better to discharge the measures in the form of the order or award taking into account various circumstances involved.

Second, to vest the tribunal with the power to issue the interim measures *ex parte*. The procedure in essence may mirror used in the Swiss arbitration rules, whilst the author proposes to make the *ex parte* proceedings even batter then in thereof. Upon the application of the party the arbitral tribunal should be in power to discharge the interim measures in the form of procedural order and forthwith inform another party giving it the right to present the case on the matter. If the tribunal decides that the interim measures should be effective even after another party presented its position on the matter, the arbitral tribunal should be vested with the authority upon the applicant's request or on its own lonesome to amend the form of the interim measures into the award after all the parties presented their case. This will ensure further enforcement of the interim measures taken into by Ukrainian courts.

Finally, the author suggests vesting the ICAC and UMAC arbitral tribunal with exclusive powers to discharge the interim measures and subject the parties' right to apply for the courts only in exceptional circumstances. As it was stated elsewhere in this master thesis the arbitral tribunal for sure is more aware of the facts of the case and will be ready to discharge the most suitable interim measure. In the meantime, if

the arbitration law of Ukraine is amended, and the enforcement of interim measures is provided for, then the tribunal's measures will be as effective as court-ordered measures.

The author does not see any other additional amendments that should be made in the respective rules, given that they already effectively regulate the matter. To sum up, the author suggested three amendments, that is with respect to the form of the interim measures, *ex parte* proceedings, and exclusive jurisdiction of the tribunal. Given that the ICAC and UMAC rules are identical regarding the interim measures, the aforesaid amendments are crystalized in the Annexes 4 and 5 respectively to this master thesis.

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CONCLUSIONS TO CHAPTER 3

The arbitration laws of different jurisdictions set forth in their arbitration laws the possibility to enforce the interim measures discharged by the arbitral tribunal. In many respects, the arbitration laws of various jurisdictions lay down similar provisions with respect to the recognition and enforcement of the interim measures. This holds true with respect to refusal in enforcement of such measures.

Ukrainian arbitration law as it currently stands does not vest the courts with the powers to recognize and enforce the interim measures discharged by the arbitral tribunal. The absence of regulation in this respect is a serious disadvantage that causes inconsistent court practice as well as prejudices the existent powers of the arbitral tribunal to preserve its integrity and enforceability of the award by means of the interim measures. The author then proposes to amend the arbitration law of Ukraine and provide for the possibility to enforce the interim measures of the arbitral tribunals.

Arbitration rules of arbitral institutions across the world entitle the tribunal with the authority to order the interim measures. This power is broad one entitling the

tribunals to issue the interim measures that best accommodates the matters involved in the dispute. Some arbitration rules provide for innovative mechanisms to make the tribunal's powers more effective.

In the meantime, the arbitration rules that currently in force in Ukraine do not reflect the best mechanisms to ensure that the arbitral tribunal has enough instruments to discharge the interim measures in the way more suitable and efficient so that to ensure that final award will fulfil its purpose – resolve the dispute in full and remedy the infringed legal rights and interests. Consequently, the author suggests the amendment of the ICAC and UAC arbitration rules in this respect.

CONCLUSIONS

Currently, the international arbitration cannot achieve its main purpose to finally resolve the disputes between the parties in the absence of the mechanisms that may assist the arbitral tribunals to fulfil this purpose. There is undoubtedly uniform position that the interim measures serve as the vanguard that preserve the integrity of the arbitral tribunal and the enforceability of the award. This is reinforced by the practice of various jurisdictions across the world which in the arbitration laws provided for the interim measures being possible to obtain from the arbitral tribunal as well as the courts. Based on theoretical as well as practical considerations the logical conclusion follows – the international arbitration is need of interim measures that may be effectively applied to assist the arbitration.

Ukraine made myriad of steps so that to become more arbitration friendly jurisdictions especially taking into account frequent developments and reforms made in order to assist the arbitration withing or outside of Ukraine. However, currently Ukrainian arbitration law has much to be developed with respect to the mechanism of interim measures. The said arbitration law comprises of the legal gaps that has to be filled in.

Today, most arbitration rules of various arbitral institutions modified their provisions and vested the parties with the right to obtain the interim measures from emergency arbitration. The advantage of the existence of such right is explained by the fact that previously only domestic courts reserved the monopoly to discharge pre-arbitral interim measures. Now, the parties may ask for appointment of the emergency arbitrator and obtain the interim measures preserving all benefits that arbitration traditionally has.

The arbitration rules of UMAC and ICAC not provide for the emergency proceedings and instead regulate the matter quite differently and for the most part ineffectively. For these reasons, the arbitration rules should be amended and vest the parties with right to obtain the emergency relief in case of urgency.

Neither Ukrainian arbitration law provides for the possibility to have recourse to domestic courts and obtain pre-arbitral interim measures before the arbitral proceedings commenced. As the practice of foreign jurisdictions shows, court-ordered pre-arbitral interim measures are indeed the trend that should be followed.

The arbitration laws of foreign jurisdictions lay down the mechanism for the recognition and enforcement of the arbitral interim measures. Still as the arbitration laws of these jurisdictions evince the treatment of enforcement of the interim measures is not different from the enforcement of the arbitral awards that finally resolve the dispute.

On its part, the arbitration law of Ukraine only provides for the recognition and enforcement of the arbitral awards. Currently, it is impossible to enforce arbitral interim measures which may undermine their effectiveness in altogether. This is considered as serious disadvantage existing in the arbitration law of Ukraine. As a consequence, Ukrainian legal regime requires amendments to be made which are proposed by the author of this master thesis.

Finally, foreign arbitral institutions effectively regulate the powers of the arbitral tribunal with regard to the interim measures to be discharged during the arbitral proceedings. The tribunals have wide autonomy in type and form of the interim measures, which is the crux for the interim measures to be effected.

On the other hand, Ukrainian arbitration rules lack innovative mechanism that assists the tribunals far better than the aforesaid arbitration rules do. Absence of these mechanisms should be resolved by the amendments in the arbitration rules taking into account the experience of leading arbitral institutions. This being said, the author of this master thesis suggests the improvements that should be implemented in the Ukrainian arbitration rules.

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ANNEX 1

ПРОЕКТ

ЗАКОН УКРАЇНИ

Про внесення змін до Цивільного процесуального кодексу України (щодо вдосконалення судової допомоги міжнародну комерційному арбітражу)

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1. У Цивільному процесуальному кодексі України (Відомості Верховної Ради України (ВВР), 2004, № 40-41, 42, ст.492):

1) Частину 3 статті 149 викласти в такій редакції:

«3. За заявою сторони у справі, яка буде передана, або вже передана на розгляд міжнародного комерційного арбітражу, третейського суду, суд може вжити заходів забезпечення позову у порядку та з підстав, встановлених цим Кодексом».

2) Доповнити статтю 151 пунктом 8 в такій редакції:

«8. До заяви про забезпечення позову у справі, яка буде передана на розгляд міжнародного комерційного арбітражу, третейського суду додається копія арбітражної угоди, чи угоди про передачу на вирішення третейського суду».

3) Частину 3 статті 153 викласти в такій редакції:

«3. Заява про забезпечення позову у справі, яка буде передана, або вже передана на розгляд міжнародного комерційного арбітражу, третейського суду, подається до апеляційного суду за місцезнаходженням арбітражу, третейського суду, місцезнаходженням відповідача або його майна за вибором заявника».

4) Доповнити статтю 153 частиною 5 в такі редакції:

«У разі подання заяви про забезпечення позову до передання справи на розгляд міжнародного комерційного арбітражу, третейського суду, заявник повинен подати позов до міжнародного комерційного арбітражу, або третейського суду або іншого документа, подання якого започатковує процедуру міжнародного комерційного арбітражу, третейського розгляду

згідно з відповідним регламентом (правилами) арбітражу, або третейського суду або законодавством за місцем арбітражу протягом строку, який визначається судом при розгляді справи за заявою про забезпечення позову, але який не може перевищувати 30 днів».

5) Частину 1 статті 153 викласти у такій редакції:

«1. Заява про забезпечення позову розглядається судом не пізніше двох днів з дня її надходження без повідомлення учасників справи (учасників справи яка буде або вже передана до третейського (арбітражного) розгляду), крім випадків, передбачених частиною п'ятою цієї статті».

6) Статтю 153 доповнити частиною 13 у такій редакції:

«13. В ухвалі про забезпечення позову у справі, яка буде передана до комерційного міжнародного арбітражу суд зазначає строк протягом якого заявник повинен подати позов до міжнародного комерційного арбітражу, або третейського суду або іншого документа, подання якого започатковує процедуру міжнародного комерційного арбітражу, третейського розгляду згідно з відповідним регламентом (правилами) арбітражу, або третейського суду або законодавством за місцем арбітражу».

7) Частину 13 статті 153 доповнити пунктом 4 у наступній редакції:

«4) Не передання справи на розгляд до міжнародного комерційного арбітражу або третейського суду згідно з вимогами частини 4 статті 153 цього Кодексу».

8) Розділ IX доповнити Главою 5, яку викласти у наступній редакції:

«Стаття 482^1. Умови визнання та надання дозволу на виконання рішення про застосування заходів забезпечення міжнародного комерційного арбітражу, якщо його місце знаходиться за межами України

1. Заходи забезпечення міжнародного комерційного арбітражу (якщо його місце знаходиться за межами України), незалежно від того, в якій країні вони були винесені, визнаються та виконується в Україні.

Стаття 482[2]. Порядок і строки подання заяви про визнання і надання дозволу на виконання рішення міжнародного комерційного арбітражу про застосування заходів забезпечення

1. Питання про визнання та надання дозволу на виконная заходів забезпечення міжнародного комерційного суду розглядається судом за заявою сторони у спорі, що розглядається міжнародним комерційним арбітражем, відповідно до цієї глави, якщо боржник має місце проживання (перебування) або місцезнаходження на території України.

2. Якщо боржник не має місця проживання (перебування) або місцезнаходження на території України, або його місце проживання (перебування) чи місцезнаходження невідоме, питання про надання дозволу на примусове виконання заходів забезпечення міжнародного комерційного арбітражу розглядається судом, якщо на території України знаходиться майно боржника.

3. Заява про визнання і надання дозволу на виконання заходів забезпечення міжнародного комерційного арбітражу подається до апеляційного суду, юрисдикція якого поширюється на місто Київ.

Стаття 482[3]. Форма і зміст заяви про визнання і надання дозволу на виконання заходів забезпечення міжнародного комерційного арбітражу

1. Заява про визнання і надання дозволу на виконання заходів забезпечення міжнародного комерційного арбітражу подається у письмовій формі і має бути підписана особою, на користь якої прийнято заходи забезпечення міжнародного комерційного арбітражу, або її представником.

2. У заяві про визнання і надання дозволу на виконання заходів забезпечення міжнародного комерційного арбітражу мають бути зазначені:

1) найменування суду, до якого подається заява;

2) найменування (за наявності) і склад міжнародного комерційного арбітражу, який прийняв захід забезпечення, за яким має бути виданий виконавчий лист;

3) імена (найменування) учасників арбітражного розгляду (їх представників), їх місце проживання (перебування) чи місцезнаходження;

4) дата і місце прийняття рішення про застосування заходу забезпечення міжнародним комерційним арбітражем;

5) вимога заявника про видачу виконавчого листа на примусове виконання заходу забезпечення міжнародного комерційного арбітражу.

3. У заяві можуть бути зазначені й інші відомості, якщо вони мають значення для розгляду цієї заяви (номери засобів зв'язку, факсів, офіційна електронна адреса, адреса електронної пошти сторін та міжнародного комерційного арбітражу тощо).

4. До заяви про визнання і надання дозволу на виконання рішення міжнародного комерційного арбітражу додаються:

1) оригінал належним чином засвідченого арбітражного рішення про застосування заходів забезпечення або нотаріально завірена копія такого рішення;

2) оригінал арбітражної угоди або нотаріально завірена копія такої угоди;

3) документ, що підтверджує сплату судового збору;

4) копії заяви про визнання і надання дозволу на виконання рішення про застосування заходів забезпечення міжнародного комерційного арбітражу відповідно до кількості учасників судового розгляду;

5) довіреність або інший документ, що підтверджує повноваження особи на підписання заяви;

6) засвідчений відповідно до законодавства переклад перелічених у пунктах 1-2 та 5 цієї частини документів українською мовою або мовою, передбаченою міжнародним договором, згода на обов'язковість якого надана Верховною Радою України, якщо вони викладені іншою мовою.

5. До заяви про визнання і надання дозволу на виконання рішення міжнародного комерційного арбітражу про застосування заходів забезпечення, поданої без додержання вимог, визначених у цій статті, застосовуються положення статті 185 цього Кодексу.

6. У випадку подання заяви про визнання і надання дозволу на виконання рішення міжнародного комерційного арбітражу про застосування заходів забезпечення в електронній формі документи, зазначені в пунктах 1, 2 частини четвертої цієї статті, можуть подаватися в копіях, проте заявник повинен надати такі документи до суду до початку судового розгляду вказаної заяви. У разі неподання вказаних документів заява повертається без розгляду, про що судом постановляється відповідна ухвала.

7. До порядку розгяду заяви про визнання і надання дозволу на виконання рішення міжнародного комерційного арбітражу про застосування заходів забезпечення застосовуються положення статті 477 цього Кодексу.

Стаття 482^4. Підстави для відмови у визнанні і наданні дозволу на виконання рішення міжнародного комерційного арбітражу про застосування заходів забезпечення

1. Суд відмовляє у визнанні і наданні дозволу на виконання рішення міжнародного комерційного арбітражу про застосування заходів забезпечення, якщо:

На прохання сторони, проти якої воно спрямоване, якщо ця сторона подасть суду доказ того, що

1) наявні підстави передбачені пунктом 1 частини 1 статті 478.
2) Рішення про застосування заходів забезпечення було змінене, скасоване або призупинене міжнародним комерційним арбітражем, або іноземним судом за місцем міжнародного комерційного арбітражу.

Якщо суд визнає, що:

1) захід забезпечення є несумісним з повноваженнями, наданими суду, якщо тільки суд не вирішить змінити захід забезпечення наскільки це необхідно з метою визнання та виконання цього заходу забезпечення але без зміни його суті; або

2) наявні підстави передбачені пунктом 2 частини 1 статті 478».

2. У Законі України “Про міжнародний комерційний арбітраж” (Відомості Верховної Ради України (ВВР), 1994, № 25, ст.198):

1) Пункт 1 Статті 2 викласти у наступній редакції:

«арбітраж» - будь-який арбітраж (третейський суд) незалежно від того, чи утворюється він спеціально для розгляду окремої справи, чи здійснюється постійно діючою арбітражною установою, зокрема Міжнародним комерційним арбітражним судом або Морською арбітражною комісією при Торгово-промисловій палаті України (додатки № 1 і № 2 до цього Закону), а також надзвичайний арбітр, що уповноважений на застосування заходів забезпечення позову, який подається або буде поданий до міжнародного комерційного арбітражу».

2) Розділ VIII Визнання та виконання арбітражних рішень доповнити статтею 36^1 яку викласти у наступній редакції:

«Стаття 36^1. Умови визнання та надання дозволу на виконання рішення про застосування заходів забезпечення міжнародного комерційного арбітражу, якщо його місце знаходиться за межами України

1. Заходи забезпечення міжнародного комерційного арбітражу (якщо його місце знаходиться на території України), незалежно від того, в якій країні вони були винесені, визнаються та виконується в Україні згідно з положенням статтей 482^1 – 482^4 ЦПК України».

ANNEX 2

ПРОЕКТ

Додаток №2 до Регламенту Міжнародного комерційного арбітражного суду при Торгово-промисловій палаті України

ПОЛОЖЕННЯ

ПРО ПРОЦЕДУРУ НАДЗИЧАЙНОГО АРБІТРА

СТАТТЯ 1. | НАДЗВИЧАЙНИЙ АРБІТР.

1. До подання стороною позовної заяви, або до формування складу Арбітражного суду, будь-яка Сторона має право звернутись з клопотанням про призначення надзвичайного арбітра та застосування заходів забезпечення позову.

2. Клопотання про призначення надзвичайного арбітра та забезпечення позову подається будь-якою стороною до Секретаріату МКАС.

СТАТТЯ 2. | ЗМІСТ КЛОПОТАННЯ ПРО ПРИЗНАЧЕННЯ НАДЗВИЧАЙНОГО АРБІТРА

1. Клопотання про призначення надзвичайного арбітра повинно містити:

1) дату;
2) повне найменування сторін, їх місцезнаходження (місце проживання), поштові адреси (мовою країни адресата чи англійською мовою), номери телефонів, факсів, адреси електронної пошти, банківські реквізити заявника;
3) відомості про представника заявника, якщо такий є, його поштову адресу (мовою країни адресата чи англійською мовою), номер телефону, факсу, адресу електронної пошти;
4) обґрунтування компетенції надзвичайного арбітра;
5) короткий виклад суті спору;
6) вказівка на запитувані забезпечувальні заходи;

7) обґрунтування наявності надзвичайних обставин, що обумовлюють необхідність вжиття запитуваних заходів до формування складу Арбітражного суду;
8) пропозиції щодо застосовуваних норм права і мови арбітражного розгляду клопотання про призначення надзвичайного арбітра, якщо вони не визначені в арбітражній угоді;
9) пропозиції стосовно особи надзвичайного арбітра;
10) перелік документів, що додаються.

2. Клопотання про призначення надзвичайного арбітра повинно бути підписане уповноваженою особою заявника/його представником.

3. Клопотання повинно бути подане до Секретаріату МКАС в письмовій формі. Для прискорення розгляду клопотання, будь-яка сторона як заявник має право подати копію клопотання в електронній формі. У такому випадку Сторона повинна подати клопотання у письмовій формі якнайшвидше, але не пізніше 5 днів з дня подання клопотання в електронній формі до Секретаріату МКАС.

4. До клопотання, що подається у письмовій формі додаються:
1) копії клопотання про призначення надзвичайного арбітра та доданих до неї документів для відповідача та надзвичайного арбітра;
2) належним чином завірені документи, що обґрунтовують застосування заходів забезпечення надзвичайним арбітром.

СТАТТЯ 3. | УСУНЕННЯ НЕДОЛІКІВ КЛОПОТАННЯ ПРО ПРИЗНАЧЕННЯ НАДЗВИЧАЙНОГО АРБІТРА

1. Якщо клопотання про призначення надзвичайного арбітра подано без дотримання вимог, передбачених частиною першою статті 2, цього Додатку до Регламенту, Генеральний секретар МКАС пропонує заявникові усунути виявлені недоліки в установлений ним строк, який, як правило не повинен перевищувати три дні з дня отримання пропозиції.

2. До усунення недоліків клопотання про призначення надзвичайного арбітра залишається без руху, а при не виконанні заявником пропозиції МКАС в

установлений строк, Президія МКАС відхиляє у призначенні надзвичайного арбітра.

СТАТТЯ 4. | МІСЦЕ РОЗГЛЯДУ КЛОПОТАННЯ

1. Місцем розгляду клопотання надзвичайним арбітром є м. Київ, Україна.

СТАТТЯ 5. | ПРИЙНЯТТЯ КЛОПОТАННЯ ДО ПРОВАДЖЕННЯ ТА ПРИЗНАЧЕННЯ НАДЗВИЧАЙНОГО АРБІТРА

1. Якщо клопотання відповідає вимогам передбаченим у частині 1 статті 2 Додатку до Регламенту, то Генеральний секретар МКАС надсилає іншій стороні електронну копію клопотання, а також письмові копії клопотання.

2. Президія МКАС призначає арбітра зі списку надзвичайних арбітрів з урахуванням пропозицій заявника, суті спору, а також інших обставин які мають значення для його призначення.

3. Президія МКАС призначає надзвичайного арбітра якнайшвидше але не пізніше ніж протягом 4 днів після прийняття клопотання до провадження. Після призначення надзвичайного арбітра, все листування здійснюється напряму з арбітром з Секретаріатом МКАС у копії листування.

СТАТТЯ 6. | ВІДВІД НАДЗВИЧАЙНОГО АРБІТРА

1. Протягом усього розгляду клопотання надзвичайний арбітр повинен зберігати неупередженість та незалежність та виконувати свої функції чесно та сумлінно.

2. Особа, якій запропоновано прийняти призначення в якості надзвичайного арбітра, зобов’язана при заповнені заяви повідомити МКАС про будь-які обставини, які можуть викликати обґрунтовані сумніви в її неупередженості та незалежності при розгляді клопотання. Надзвичайний арбітр повинен негайно довести до відома МКАС і сторони про будь-яку таку обставину, якщо вона стає йому відома у подальшому під час розгляду клопотання.

3. Сторона має право заявити відвід надзвичайного арбітра відповідно до статті 33 Регламенту з урахуванням статей 5 і 6 цього Додатку до Регламенту.

4. Відвід має бути заявлений протягом 24 годин після призначення надзвичайного арбітра, або протягом 24 годин після того, як стороні стало відомо про обставини, які слугують підставою для відводу.

5. Президія МКАС вирішує питання про відвід надзвичайного арбітра якнайшвидше, але не пізніше 5 днів з подання заяви стороною. Вирішення питання про відвід не зупиняє розгляд клопотання. Рішення Президії МКАС є фінальним і не підлягає оскарженню.

6. У випадку самовідводу надзвичайного арбітра, або прийняття рішення про відвід, Президія МКАС призначає нового надзвичайного арбітра відповідно до статті 4 Додатку до цього Регламенту.

7. Надзвичайний арбітр не може бути обраний або призначеним арбітром у справі, щодо якої ним були застосовані заходи забезпечення позову.

СТАТТЯ 7. | ПРОЦЕДУРА РОЗГЛЯДУ КЛОПОТАННЯ

1. Надзвичайний арбітр здійснює розгляд клопотання з дотриманням положень Закону України «Про міжнародний комерційний арбітраж» і загальних засад арбітражного розгляду, передбачених Регламентом.

2. Надзвичайний арбітр веде розгляд клопотання таким чином, який він вважає належним з метою забезпечення ефективного і якнайшвидшого розгляду клопотання з урахуванням його надзвичайного характеру.

3. Надзвичайний арбітр зобов’язаний надати кожній стороні рівні і розумні можливості для захисту своїх прав.

4. Строк передбачений у частині 2 статті 6 Додатку до регламенту може бути продовжений Президією МКАС у наступних випадках:

1) За взаємною письмовою згодою сторін. Така згода повинна бути підписана уповноваженими особами/представниками Сторін;
2) За обґрунтованим зверненням надзвичайного арбітра;
3) За обґрунтованим клопотанням сторони.

5. Сторони та їхні представники повинні діяти таким чином, щоб розгляд клопотання був швидким та економним, не допускаючи зловживання процесуальними правами.

СТАТТЯ 8. | РІШЕННЯ НАДЗВИЧАЙНОГО АРБІТРА

1. Надзвичайний арбітр приймає рішення не пізніше 12 днів з моменту його призначення та передання йому клопотання.

2. Надзвичайний арбітр приймає рішення у письмовій формі у формі рішення арбітражу в якому повинно бути зазначене, зокрема, наступне:

1) Найменування МКАС;
2) Номер справи;
3) Місце арбітражу;
4) Дата винесення рішення;
5) Найменування сторін;
6) Обґрунтування компетенції надзвичайного арбітра;
7) Стислий виклад обставин справи;
8) Мотиви, на яких ґрунтується рішення;
9) Висновок про задоволення або відхилення застосування заходів забезпечення, які були предметом клопотання;
10) Суми арбітражного збору та витрат у справі, їх розподіл між сторонами;
11) Підпис надзвичайного арбітра.

3. За вмотивованим клопотанням сторони рішення може бути скасоване або змінено надзвичайним арбітром, або складом Арбітражного суду після його призначення.

4. Рішення надзвичайного арбітра втрачає чинність у наступних випадках:

1) У разі відводу надзвичайного арбітра;
2) Якщо сторона не подала позовну заяву до МКАС протягом 30 днів з дня прийняття рішення надзвичайним арбітром;
3) Після прийняття рішення по суті спору складом Арбітражного суду;
4) Якщо протягом 60 днів справа не була передана до складу Арбітражного суду.

4. Сторони зобов’язуються виконувати рішення надзвичайного арбітра.

5. Склад арбітражного суду не зв’язаний з мотивами рішення надзвичайного арбітра, зокрема, стосовно компетенції надзвичайного арбітра, а також обґрунтованості застосування заходів забезпечення тощо.

СТАТТЯ 9. | ВИТРАТИ ТА ЗБИТКИ

1. Стосовно відшкодування витрат та збитків, понесених стороною, проти якої були застосуванні заходи забезпечення надзвичайного арбітра застосовуються положення пунктів 1 та 3 статті 28 Регламенту МКАС.

СТАТТЯ 10. | ЗАСТОСУВАННЯ ПРОЦЕДУРИ НАДЗВИЧЙНОГО АРБІТРА

1. Якщо сторони не домовились про інше, Процедура надзвичайного арбітра застосовується до арбітражних угод або застережень, які були укладені після прийняття цього Додатку до Регламенту.

2. Сторони мають право у письмовій формі відмовитись від застосування процедури надзвичайного арбітра.

ANNEX 3

ПРОЕКТ

ДОДАТОК №2

до Регламенту Морської арбітражної комісії при Торгово-Промисловій Палаті України

ПОЛОЖЕННЯ
ПРО ПРОЦЕДУРУ НАДЗИЧАЙНОГО АРБІТРА

СТАТТЯ 1. | НАДЗВИЧАЙНИЙ АРБІТР.

1. До подання стороною позовної заяви, або до формування складу Арбітражної комісії, будь-яка Сторона має право звернутись з клопотанням про призначення надзвичайного арбітра та застосування заходів забезпечення позову.

2. Клопотання про призначення надзвичайного арбітра та забезпечення позову подається будь-якою стороною до Секретаріату МКАС.

СТАТТЯ 2. | ЗМІСТ КЛОПОТАННЯ ПРО ПРИЗНАЧЕННЯ НАДЗВИЧАЙНОГО АРБІТРА

1. Клопотання про призначення надзвичайного арбітра повинно містити:

1) дату;
2) повне найменування сторін, їх місцезнаходження (місце проживання), поштові адреси (мовою країни адресата чи англійською мовою), номери телефонів, факсів, адреси електронної пошти, банківські реквізити заявника;
3) відомості про представника заявника, якщо такий є, його поштову адресу (мовою країни адресата чи англійською мовою), номер телефону, факсу, адресу електронної пошти;
4) обґрунтування компетенції надзвичайного арбітра;
5) короткий виклад суті спору;
6) вказівка на запитувані забезпечувальні заходи;

7) у разі запитування застосування арешту на судно, яке знаходиться в українському порту зазначається обґрунтування того, що забезпечувальна вимога є морською.
8) обґрунтування наявності надзвичайних обставин, що обумовлюють необхідність вжиття запитуваних заходів до формування складу Арбітражної комісії;
9) пропозиції щодо застосовуваних норм права і мови арбітражного розгляду клопотання про призначення надзвичайного арбітра, якщо вони не визначені в арбітражній угоді;
10) пропозиції стосовно особи надзвичайного арбітра;
11) перелік документів, що додаються.

2. Клопотання про призначення надзвичайного арбітра повинно бути підписане уповноваженою особою заявника/його представником.

3. Клопотання повинно бути подане до Секретаріату МАК в письмовій формі. Для прискорення розгляду клопотання, будь-яка сторона як заявник має право подати копію клопотання в електронній формі. У такому випадку Сторона повинна подати клопотання у письмовій формі якнайшвидше, але не пізніше 5 днів з дня подання клопотання в електронній формі до Секретаріату МАК.

4. До клопотання, що подається у письмовій формі додаються:

1) копії клопотання про призначення надзвичайного арбітра та доданих до неї документів для відповідача та надзвичайного арбітра;
2) належним чином завірені документи, що обґрунтовують застосування заходів забезпечення надзвичайним арбітром.

СТАТТЯ 3. | УСУНЕННЯ НЕДОЛІКІВ КЛОПОТАННЯ ПРО ПРИЗНАЧЕННЯ НАДЗВИЧАЙНОГО АРБІТРА

1. Якщо клопотання про призначення надзвичайного арбітра подано без дотримання вимог, передбачених частиною першою статті 2, цього Додатку до Регламенту, Генеральний секретар МАК пропонує заявникові усунути виявлені недоліки в установлений ним строк, який, як правило не повинен перевищувати три дні з дня отримання пропозиції.

2. До усунення недоліків клопотання про призначення надзвичайного арбітра залишається без руху, а при не виконанні заявником пропозиції МАК в установлений строк, Президія МАК відхиляє у призначенні надзвичайного арбітра.

СТАТТЯ 4. | МІСЦЕ РОЗГЛЯДУ КЛОПОТАННЯ

1. Місцем розгляду клопотання надзвичайним арбітром є м. Київ, Україна.

СТАТТЯ 5. | ПРИЙНЯТТЯ КЛОПОТАННЯ ДО ПРОВАДЖЕННЯ ТА ПРИЗНАЧЕННЯ НАДЗВИЧАЙНОГО АРБІТРА

1. Якщо клопотання відповідає вимогам передбаченим у частині 1 статті 2 Додатку до Регламенту, то Генеральний секретар МАК надсилає іншій стороні електронну копію клопотання, а також письмові копії клопотання.

2. Президія МАК призначає арбітра зі списку надзвичайних арбітрів з урахуванням пропозицій заявника, суті спору, а також інших обставин які мають значення для його призначення.

3. Президія МАК призначає надзвичайного арбітра якнайшвидше але не пізніше ніж протягом 4 днів після прийняття клопотання до провадження. Після призначення надзвичайного арбітра, все листування здійснюється напряму з арбітром з Секретаріатом МАК у копії листування.

СТАТТЯ 6. | ВІДВІД НАДЗВИЧАЙНОГО АРБІТРА

1. Протягом усього розгляду клопотання надзвичайний арбітр повинен зберігати неупередженість та незалежність та виконувати свої функції чесно та сумлінно.

2. Особа, якій запропоновано прийняти призначення в якості надзвичайного арбітра, зобов’язана при заповнені заяви повідомити МАК про будь-які обставини, які можуть викликати обґрунтовані сумніви в її неупередженості та незалежності при розгляді клопотання. Надзвичайний арбітр повинен негайно довести до відома МАК і сторони про будь-яку таку обставину, якщо вона стає йому відома у подальшому під час розгляду клопотання.

3. Сторона має право заявити відвід надзвичайного арбітра відповідно до статті 33 Регламенту з урахуванням статей 5 і 6 цього Додатку до Регламенту.

4. Відвід має бути заявлений протягом 24 годин після призначення надзвичайного арбітра, або протягом 24 годин після того, як стороні стало відомо про обставини, які слугують підставою для відводу.

5. Президія МАК вирішує питання про відвід надзвичайного арбітра якнайшвидше, але не пізніше 5 днів з подання заяви стороною. Вирішення питання про відвід не зупиняє розгляд клопотання. Рішення Президії МАК є фінальним і не підлягає оскарженню.

6. У випадку самовідводу надзвичайного арбітра, або прийняття рішення про відвід, Президія МАК призначає нового надзвичайного арбітра відповідно до статті 4 Додатку до цього Регламенту.

7. Надзвичайний арбітр не може бути обраний або призначеним арбітром у справі, щодо якої ним були застосовані заходи забезпечення позову.

СТАТТЯ 7. | ПРОЦЕДУРА РОЗГЛЯДУ КЛОПОТАННЯ

1. Надзвичайний арбітр здійснює розгляд клопотання з дотриманням положень Закону України «Про міжнародний комерційний арбітраж» і загальних засад арбітражного розгляду, передбачених Регламентом.

2. Надзвичайний арбітр веде розгляд клопотання таким чином, який він вважає належним з метою забезпечення ефективного і якнайшвидшого розгляду клопотання з урахуванням його надзвичайного характеру.

3. Надзвичайний арбітр зобов’язаний надати кожній стороні рівні і розумні можливості для захисту своїх прав.

4. Строк передбачений у частині 2 статті 6 Додатку №2 до регламенту може бути продовжений Президією МАК у наступних випадках:

1) За взаємною письмовою згодою сторін. Така згода повинна бути підписана уповноваженими особами/представниками Сторін;
2) За обґрунтованим зверненням надзвичайного арбітра;
3) За обґрунтованим клопотанням сторони.

5. Сторони та їхні представники повинні діяти таким чином, щоб розгляд клопотання був швидким та економним, не допускаючи зловживання процесуальними правами.

СТАТТЯ 8. | РІШЕННЯ НАДЗВИЧАЙНОГО АРБІТРА

1. Надзвичайний арбітр приймає рішення не пізніше 12 днів з моменту його призначення та передання йому клопотання.

2. Надзвичайний арбітр приймає рішення у письмовій формі у формі рішення арбітражу в якому повинно бути зазначене, зокрема, наступне:

1) Найменування МАК;
2) Номер справи;
3) Місце арбітражу;
4) Дата винесення рішення;
5) Найменування сторін;
6) Обґрунтування компетенції надзвичайного арбітра;
7) Стислий виклад обставин справи;
8) Мотиви, на яких ґрунтується рішення;
9) Висновок про задоволення або відхилення застосування заходів забезпечення, які були предметом клопотання;
10) Суми арбітражного збору та витрат у справі, їх розподіл між сторонами;
11) Підпис надзвичайного арбітра.

3. За вмотивованим клопотанням сторони рішення може бути скасоване або змінено надзвичайним арбітром, або складом Арбітражної комісії після її призначення.

4. Рішення надзвичайного арбітра втрачає чинність у наступних випадках:

1) У разі відводу надзвичайного арбітра;
2) Якщо сторона не подала позовну заяву до МАК протягом 30 днів з дня прийняття рішення надзвичайним арбітром;
3) Після прийняття рішення по суті спору складом Арбітражної комісії;
4) Якщо протягом 60 днів справа не була передана до складу Арбітражної комісії.

4. Сторони зобов’язуються виконувати рішення надзвичайного арбітра.

5. Склад Арбітражної комісії не зв’язаний з мотивами рішення надзвичайного арбітра, зокрема, стосовно компетенції надзвичайного арбітра, а також обґрунтованості застосування заходів забезпечення тощо.

СТАТТЯ 9. | ВИТРАТИ ТА ЗБИТКИ

1. Стосовно відшкодування витрат та збитків, понесених стороною, проти якої були застосуванні заходи забезпечення надзвичайного арбітра застосовуються положення пунктів 1 та 3 статті 28 Регламенту МАК.

СТАТТЯ 10. | ЗАСТОСУВАННЯ ПРОЦЕДУРИ НАДЗВИЧЙНОГО АРБІТРА

1. Якщо сторони не домовились про інше, Процедура надзвичайного арбітра застосовується до арбітражних угод або застережень, які були укладені після прийняття Додатку №2 до цього Регламенту.

2. Сторони мають право у письмовій формі відмовитись від застосування процедури надзвичайного арбітра.

ANNEX 4

ПРОЕКТ

Внесення змін до Регламенту Міжнародного комерційного арбітражного суду при Торгово-промисловій палаті України

У Регламенті Міжнародного комерційного арбітражного суду при Торгово-промисловій палаті України:

1) Викласти частину 1 статті 25 у наступній редакції:

«1. Склад Арбітражного суду, за письмовим клопотанням будь-якої сторони, якщо визнає це прохання обґрунтованим, може встановити розмір та форму забезпечення вимоги (забезпечувальні заходи)».

2) Викласти частину 2 статті 25 у наступній редакції:

«2. У клопотанні про забезпечувальні заходи повинні бути зазначені:

1) дата;

2) повні найменування сторін та їхніх представників, їхнє місцезнаходження (місце проживання), поштові адреси, номери телефонів, факсів, адреси електронної пошти;

3) короткий виклад суті спору;

4) вказівка на запитувані забезпечувальні заходи;

5) вказівка на форму, у якій потрібно прийняти забезпечувальні заходи;

6) обґрунтування необхідності вжиття запитуваних забезпечувальних заходів;

7) перелік документів, що додаються.

Клопотання про забезпечувальний захід підписується уповноваженою особою».

3) Статтю 25 доповнити частиною 5 і 6 які викласти у наступній редакції:

«5. Склад Арбітражного суду приймає забезпечення вимоги у формі постанови або арбітражного рішення.

6. Склад Арбітражного суду у виняткових випадках може за письмовим клопотанням будь-якої сторони встановити розмір та форму забезпечення вимоги без заслуховування сторони, проти якої застосовується забезпечення

вимоги. Склад Арбітражного суду приймає рішення у формі попередньої постанови і після чого негайно надає рівні і розумні можливості для захисту своїх прав іншим сторонам, зокрема, стороні проти якої було застосоване забезпечення вимоги. Після надання кожній стороні можливості захистити свої права, склад Арбітражного суду скасовує, змінює, або підтверджує прийняте забезпечення вимоги. У разі підтвердження забезпечення вимоги, склад Арбітражного суду змінює попередню постанову і приймає забезпечення вимоги у формі постанови, або у формі арбітражного рішення».

4) Статтю 29 змінити і викласти у наступній редакції:

«1. Після формування складу Арбітражного суду будь-яка сторона має право звернутись до компетентного державного суду про вжиття заходів забезпечення поданого до МКАС позову лише у виняткових випадках. Сторона повинна без зволікання повідомити МКАС про звернення до компетентного державного суду про вжиття заходів забезпечення поданого до МКАС позову, а також коли цим судом винесено ухвало або інший процесуальний документ про вжиття таких заходів».

ANNEX 5

ПРОЕКТ

Внесення змін до Регламенту
Морської арбітражної комісії
при Торгово-промисловій палаті України

У Регламенті Морської арбітражної комісії при Торгово-промисловій палаті України:

1) Викласти частину 1 статті 25 у наступній редакції:

«1. Склад Арбітражної комісії, за письмовим клопотанням будь-якої сторони, якщо визнає це прохання обґрунтованим, може встановити розмір та форму забезпечення вимоги (забезпечувальні заходи)».

2) Викласти частину 2 статті 25 у наступній редакції:

«2. У клопотанні про забезпечувальні заходи повинні бути зазначені:

1) дата;

2) повні найменування сторін та їхніх представників, їхнє місцезнаходження (місце проживання), поштові адреси, номери телефонів, факсів, адреси електронної пошти;

3) короткий виклад суті спору;

4) вказівка на запитувані забезпечувальні заходи;

5) вказівка на форму, у якій потрібно прийняти забезпечувальні заходи;

6) обґрунтування необхідності вжиття запитуваних забезпечувальних заходів;

7) перелік документів, що додаються.

3. Клопотання про забезпечувальний захід підписується уповноваженою особою».

3) Статтю 25 доповнити частиною 5 і 6 які викласти у наступній редакції:

«5. Склад Арбітражної комісії приймає забезпечення вимоги у формі постанови або арбітражного рішення.

6. Склад Арбітражної комісії у виняткових випадках може за письмовим клопотанням будь-якої сторони встановити розмір та форму забезпечення

вимоги без повідомлення сторони, проти якої застосовується забезпечення вимоги. Склад Арбітражної комісії приймає рішення у формі попередньої постанови і після чого негайно повідомляє прийняті забезпечувальні заходи та надає рівні і розумні можливості для захисту своїх прав іншим сторонам, зокрема, стороні проти якої було застосоване забезпечення вимоги. Після надання кожній сторони можливості захистити свої права, склад Арбітражного суду скасовує, змінює, або підтверджує прийняте забезпечення вимоги. У разі підтвердження забезпечення вимоги, склад Арбітражного суду змінює попередню постанову і приймає забезпечення вимоги у формі постанови, або у формі арбітражного рішення».

4) Статтю 29 змінити і викласти у наступній редакції:

«1. Після формування складу Арбітражної комісії будь-яка сторона має право звернутись до компетентного державного суду про вжиття заходів забезпечення поданого до МАК позову лише у виняткових випадках. Сторона повинна без зволікання повідомити МАК про звернення до компетентного державного суду про вжиття заходів забезпечення поданого до МАК позову, а також коли цим судом винесено ухвало або інший процесуальний документ про вжиття таких заходів».