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ABBREVIATIONS

ICAC at the Chamber of Commerce and Industry of Ukraine	International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine
ICC	International Chamber of Commerce
ICC Rules	Arbitration Rules of ICC International Court of Arbitration Rules
ICSID Rules	Arbitration Rules of the International Centre for the Settlement of Investment Disputes
LCIA	London Court of International Arbitration
LCIA Rules	London Court of International Arbitration Rules of Arbitration
NY Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Swiss chambers	Swiss chambers' court of arbitration and mediation
Swiss Rules	Swiss Rules of International Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Rules	United Nations Commission on International Trade Law Arbitration Rules
UNCITRAL Model law	United Nations Commission on International Trade Law Model Law on International Business Arbitration
VIAC	Vienna International Arbitral Centre
Vienna Rules	Vienna International Arbitral Centre Rules of Arbitration
WIPO	World Intellectual Property Organization

INTRODUCTION

With the fast development of the system of external economic relations and enlargement of number of international business contracts, international business arbitration has become an important mechanism for resolution of international business disputes. Arbitration itself brings some advantages such as expertise, confidentiality and high speed of the process. Moreover, arbitrational method is noticeably more effective – it allows the exercise of autonomy of contracting parties due to its flexible nature. In this prospective, interim measures of protection in international business arbitration are noticed by **the high level of contemporaneousness**: they conclude a significant part of arbitration as such and have a countless impact on the effective enforcement of arbitral decision. Furthermore, without an effective mechanism for enforcement of arbitration rulings regarding interim measures the effectiveness of international business arbitration as an alternative dispute resolution mechanism remains uncertain, even if making other necessary changes and amendments to the legislation on arbitration proceedings.

Relevance of the topic. A provision of arbitration agreement on the adoption of interim measures is fiduciary in its nature, which decreases the effectiveness of the enforcement of such decisions. In numerous cases, state courts are less suitable for settlement of the complicated international relations, while arbitration is precisely designed to facilitate resolution of disputes arising from such transactions. But not so very long ago, interim relief was only available through the national courts. Moreover, in some jurisdictions, once a party had sought such relief from the courts, particularly if the relief was needed on an urgent basis before the tribunal was constituted, the party would have been held to have waived its right to arbitrate[1].

The power of arbitrators to grant interim relief is guaranteed by the law, mentioned in the arbitration agreement. Most of legislations and Rules of arbitral institutions provide both – state courts and arbitrators – with this right. However, some countries do not have an appropriate legal authority for this purpose. For example, under the Italian law, in particular the Italian Code of Civil Procedure 2005, arbitrators cannot dispose freezing of assets, nor can order other interim measures, unless otherwise given by the law. By contrast, in other jurisdictions, particularly in England, legislator tends to expand the powers of arbitrators in respect of the right to grant an interim relief[2].

[1] M.L. Moses, *The Principles and Practice of International Business Arbitration* (2nd edn, Cambridge University Press 2012), 110-111.
[2] See Arbitration Act 1996, art 39.

The use of interim measures in international business arbitration may lie in maintaining the Status Quo, protecting arbitral process itself, preservation of assets or evidence etc. Because interim relief in this case involve the direct use of national law, a high degree of coordination is required for interim measures to reach a successful outcome in each case, as they are intended to do. **The aim of this work** is to analyse wide range of practical and theoretical aspects of interim measures in international business arbitration including their legal nature, types and implementation; to examine the basic legal problems of maintenance of the claim in international business arbitration and possible ways to resolve them.

In order to complete the scientific analysis with the preservation of a narrow circle of relations of an object of research, namely, relations arising from the use of means of securing a claim and evidence in international business arbitration, I have been dealing with the relevant rules of international law, including Austrian, English, Swiss, French and Ukrainian legislations. In addition, I turn to academics and lawyers, who have been exploring these aspects of international business arbitration. To the problems of legal regulation and nature of measures securing a claim in international business arbitration, scientific works have been devoted by such well-known researchers as M. Moses, S. Ferguson, A. Yesilirmak, D. Reichert, B. Harris, R. Planterose, M. Platte, J. Tecks, P. Sherwin, D. Rennie, G. Born G. Hanessian, J. Mark, M. Zaheeruddin and others. However, the existence of a number of gaps and practical problems in applying the interim measures in international business arbitration both at normative and doctrinal levels makes the available volume of research on a given topic still deficient.

CHAPTER I - DEFINITION AND KINDS OF INTERIM MEASURES IN INTERNATIONAL BUSINESS ARBITRATION

In today's realities of the rapid development of international business, its participants are increasingly concluding a separate arbitration agreement or include an arbitration clause in the text of their business contracts. Arbitral decisions may be of low value to the party in whose favour the decision was made if behaviour of the other party makes the outcome of it ineffective - for example, when a party dissipates its assets or places them in jurisdictions where it is impossible to enforce a decision under the New York Convention. Interim measures issued in international business arbitration differ significantly from one another and because of international trade practices continue to evolve and grow into new types in accordance with the needs of the parties and the increasing complexity of cases.

There is no uniform approach to the definition and the legal nature of interim measures in international business arbitration in scientific literature, what indicates the existence of discussions in this area. It is directly related to the controversial characteristics of the legal nature of arbitration itself.

It is also extremely important to differ provisional remedies and interim measures of protection in international business arbitration. Provisional remedies are mandatory writs issued by the court to ensure the efficacy of an eventual judgment[3].

A. Definition and legal nature of interim measures

An important place is attributed for interim measures in law-science and practice of arbitration, which is explained by their characteristic as one of the most debatable issue with regard to arbitration[4]. In international business arbitration to indicate interim relief as such, parallel to the most common term "*interim measures*", other concepts are used[5] – "*interim measures of protection*", "*conservatory measures*", "*protective measures*"[6], "*preliminary measures*", "*preliminary injunctive measures*", "*preliminary judicial measures*", "*urgent*

[3] D. Reichert, *Provisional Remedies in the Context of International Business Arbitration* (3 Int'l Tax & Bus. Law. 368 1986) <http://scholarship.law.berkeley.edu/bjil/vol3/iss2/6> accessed 1 December 2017, 370.
[4] J.-B. Racine, *L'exécution des mesures provisoires ordonnees par un arbitre. L'éclairage du projet de nouvelle loi type de la CNUDI* (Paris: Litec/LexisNexis 2007), 113.
[5] M. Roth, 'Interim Measures' [2012] vol 2012/2(2012) Journal of Dispute Resolution <http://scholarship.law.missouri.edu/jdr/vol2012/iss2/3> accessed 1 December 2017
[6] A. Yesilirmak, 'Provisional and Protective Measures under Austrian Arbitration Law' [2007] vol 23/4 LCIA, Arbitration International, 593.

measures", "*emergency actions*", "*precautionary measures*", "*holding measures*" etc. In the UNCITRAL Model Law and UNCITRAL Rules, they are called "*interim measures of protection*." The ICC Rules refers to interim measures as "*interim or conservatory measures*", in the French version, as "*mesures provisoires ou conservatoires*", while in the Swiss Private International Law Act 1987, they are referred to as "*provisional or conservatory measures*".

According to A. Yesilirmak, such definitions can be used systematically and simultaneously, while the terms "protective measure" and "conservatory measure" are based on their task – the protection of the rights of parties to arbitration[7]. On the other hand, B. Harris, J. Tecks, and R. Planteroze believe that it is necessary to clearly distinguish the terms provisional measure and interim measure, because the English legislator chose the word "provisional" to avoid the use of "interim", that is, temporary (intermediate) measure[8].

The term "interim measure" for a long time had no precise definition[9], but UNCITRAL gave it an explanation in the UNCITRAL Model law. According to Article 17 of Chapter IV of UNCITRAL Model Law an interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the Status Quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

In other words, the interim measures of protection can include any temporary measure ordered by the arbitral tribunal pending the issuance of the award by which the dispute is finally decided. Some common types of interim measures of protection ordered by courts and tribunals include injunctions, partial payment of claims, and posting of security for costs[10]. According to the general trend, arbitral tribunals have the power to order such measures, except if the parties have agreed otherwise[11].

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[7] A. Yesilirmak, *Provisional Measures in International Commercial Arbitration* (The Hague: Kluwer Law International 2005), 9.

[8] B. Harris, R. Planterose and J. Tecks, *The Arbitration Act 1996: A Commentary* (4th edn, Blackwell Publishing 2007), 96.

[9] M.L. Moses, *The Principles and Practice of International Business Arbitration* (2nd edn, Cambridge University Press 2012) 105.

[10] S. Ferguson, 'Interim Measures of protection in International Business Arbitration: Problems, proposed solutions, and anticipated Results' [2003] vol 12 Currents Int'l Trade Law Journal, 55.

[11] P. Sherwin and D. Rennie, 'Interim Relief under International Arbitration Rules and Guidelines: A Comparative

However, it should be noted that paragraph (b) of this article of UNCITRAL Model Law defines the concept of "anti-suit injunction"[12] (anti-suit interim measures). This is a prohibition issued by a court that have its own jurisdiction over an arbitration panel to file a lawsuit in another jurisdiction or to continue the trial on a claim that has already been filed in another court[13].

R. Hodykin proposes to consider three main categories of anti-suit interim measures in relation to international business arbitration:

- measures required by the party to prevent proceeding from being resolved by Arbitral Tribunal or, conversely, when the other party tries to prevent a court hearing in violation of an arbitration agreement;

- measures issued after the approval of the arbitral panel in order to make it more difficult or impossible to recognize or enforce the application;

- if the state court satisfies the petition of the party, in most cases the ban will be imposed on the other party, but, in contrast, in the hearing of the case by the state court, there are prohibitions addressed directly to the Arbitral tribunal[14].

Despite the fact that there are decent reasons to consider interim measures as having a procedural nature, I believe that it is expedient to concern them as a material law institute – they are entitled to influence the material-legal relations by establishing certain restrictions and prohibitions by the court.

M. Boguslavsky defines interim measures as urgent temporary measures aimed to secure the claim or the property interests of the plaintiff[15].

S. Lebedev considers interim measures as means of ensuring those requirements which, by virtue of the parties' agreement, are subject to arbitration[16].

Under the term "interim measures" G. Born understands decisions aimed to protect one or both of the parties in a dispute from losses during arbitration proceedings – they are used to

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Analysis' [2009] vol 20 American Review of International Arbitration, 317.

[12] M.L. Moses, *The Principles and Practice of International Business Arbitration* (2nd edn, Cambridge University Press 2012) 106.

[13] ibid 95.

[14] Р.М. Ходыкин, *Антиисковые обеспечительные меры в цивилистическом процессе и международном арбитраже // Вопросы международного частного, сравнительного и гражданского права, международного коммерческого арбитража* (Сост. и науч. ред. С.Н. Лебедев, Е.В. Кабатова, А.И. Муранов, Е.В. Вершинина. - М.: Статут, 2013), 292.

[15] М.М. Богуславский, *Связь третейских судов с государственными судами // Международный коммерческий арбитраж: современные проблемы и решения* (Под ред. А.С. Комарова; МКАС при ТПП РФ. – М.: Статут, 2007), 69-70.

[16] С.Н. Лебедев, *Международный коммерческий арбитраж и обеспечительные меры // Лебедев С.Н. Избранные труды по международному коммерческому арбитражу, праву международной торговли, международному частному праву, частном морскому праву* (М.: Статут, 2009), 648.

preserve the factual or legal situation in such a way as to ensure the rights of the parties to arbitration and may go beyond the mere preservation of the actual or legal Status Quo with the requirement to restore the previous state of business affairs or to commit new acts[17]. As noted by G. Born, interim measures provide one of the parties limited in time, but immediate protection of property or rights during the hearing of the case on the merits by the Arbitral Tribunal[18].

W. Wang points out that the majority of such measures include the seizure of property, which is often referred to as a restriction of possession or encumbrance: in arbitration proceedings, the applicant's purpose is to protect the property that is the subject of the dispute or property that should become necessary for the enforcement of the decision of international business arbitration[19]. Such decisions of the Arbitral Tribunal are aimed to prevent the flight of assets or preserving their status.

As to the tasks and functions of interim measures, J. Prytyka refers them to the following actions: regulation of the behaviour of the parties and relations between them during hearing, i.e. the application of measures aimed to prohibit certain actions or obligations to commit certain actions; providing a guarantee that the material object of the dispute will not be affected until the final decision on the legal subject is expected and the possibility of enforcing the Arbitral Award[20].

N. Pavlova emphasizes that the use of interim measures is based on two objectives: maintaining the existing state of relations between the parties and ensuring the enforcement of the future Arbitral Award[21]. T. Clay also follows the same approach and distinguishes measures aimed to ensure the future enforcement of the Arbitral Award by preserving the assets of the opponent and those aimed to maintain evidence[22].

While I agree with the aforementioned definitions of interim measures in international business arbitration, in my opinion, the most relevant is the definition proposed by G. Prusenko, namely, measures envisaged by law that may be applied by the authorized Arbitral Tribunal or the national court in support of the arbitration proceedings in order to preserve the Status Quo

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[17] G. Born, *International Arbitration: Cases and Materials* (Wolters Kluwer 2011), 813.
[18] G. Born, *International Commercial Arbitration* (The Netherlands: Kluwer Law International 2009), 813.
[19] W. Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' [2002] vol 28 Brook. J. Int'l L, <http://brooklynworks.brooklaw.edu/bjil/vol28/iss3/8> accessed 1 December 2017
[20] Ю.Д. Притика, 'Актуальні проблеми застосування забезпечувальних заходів у міжнародному комерційному арбітражі' [2004] №8 Господарський процес, 16-17.
[21] Н.В. Павлова, *Предварительные обеспечительные меры в международном гражданском процессе Автореферат дис. на соискание ученой степени к.ю.н.* (М., 2002), 9.
[22] T. Clay and E. Jolivet, *Les mesures provisoires dans l'arbitrage commercial international: évolutions et innovations* (Paris: Litec/LexisNexis 2007), 9.

between the parties and/or to ensure the enforcement of the future Arbitral Award[23]. Consequently, I believe that interim measures in its legal nature are a material institute with such characteristics as *temporality* (they are limited in time), *proportionality* (what is displayed in their types and purpose) and *dispositivity* (as the parties can provide in their arbitration agreement a list of possible interim measures).

B. **Kinds of possible interim relief in international business arbitration**

Interim measures provide a party to arbitration with immediate and temporary protection of rights or property during the period when a decision on the merits by the arbitral tribunal remains pending[24]. These measures vary widely according to the needs of the parties and the complexity of the cases in international trade practice[25]. Article 17(2) of the UNCITRAL Model Law lists four functions of interim measures: maintenance of the Status Quo; protection of the arbitral process itself; preservation of assets; and preservation of evidence. This list is not exhaustive, and an interim measure may, of course, serve more purposes at the same time.

Interim measures are divided into types mainly depending on the features (characters, purpose) of the claim. Provisional remedies and interim relief come in many forms depending on the parties involved and context of the dispute. The kinds of interim measures that a party to arbitration generally would seek are, for example, measures that would prevent the other side from hiding or removing assets, from using licensed intellectual property in a way that would devalue the licensor's interest, or from dispersing or destroying evidence that the party needed to prove its position.

Though, most often these remedies entail either the seizure of property, often called attachments or holding orders, or interim orders, also known as injunctions[26]. In attachment proceedings, the intention of the party to arbitration is to preserve the assets representing the subject matter or being necessary for enforcement of the Arbitral Award. These orders are designed to prevent dissipation of the property or to preserve the condition of the property for future inspection[27]. Alternatively, a litigant may be ordered to deposit property into the custody

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[23] Г.Є. Прусенко, *Забезпечувальні заходи у міжнародному комерційному арбітражі: Дисертація на здобуття наукового ступеня к. ю. н.* (Київ, 2016), 25.
[24] G. Born, *International Commercial Arbitration* (The Netherlands: Kluwer Law International 2009), 1942.
[25] G. Marchac, 'Note & Comment: Interim Measures in International Business Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules' [1999] 10 AMRIARB 123, <https://mitchellhamline.edu/wp-content/uploads/sites/18/2016/05/DOC-35-Marchac_10_AMRIARB_123_4-5-10_0551.pdf> accessed 1 December 2017.
[26] G. Zekos, *International Commercial and Marine Arbitration* (Routledge 2008), 38.
[27] ibid.

of a third party.

Another type of interim measure is an order to preserve the Status Quo between the parties pending the resolution of the merits of their dispute. For example, a party may be ordered not to take certain steps, such as terminating an agreement, disclosing trade secrets or using disputed intellectual property or other rights, pending a decision on the merits[28]. In the interest of preserving the Status Quo, ICC tribunals have been willing to order a contract to be performed for a limited period, even though one-party claims that the contract was rescinded[29]. The provisional relief of preserving the Status Quo can be provided either by the arbitrator or by the public courts, during and in conjunction with the arbitral proceedings[30]. Issues often arise as to whether arbitral tribunals or national courts have the power to order such relief[31].

According to the criteria of the purpose of the participants in the dispute and the subject of the dispute O. Kabatova highlights interim measures that allow:

1) to preserve the property that is the subject of the dispute, or necessary for the possible enforcement of the future Arbitral Award;

2) to preserve certain evidence;

3) to maintain the Status Quo between the parties;

4) to oblige the party to provide security for the enforcement of the future final Arbitral Award[32]

A. Yesilirmak notes that the types of interim measures practically do not vary in national jurisdictions, as well as in public and private international law; however, one can trace the tendency to including functionally similar or even identical types of interim measures (but under different names) in each of these jurisdictions[33]. He also distinguishes, depending on the purpose of granting interim measures, three types of them:

- measures related to the preservation of evidence;

- measures related to the hearing and interactions between the parties during arbitration proceedings, and

[28] G. Born, *International Arbitration: Cases and Materials* (Wolters Kluwer 2011), 921.
[29] *Cowhides case* [1990] ICC 6503 (1990), <https://cisgw3.law.pace.edu/cases/947331i1.html> accessed 1 December 2017
[30] D. Reichert, *Provisional Remedies in the Context of International Business Arbitration* (3 Int'l Tax & Bus. Law. 368 1986) <http://scholarship.law.berkeley.edu/bjil/vol3/iss2/6> accessed 1 December 2017
[31] G. Zekos, *International Commercial and Marine Arbitration* (Routledge 2008), 38.
[32] А.А. Костин, *Современный международный коммерческий арбитраж* (М.: МГИМО-Университет, 2013), 192.
[33] A. Yesilirmak, *Provisional Measures in International Commercial Arbitration* (The Hague: Kluwer Law International 2005), 10.

- measures designed to facilitate the future enforcement of the Arbitral Award[34].

S. Kurochkin proposes to divide the preliminary interim measures in international business arbitration into three groups:

1) measures related to the disclosure, sending and receiving of evidence important for the dispute to be resolved. According to the researcher, this group of interim measures is aimed at formation of the evidence base in case of threat of possible loss of certain evidence in the future;

2) measures applied to preserve the subject matter of the dispute and eliminate possible violations of the rights of the parties to the arbitration proceedings. Their application is aimed to preserve the Status Quo in the relations between the parties, preventing possible changes in the relations between the plaintiff and defendant during the hearings and maintaining the subject of the dispute;

3) measures aimed to ensure the effective enforcement of the future Arbitral Award (*actual interim measures*). Granting of such measures requires the imposition of restrictions on the defendant, as well as the participation of third parties who have property or funds. For this reason, such safeguards are most often granted by state courts[35].

D. Lopatina suggests combining interim measures in the following four categories (due to functional purpose):

1) measures aimed to maintain the Status Quo to resolve the dispute;

2) measures applied to prevent the damage to one or another party to the dispute or damage to the arbitration itself;

3) measures aimed to preserve the assets within which a future arbitration award may be enforced;

4) measures that will facilitate the preservation of evidence that may be relevant to the case and have a significant impact on resolving of the dispute[36].

According to the Guidance Note of the Chartered Institute of Arbitrators in London, the types of security funds should include:

- measures for the preservation of evidence that may be relevant and material to the resolution of the dispute;

- measures for maintaining or restoring the Status quo;

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[34] ibid 11.

[35] С.А. Курочкин, *Отдельные элементы арбитражного разбирательства // Международный коммерческий арбитраж* (Под ред. В.А. Мусина, О.Ю. Скворцова. СПб.: АНО «Редакция журнала «Третейский суд»; М.: Infotropic Media, 2012), 223-224.

[36] Д.А. Лопатина, 'Обеспечительные меры в международном коммерческом арбитраже' [2008] №2 Реклама и право, 35.

- measures for providing security for costs; and

- measures for interim payments[37].

After analysing the abovementioned information and the norms of international law, the following types of interim measures can be distinguished in international business arbitration:

1. Maintenance of the Status Quo

According to the Article 17(2)(a) of UNCITRAL Model Law, an interim measure should maintain the Status Quo until a final decision on the merits of the case is rendered. The term "Status Quo" has been interpreted by case law as "the last peaceable state of affairs between the parties"[38]. This type of remedy can be explained by the following example: one may think of an international construction dispute where the tribunal requests the general contractor to continue working even though it claims it is entitled to suspend the work unless the customer makes payments in addition to the amount owed under contract. At the same time, the customer is usually ordered to continue making those payments, that it undoubtedly owes under the contract. Obviously, such an interim measure prevents the costly standstill of construction work on a building site while a final decision on the merits of the case is pending[39]. Maintaining the Status Quo is widely accepted in many legal systems as one important purpose of interim measures[40].

2. Protection of the Arbitral Process Itself

Article 17(2)(b) of UNCITRAL Model Law empowers the arbitral tribunal to prevent a party from taking any actions that may cause obstruction or delay of the arbitral process. An example in this category is the issuance of anti-suit injunctions. These are interim measures by which an arbitral tribunal orders a party not to pursue parallel court proceedings or other separate legal proceedings in the same matter[41]. Accordingly, such a measure aims to avoid contradictory results.

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[37] See <http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/practice-guidelines-protocols-and-rules/international-arbitration-guidelines-2015/2015applicationinterimmeasures.pdf?sfvrsn=26> accessed 1 December 2017

[38] *Safe Kids in Daily Supervision Limited v. McNeill* [2010] High Court, Auckland, New Zealand CIV-2010-404-1696/2010 <https://www.nzdrc.co.nz/site/commercialdisputes/files/Court%20Decisions/SAFE%20KIDS%20IN%20DAILY%20SUPERVISION%20LTD%20v%20MCNEILL%20HC%20AK%20CIV-2010-404-1696%2014%20April%202010.pdf> accessed 1 December 2017

[39] M. Roth, 'Interim Measures' [2012] vol 2012/2(2012) Journal of Dispute Resolution <http://scholarship.law.missouri.edu/jdr/vol2012/iss2/3> accessed 1 December 2017

[40] ibid.

[41] M. Roth, 'Interim Measures' [2012] vol 2012/2(2012) Journal of Dispute Resolution <http://scholarship.law.missouri.edu/jdr/vol2012/iss2/3> accessed 1 December 2017

3. Preservation of Assets

Article 17(2)(c) of UNCITRAL Model Law entitles the arbitral tribunal to issue interim measures preserving party assets so as to secure the enforcement of the final award. Hence, under this provision, the tribunal may be asked to issue an interim measure aimed to secure the assets out of which a subsequently rendered award may be satisfied. Measures in this category include those interim efforts used to avoid loss or damage[42]. For example, such measures might include an order restraining a party from transferring money to a less favorable enforcement regime—such as some islands in the Caribbean Sea that are not parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter New York Convention)—an order appointing an administrator of assets, or an order to safeguard goods. Also, the arbitrator may order the appointment of a property manager or to deposit the property[43].

4. Preservation of Evidence

Pursuant to Article 17(2)(d) of UNCITRAL Model Law, the arbitral tribunal can "preserve evidence that may be relevant and material to the resolution of the dispute" in order to secure the proper conduct of the proceedings. This can be done, for example, by appointing an independent expert who evaluates the quality of perishable goods. The arbitrators might also require a party to grant the opposing party an opportunity to inspect the premises in question in order to seek out and preserve evidence. "The purpose of this preservation is to facilitate the proper conduct of the arbitral process"[44].

[42] ibid.
[43] ibid.
[44] ibid.

CHAPTER II - AUTHORITIES TO IMPOSE INTERIM MEASURES AND ENFORCEMENT OF SUCH DECISIONS IN INTERNATIONAL BUSINESS ARBITRATION

Considering the definition of interim measures, classification and their legal nature, it is necessary to pay attention also to the peculiarities of their application, namely, their form and the authorities empowered to grant them.

Today, national and arbitration courts, in accordance with the regulations of various arbitral institutions and international law, have competitive powers to grant interim measures; and that is why, in different jurisdictions, the legislator looks differently at how and when these bodies should be involved[45].

In most jurisdictions, if the Arbitral Tribunal has not yet been formed, the parties to the agreement may apply to the national court for the application of interim measures for the purpose of protection because of a direct threat[46]. In such circumstances, if there is a real need for an immediate granting of interim measure, this is done by a local court.

However, as soon as the Arbitral Tribunal is formed, the order of actions will be slightly different[47]; for example, under the rules of some arbitral institutions, after the formation of the Arbitral Tribunal, the parties apply to the national court solely in the case of "certain circumstances"[48] (the ICC Rules) or, according to the LCIA Rules - "in exceptional cases"[49].

M. Roth notes that interim measure in international business arbitration may be either in the form of a procedural order, or a corresponding decision to grant such measures[50].

According to G. Cirat, unlike national court system, international business arbitration is here in a more "vulnerable" position: "The civil procedural law of many countries knows such institutes as keeping evidence and the means of securing a claim, ensuring enforcement of a court decision: these means differ in content, in timing (when they can be applied during the

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[45] M.L. Moses, *The Principles and Practice of International Business Arbitration* (2nd edn, Cambridge University Press 2012) 116.

[46] Г.Є. Прусенко, 'Органи, уповноважені застосовувати забезпечувальні заходи у міжнародному комерційному арбітражі' [2014] №5 Т.3 Науковий вісник Херсонського державного університету, 289 <http://www.lj.kherson.ua/2014/pravo05/part_3/62.pdf> accessed 1 December 2017

[47] M.L. Moses, *The Principles and Practice of International Business Arbitration* (2nd edn, Cambridge University Press 2012) 108.

[48] See art 28, <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> accessed 1 December 2017

[49] See art 25, <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> accessed 1 December 2017

[50] M. Roth, 'Interim Measures' [2012] vol 2012/2(2012) Journal of Dispute Resolution <http://scholarship.law.missouri.edu/jdr/vol2012/iss2/3> accessed 1 December 2017

stages of the arbitration) and in the granting authorities[51]".

Therefore, the question of the form of interim measures in the international business arbitration and, accordingly, the authorities with the power to grant them is debatable in the legal field. In my opinion, this is happening due to the fact that the current tendency of increasing cases international business arbitration gives a logical impetus to the proposals of giving the arbitrator more powers in this area. In order to find out effective approaches and the best solution to this issue, it is necessary to describe the powers of the arbitrators and national courts in granting interim measures in international business arbitration.

A. The power of arbitrators to grant interim relief

The arbitral tribunal shall take interim measures in the form of a procedural order or an interim award. According to M. Roth, if the first kind is more unofficial (off-the-record), then the latter is more formal[52]. Different arbitration regulations give arbitrators wide discretion in choosing a form of procedural act for securing a claim. Taking advantage of the possibility of an alternative to the application of an order or the adoption of an interim decision, the arbitral tribunal will consider a specific action, which the plaintiff requests, procedural or contractual in its legal nature, as well as the law applicable to the merits of the dispute. In practice, referees tend to favour a more informal interim measure - in the form of a procedural order, since an award may seem too similar to a final decision in a case.[53]

In international business arbitration interim measures most often relate to the prohibition of the transfer of goods or assets from their place of residence or outside of a particular jurisdiction, the prohibition of sale or other alienation of property, making a monetary guarantee, or a deposit. Unlike litigation, where the regulation is done by national procedural law quite thoroughly in different countries, there are a number of gaps in arbitration in this area, which sometimes call into question the possibility of recognising an international Arbitral Award. It is for these reasons that the reform of modern international arbitration legislation is to the greatest extent aimed to eliminate shortcomings in the field of interim measures and creating a unified legal regime for them[54].

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[51] Г.А. Цірат, 'Забезпечувальні заходи в міжнародному комерційному арбітражі: Питання законності та юридичної сили. Частина 1' [2010] №2 Європейські перспективи, 64-65.

[52] M. Roth, 'Interim Measures' [2012] vol 2012/2(2012) Journal of Dispute Resolution <http://scholarship.law.missouri.edu/jdr/vol2012/iss2/3> accessed 1 December 2017, 429.

[53] ibid 430.

[54] В.Н. Захватаев, *Комментарий к мировой практике международного коммерческого арбитража. Книга первая (*К.: Алерта, 2015), 789.

The power of the arbitral tribunal to order interim measures must be established under the applicable procedural law, which is the law chosen by the parties or, in absence of such choice, the law of the place of arbitration[55]. The major sets of arbitral rules provide for provisions which expressly empower the arbitrator to order interim measures. The UNCITRAL Model Law, which serves as a model for national legislators drafting their own arbitration acts, was amended in 2006 and has provided detailed rules regarding interim measures since that time[56].

In practice, the arbitrators are reluctant to use their authority to apply interim measures, since, according to M. Roth, they do not want to make the false impression that the decision in the case was taken in advance, until the final determination of all the facts, or in favour of one of the parties[57].

The relevant provisions under the Arbitration Rules of the ICC, the International Centre for Dispute Resolution (ICDR), the LCIA and the UNCITRAL are more or less detailed and vary as to the scope of interim measures: whereas most arbitral regimes give broad powers to arbitrators, who may grant any measures they deem appropriate or necessary, under some rules, such as the LCIA Rules, the tribunal may only take measures it deems necessary in respect to the subject matter of the dispute[58]. Thus, the scope of interim measures under the LCIA Rules seems to be more limited compared to other rules because the measure has to be in direct relation to the subject matter of the dispute. None of the many arbitral rules limit arbitrators to the traditional remedies provided in the procedural law of the place of arbitration. However, it should be noted that the enforcement of innovative measures could prove difficult if the state where enforcement is sought is not familiar with these kinds of interim measures[59]. Generally, arbitrators have "wide discretion in deciding whether the requested measure is appropriate or necessary[60]." Nonetheless, in practice arbitrators tend to use their authority to grant interim measures reluctantly because they do not want to appear as if they have already decided the merits of the case before the facts are firmly established in favour of one party[61]. The recent

[55] G. Hanessian and J. Mark, 'Provisional Relief' in *International Arbitration checklists* (2nd edn, Baker & McKenzie 2009), 61.
[56] M. Roth, 'Interim Measures' [2012] vol 2012/2(2012) Journal of Dispute Resolution <http://scholarship.law.missouri.edu/jdr/vol2012/iss2/3> accessed 1 December 2017
[57] ibid 428.
[58] LCIA Rules, art. 25(1)(b).
[59] G. Marchac, 'Note & Comment: Interim Measures in International Business Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules' [1999] 10 AMRIARB 123, <https://mitchellhamline.edu/wp-content/uploads/sites/18/2016/05/DOC-35-Marchac_10_AMRIARB_123_4-5-10_0551.pdf> accessed 1 December 2017.
[60] See ICC Rules, art. 28(1); ICDR Rules, art. 21(1).
[61] G. Marchac, 'Note & Comment: Interim Measures in International Business Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules' [1999] 10 AMRIARB 123, <https://mitchellhamline.edu/wp-

trend of arbitral rules and national arbitration acts is that arbitrators are vested with express powers to order interim awards. As an exception to this general tendency, however, some national laws still accord the exclusive jurisdiction to order interim measures to their domestic courts, such as Finland, Greece, Italy, and Thailand[62].

In different countries, legislators have introduced detailed procedures, according to which the parties to the arbitration may, under certain conditions, apply for the application of interim measures. For example, according to part one of Article 24 of the current version of the ICDR International Dispute Resolution Rules, effective from June 1, 2014, at the request of either party, the arbitral tribunal may designate or decide on any interim measure that it recognizes as necessary, including forensic prohibitions and measures aimed at the preservation of property. In accordance with Part 2 of the aforementioned Article, such decision may take the form of an interim order or an interim award.

Similarly, as Article 9 of the UNCITRAL Model Law grants the State Court the power to take a decision on the application of certain interim measure by an action initiated by the party to the arbitration agreement, Article 17 of the UNCITRAL Model Law grants the relevant power to arbitrators. From the practical point of view, Article 17 provides the parties with an additional opportunity to ensure the exercise of their rights within the framework of the arbitration without referring to a state court[63].

Article 17A, paragraph 1, of the UNCITRAL Model Law establishes requirements for the application of interim measures, namely: there is a significant likelihood that, if the measure is not applied, it may result in the situation, where damages awarded will not be sufficiently covered; there is a reasonable likelihood that the party applying for the measure will succeed in its satisfaction when considering the merits. Paragraph 2 of this Article clarifies that the relevant requirements apply only to the extent to which arbitration will consider them to be appropriate.

Examples of interim measures to anticipate or reduce losses include, inter alia, measures aimed to preserve or storing goods or selling perishable products that are the subject of a dispute. During the development of the Model Law, UNCITRAL was also requested to include in its text special provisions on the application of arbitration measures to ensure the claim[64]. In particular, it was about measures such as the transfer of goods to third parties, the sale of

content/uploads/sites/18/2016/05/DOC-35-Marchac_10_AMRIARB_123_4-5-10_0551.pdf> accessed 1 December 2017.

[62] M. Roth, 'Interim Measures' [2012] vol 2012/2(2012) Journal of Dispute Resolution <http://scholarship.law.missouri.edu/jdr/vol2012/iss2/3> accessed 1 December 2017

[63] В.Н. Захватаев, *Комментарий к мировой практике международного коммерческого арбитража. Книга первая (*К.: Алерта, 2015), 781.

[64] ibid.

perishable products, the imposition of seizure on assets or the withdrawal of assets. The question also arises as to whether arbitral tribunal may apply such measures without getting the necessary powers from the parties to the dispute.

E. Collins defines a list of obstacles to the effective securing of a claim by arbitral tribunal[65]:

1. Timing. The main obstacle to obtaining interim measures in arbitration is the presence of an arbitrator (formed arbitral tribunal, an urgent arbitrator) for consideration of the application. Many arbitration procedures, especially those involving more than one arbitrator, are very complex. Even when the arbitral tribunal is formed, there must be a timetable for filing applications, since the arbitration must hear both parties on the matter; further, a decision should be made on the merits. The procedural terms, therefore, can greatly affect the ability of the party to an arbitration agreement to secure the claim within the required period of time.

2. Availability of security measure. Most arbitration regulations indicate the concrete form of an interim measure, which may be used by arbitral tribunal. In some regulations, however, it is noted that an arbitrator who decides to take such a measure may choose the form of action at his own discretion, which he considers necessary.

Part one of Article 28 of ICC Rules is rather vague. It is provided that, unless otherwise agreed by the parties, the arbitral tribunal, upon receiving of the case, may, at the request of any party, issue an order for taking interim or protective measures that it considers appropriate[66]. An arbitral tribunal may require that such measures be taken by providing adequate security to the party who has made the appropriate application: such measures may be taken in the form of an order or Arbitral Award, if the arbitral tribunal finds it necessary[67].

3. The criteria governing the arbitral tribunal will also play an important role in determining whether interim measures will be applied to secure the claim. The criteria vary widely depending on the state court and arbitration institute. E. Collins notes that United States state courts in their practice tend to show a high probability of success in the event of a threat of irreparable damage, other legal systems may require proof of probable reasons or urgent circumstances that necessitate the adoption of protective measures.[68]

[65] E. Collins, 'Pre-Tribunal Emergency Relief in International Commercial Arbitration' [2012] vol 10/1 Loyola University Chicago International Law Review, 105-118.
[66] See ICC Rules, art 28.
[67] ibid.
[68] E. Collins, 'Pre-Tribunal Emergency Relief in International Commercial Arbitration' [2012] vol 10/1 Loyola University Chicago International Law Review, 105-118.

4. Appeal to enforcement. The parties to the arbitration agreement must have the opportunity to bring enforcement actions taken by the arbitral tribunal if the party to whom they were applied will refuse to comply with the arbitration order on a voluntary basis. In the United States, a number of state courts refused to recognize arbitration measures to secure a claim, referring to the fact that the decision to take such measures was not final decisions in the case[69]. Other US courts have argued that arbitration measures should be verified and enforced in a judicial manner, based on the view that the temporary fair securing of a claim is necessary to prevent the impossibility of the enforcement of a final decision in a case, serves a clear function and, accordingly, such decisions are final[70].

5. Pre-arbitrational secure of the claim. The formation of the arbitral tribunal thus takes a relatively long time, and, as noted, interim measures may be needed before the appointment of the arbitrators. In order to find the possibility of taking security measures to form the arbitral tribunal arbitration institutes introduced two main procedures: accelerating the formation of arbitral tribunal and the appointment of a pre-arbitral judge (pre-tribunal referee, pre-arbitral judge).

6. Ex parte ensuring of the claim. Ex parte interim measures are measures taken without the prior hearing of the party to the agreement in respect of which the measure is being taken. The UNCITRAL Model Law recognizes ex parte safeguards in the form of preliminary awards: in accordance with the provisions of Article 17 of the Model Law, unless otherwise agreed by the parties, the party to the arbitration agreement may, without notifying the other party, submit a claim for the taking of an interim measure together with a claim for the issuance of a preliminary ruling[71]. Arbitral tribunal may make a preliminary ruling if it considers that the prior disclosure of information about the application may undermine the purpose of the measure.

7. The opinion of the state courts. Several situations can be distinguished during which appeals to the state court remain necessary: the effective protection of the claim ex parte, when one of the parties motivated doubts about the goodwill of the other party, as well as the application of interim measures against third parties having information or assets, related to arbitration proceedings.

[69] E. Collins, 'Pre-Tribunal Emergency Relief in International Commercial Arbitration' [2012] vol 10/1 Loyola University Chicago International Law Review, 105-118.
[70] ibid 325.
[71] see UNCITRAL Model Law, art 17.

If Article 9 of the UNCITRAL Model Law allows a party to apply to a state court for taking of any interim measures not prohibited by law, including, for example, in respect of property held by a third party and not subject to dispute, the security measures provided by the Article 17 of the UNCITRAL Model Law is of a limited nature (may only be addressed to the party concerned to the dispute, may only relate directly to the subject matter of the dispute)[72].

8. Shortened (simplified) procedures. Accelerating of the final settlement of the arbitration may be an alternative to litigation, as consideration of the claim for the use of interim measures postpones the decision as a whole. The simplified procedures, in comparison with the use of interim measures, can theoretically even be given an advantage, but only in cases where the requests of the parties involve a relatively quick, but not urgent solution[73].

In particular, the Arbitration Rules of the China International Economic and Trade Commission provide for the possibility of simplified conducting of arbitration proceedings in cases where the amount of the claim does not exceed 5 million RMB, unless otherwise agreed; or both sides of the arbitration agreement have agreed to apply the simplified arbitration procedure[74].

In the Arbitration Rules of the Japan Commercial Arbitration Association the simplified procedures are conducted if the party to the arbitration agreement notifies the Japan Association of Commercial Arbitration in writing of the agreement between the parties on the change to the shortened procedures, and only in cases where the amount of the claim does not exceed 20 million Yen[75].

The ICSID Rules contain Article 26, which regulates the time limits for arbitration. In particular, it is noted that the terms may be set by the arbitration body by assigning the completion dates of the various stages of consideration[76].

The WIPO has introduced separate WIPO Expedited Arbitration Rules. Arbitration, reduced in time, is carried out in a short time and requires less expenses. The registration fee and administrative fee are lower than in the arbitration proceedings conducted in accordance with the WIPO Arbitration Rules. A fixed fee for an arbitrator is applicable to the settlement of disputes in which amount of claim is less than 10 million USD[77].

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[72] В.Н. Захватаев, *Комментарий к мировой практике международного коммерческого арбитража. Книга первая (*К.: Алерта, 2015), 782.
[73] E. Collins, 'Pre-Tribunal Emergency Relief in International Commercial Arbitration' [2012] vol 10/1 Loyola University Chicago International Law Review, 105-118.
[74] See art 56, <www.cietac.org/index.cms/> accessed 1 December 2017
[75] See art 53, <http://www.jcaa.or.jp/e/arbitration/docs/Arbitration_Rules_2014e.pdf/> accessed 1 December 2017
[76] See art 26, <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partf-chap03.htm> accessed 1 December 2017
[77] See <http://www.wipo.int/amc/en/arbitration/expedited-rules/newrules.html> accessed 1 December 2017

R. Werbicki defines a list of cases in which the possibility of arbitration to grant interim measures may be limited or neglected:

- urgent need to apply measures to secure the claim before the formation of the arbitral tribunal;

- despite the fact that arbitrators may have knowledge, including special one, necessary to resolve significant issues of the dispute, they may not consider interim measures as a part of their powers;

- the Arbitral Award regarding interim measures may be difficult to enforce;

- in order to be effective, interim measures may require the involvement of third parties, where arbitrators do not have jurisdiction;

- the jurisdiction of the arbitral tribunal regarding interim measures may be limited by the law applicable to the arbitration, in accordance with the terms of the arbitration agreement[78].

B. The power of national courts to grant interim relief

There are practical reasons why a party may prefer to apply for an interim measure to a local court, even if the Arbitral Tribunal has already been formed. If such a measure has the purpose of preserving assets (which in some jurisdictions requires the direct involvement of a national court), then, ultimately, a suit, filed in a national court, can save time for that party. Thus, especially if the need to get an interim relief is urgent, such a way may become more effective and operative for the party to arbitration. Also, with a proper remark of J. Prytyka, the most common case of a party applying for an interim measure before a national court is a situation where, at the time of the dispute there is still no appointed Arbitral Tribunal, which in practice is often necessary in particular at the moment when the decision to begin an arbitration is made, and in case of the absence of necessary arbitrators powers, which, accordingly, cannot grant an interim measure against the party which, for example, does not appear at the arbitral tribunal at all[79].

It is up to the parties to seek interim relief from national courts or Arbitral Tribunal, including from the Emergency Arbitrator. Though, where there is an agreement between the parties to "opt-out" from arbitration for such a purpose, the local courts have the jurisdiction to

[78] R. Werbicki, 'Arbitral Interim Measures: Fact or Fiction' [2010] 2nd ed. AAA Handbook on International Arbitration & ADR <www.steptoe.com/assets/htmldocuments/11-ch8-Werbicki.pdf> accessed 1 December 2017, 91.

[79] Ю.Д. Притика, 'Забезпечувальні заходи в міжнародному комерційному арбітражі' [2011] №1 Право України, 141-142.

grant such measures. So, it is well established that where there is no agreement in writing, national courts commonly have parallel jurisdiction to grant interim measures, together with Arbitral Tribunal. In my opinion, the only kind of agreement that would avail to exclude the Arbitral Tribunal's power to grant interim relief should be a written provision expressly denying such a possibility.

According to relevant practice, the legislator provided support to arbitration by a national court on the base of the next reasons. The necessity to assist local court follows, firstly, from the contractual nature of arbitration itself. On the other hand, arbitration is a particular court which does not have the such a strong power, where the national court does. Among the other motives for preferring to national court over Arbitral Tribunal includes situations where it is not possible to order an interim measure against third parties; the arbitrators powers are restricted only to the subject matter of dispute; and the decisions of the Arbitral Tribunal may not sometimes be directly enforceable without the help of local courts.

Moreover, Arbitral Tribunals tend to reluctantly make a decision about a particular interim measure. They must apply the relevant standards prior to their granting, and one of these requirements is to determine whether the party's claim is declared reasonable within this framework. Arbitrators often refrain from making such a decision, because they fear that this may cause some prejudice on their part as to the final decision of the case on the merits. And national courts, on the other hand, are less concerned about granting of an interim measure, since, ultimately, the final decision is made by the Arbitral Tribunal. Thus, local courts may be more willing than arbitrators to grant interim relief in international business arbitration.

Despite the fact that there are strong reasons for the parties to submit a claim to the national court, growing attention to increase the powers of the arbitrators to grant interim measures provokes a tendency in the field of international arbitration, according to which the Arbitral Tribunal takes precedence.

Consequently, despite the fact that modern arbitration rules and international law give arbitrators more or less full power to grant interim measures in international business arbitration, there are objective and subjective reasons why the parties are still filing their suits to national courts. However, modern trends in the development of arbitration contribute to the increase of the powers of the Arbitral Tribunal, which, accordingly, contributes to the increase in the number of decisions (orders) of arbitrators on the granting such measures.

C. Relevant legal problems related to enforcement of decisions of arbitrators on granting interim measures

If the Arbitral Tribunal makes a decision to grant an interim measure, and, consequently, the party must enforce such a decision through the national court, then, as a rule, the local court at the place of arbitration will enforce such a decision. But there is a rather acute issue if the interim measure has to be enforced in another jurisdiction.

It is likely that the jurisdiction, where the party will request enforcement, will not be a place of arbitration, as the parties usually choose the country, neutral for both sides. For example, if the function of a particular interim measure is to preserve assets, a bank account and property are likely to be in the same country where the arbitration takes place, and, therefore, it must be enforced in the country where they are located[80].

The New York Convention[81] is one of the most important documents in the field of international business arbitration, which obliges Member States to recognize and enforce arbitration awards of foreign jurisdictions. It aims at facilitating the recognition and enforcement of arbitration agreements between the parties and, accordingly, the decisions of arbitration courts. However, it was not targeted by its compilers for intermediate decisions, in particular decisions on the use of interim measures, but only for the enforcement of final awards of the arbitrator on the merits of the case.

As of November 1, 2017, 157 states are parties to the New York Convention. According to its provisions, the recognition or enforcement of an arbitration agreement or arbitral award may be refused only on limited grounds and if the opposing party can prove the following:

- non-compliance of the parties to the agreement or the invalidity of the arbitration clause itself;

- improper legal procedure;

- decision outside the scope of arbitration agreement;

- incorrect procedure of the arbitral proceedings or mistake in forming the Arbitral Tribunal; or

- if the Arbitral Award has been revoked or suspended or otherwise is not mandatory[82].

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[80] M.L. Moses, *The Principles and Practice of International Business Arbitration* (2nd editio, Cambridge University Press 2012) 149.
[81] See <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> accessed 1 December 2017
[82] ibid.

The enforcement of decisions on granting interim relief in international business arbitration is also governed by other international conventions, domestic law of the countries, arbitration agreements and *lex arbitri*[83].

Since there are few rules to resolve the above-mentioned situation, the UNCITRAL Model Law, by including this issue in the amended Article 17, introduces a very useful step towards improving the status of the parties to the arbitration, namely ensuring that interim measure will be enforced in foreign courts.

The UNCITRAL Model Law provides that "an interim measure issued by an arbitral tribunal shall be recognized as binding and … enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17(I)".

Article 17(I) implies, in turn, that the appropriate decision on interim measure must be enforced if there are no sufficient grounds for non-compliance. Such grounds essentially repeat what is included in the New York Convention. The UNCITRAL Model Law creates conditions for its Member States to enable them to comply with an arbitrator's decision in other countries, regardless of the New York Convention.

It happens, that the decision on interim measures was made in accordance with the Convention, when it was in the form of a partial decision[84], or an interim measure was determined by the court as final and enforceable[85]. However, the UNCITRAL Model Law avoids the need to provide the interim measures with an official status - whether it is an order or a final decision. Therefore, if they receive the definition of the "*interim measures*", then the decision on granting them is automatically binding, and the court in the country that adopted the provisions of the UNCITRAL Model Law must ensure that it is enforced.

For example, such a side took M. Malskiy and A. Bogutskiy, who substantiate it, referring to the New York Convention, which provides that the term "Arbitral Award" includes not only decisions made by arbitrators appointed in each individual case but also those, made by permanent arbitrational bodies to which the parties appealed[86].

The second approach means that such interim measures are enforced through state courts that exercise only a controlling function and do not have the appropriate authority to review

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[83] M. Zaheeruddin, 'The Remedy of Provisional or Interim Measures in international Commercial Arbitration and Conditions for grant of such measures' [2015] vol 4/8 International Journal of Arts and Commerce <http://www.ijac.org.uk/images/frontImages/gallery/Vol._4_No._8/9._77-89.pdf> accessed 1 December 2017

[84] *Four Seasons v. Consorcio Barr* [2008] 533 F.3d 1349 <http://caselaw.findlaw.com/us-11th-circuit/1010030.html accessed 1 December 2017

[85] *Yasuda Fire & Marine Ins. Co. v. Continental Cas*. [1994] 37 F.3d 345 <http://law.justia.com/cases/federal/appellate-courts/F3/37/345/508384> accessed 1 December 2017

[86] М.М. Мальський і А.І. Богуцький, 'Арбітраж: Невиконане завдання' [2013] №01-02 Український юрист <http://jurist.ua/?article/301> accessed 1 December 2017

such Arbitral Awards (for example, in Austria)[87]. I think, this approach seems to be the most justifiable, since, on the one hand, the state court promotes an effective appeal to enforce interim measures that are used by arbitration, which themselves have no mandatory force. On the other hand, they exercise state control over the observance of the rights of the participants of arbitration proceedings.

[87] M. Platte, *Ordering of protective or interim measures* (Arbitration Law of Austria: Practise and Procedure, Vienna: Juris Publishing, Inc. 2016) 320.

CHAPTER III – LEGAL BASIS FOR INTERIM MEASURES IN INTERNATIONAL BUSINESS ARBITRATION AND APPROACHES ON GRANTING THEM IN DIFFERENT LEGISLATIONS

While the different sets of rules of each arbitral institution are fairly similar, the problem of interim measures of protection is not effectively addressed by any of the various institutional rules. Although arbitration rules may provide for the issuance of interim measures of relief, there has been no uniform practice among arbitral tribunals in granting or denying such relief[88].

Instead, some arbitral tribunals grant interim measures, others explicitly do not and some tribunals direct parties to national courts for resolution of interim awards[89]. Tribunals refer parties to courts because arbitral tribunals possess no coercive power for enforcement of their interim orders and because provisional remedies can only be properly enforced through the court system[90]. Although interim measures can be coercively enforced through the courts, presenting arbitral orders to courts is often problematic.

A. United Nations Commission on International Trade Law Model Law on International Business Arbitration and Arbitration Rules

United Nation's Commission on International Trade Law was founded in 1966 with the main function of unification of the law of international trade. This section proposes to consider the provisions of two important documents that it has concluded, namely: UNCITRAL Model Law on International Commercial Arbitration[91] and UNCITRAL Arbitration Rules[92].

Although UNCITRAL is not an arbitral institution, UNCITRAL Arbitration Rules may be accepted by parties as rules for *ad hoc* or institutional arbitration. Moreover, in order to facilitate the harmonization of the definition and enforcement of interim measures in international business arbitration, in 2006 UNCITRAL amended Article 17 of the UNCITRAL Model Law on Interim Measures. Just as Article 9 of the UNCITRAL Model Law grants national courts the power to grant interim relief to a party to arbitration agreement, Article 17

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[88] W. Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' [2002] vol 28 Brook. J. Int'l L, <http://brooklynworks.brooklaw.edu/bjil/vol28/iss3/8> accessed 1 December 2017, 1075.
[89] G. Zekos, *International Commercial and Marine Arbitration* (Routledge 2008), 38.
[90] ibid.
[91] See <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 1 December 2017
[92] See <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> accessed 1 December 2017

of the UNCITRAL Model Law grants the relevant right to the Arbitral Tribunal. The powers given to the arbitrators stipulate that, in the absence of an agreement of the parties to the other, Article 17 gives the parties additional opportunity to ensure the realization of their rights within the framework of the arbitration process without reference to the national court[93].

The UNCITRAL Model Law also specifies the conditions under which an arbitrator can decide on the use of interim measures, namely: the existence of a significant probability that, if such an interim relief is not applied, it may lead to such a loss, that an awarded damages will not be able to be covered in the future, and that this loss is substantially overwhelming that one, which may be caused to the party against which interim measure is granted; and the existence of a reasonable likelihood that the party requesting the use of interim measure will succeed in its satisfaction when considering the merits[94].

Article 17 of the UNCITRAL Model Law also provides that an Arbitral Tribunal may change, suspend or cancel the remedy used by it on a claim from any party to the dispute, or, in exceptional circumstances and after the parties have been notified, on its own initiative.

UNCITRAL also decided to review its Arbitration Rules in order to provide a higher level of efficiency in arbitration and reflect the latest developments in international business arbitration, which was implemented in the form of further harmonization between the Model Law and the Arbitration Rules. New Arbitration Rules came into force in 2010. Thus, they provide that an Arbitral Tribunal may, at the request of the party, provide any interim measure, and that arbitrator has the power to amend, postpone or cancel the interim relief that was granted[95].

These measures are provisional decisions made within the limits of the powers of the tribunal or court and have a preliminary effect on the enforcement of the order to be given[96] and guarantee that no action that may impede or delay the process will be tolerated[97]. Each party may request for application of such relief. In order to prevent abuse or unfounded allegations regarding the use of interim measures, UNCITRAL Arbitration Rules allow an arbitrator to require a party to deposit funds that are able to cover the cost of implementing an interim measure.

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[93] В.Н. Захватаев, *Комментарий к мировой практике международного коммерческого арбитража. Книга первая* (К.: Алерта, 2015), 781.

[94] See <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 1 December 2017

[95] See <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> accessed 1 December 2017

[96] S. Rosenne, *Provisional Measures in International Law* (Oxford: Oxford University Press 2005), 3.

[97] C. Giorgetti, *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Boston: Martinus Nijhoff Publishers 2012), 144.

In general, revised Arbitration Rules are a prudent reconstruction that complements the Model Law, but taking into account their peculiarities, as well as the fact that only a few countries have adopted changes to the legislation, taking into account the recent changes to the Model Law, the updated framework of interim measures has identified obstacles in the way[98].

B. International Chamber of Commerce Rules of Arbitration

ICC, with its location in Paris, was founded in 1919 and aims to promotion of the development of international trade and investment, as well as the free flow of capital, goods and services in the world. ICC International Court of Arbitration was established in 1923. The general policy of ICC International Court of Arbitration is non-interference in the merits of the case – the arbitrators are independent in deciding the case. In this case, the function of the court is determined by supervision and indirect control over the course of each case. That is, as W. Wang defines, it does not actually "resolve" the issue of arbitration, but administers arbitration, helping to select a competent arbitrator, exchanging documentation, and reviewing decisions for technical accuracy[99].

The powers of the arbitrator to grant an interim measure for a long time were the subject of legal discussions. In 1995, the Commission of ICC Arbitration Court appointed a Working Group to prepare proposals for possible changes to the Rules of this institution. One of the main issues considered by this Commission was the need for clarification on the granting of interim relief. The working group informed the Commission that it proposed to introduce changes that would help practices in this area in the future, due to the fact that the frequently changing rules cannot be effective. Thus, ICC Rules have been revised in 2012 and now contain a clear rule on the direct authority of arbitrators to use interim measures: "Unless the parties have agreed otherwise, as soon as the Arbitral Tribunal was formed, the arbitrators shall have the right, at the request of one of the parties, grant an interim measure that it considers necessary"[100]. To date, ICC Rules stipulate that the arbitrator is the principal source for making such a decision or order. Moreover, it should be noted that the time when the arbitrator is given such authority

[98] L.A. Tucker, 'Interim Measures under Revised UNCITAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty' [2011] no. 2 International Commercial Arbitration Brief 1, 17.
[99] W. Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' [2002] vol 28 Brook. J. Int'l L, <http://brooklynworks.brooklaw.edu/bjil/vol28/iss3/8> accessed 1 December 2017
[100] Ö. Atlıhan, 'The Main Principles Governing Interim Measures In The Pre-Arbitral Proceedings – Specifically, The ICC Emergency Arbitrator Rules' [2012] Annales de la Faculté de Droit d'Istanbul, <http://istanbul.dergipark.gov.tr/download/article-file/7029> accessed 1 December 2017

is not the moment of signing the procedural document "Terms of Reference" between the parties and the Arbitral Tribunal, but the moment of transfer of the case to the arbitrators.

ICC Rules are among the few that contain definition of interim measures and went beyond the scope of most Arbitration Rules and allow the arbitrator to use "any" measures that are not relevant to the merits of the dispute.

C. Law of French Republic on international business arbitration

France can undoubtedly be called a favouring country for international business arbitration, which provides a wide range of disposable rights to the parties to arbitration. International business arbitration has been operating here since 1925. It is regulated by the Civil Procedural Code, namely Book IV. Following the development of the UNCITRAL Model Law, the French legislator made all the relevant amendments and additions into the norms of this Code.

In France the arbitrator has the right to grant interim measures, if the circumstances of the case so require. They are used in the form of an intermediary decision. In general, and unless otherwise provided by the parties to arbitration, the court and the arbitrators have a competitive jurisdiction over this matter[101].

A special feature of French law is a procedure known as "*refere-provision*", where the creditor can use the auxiliary procedure to enforce his right, in full or in part, if these rights are not persistently challenged[102]. The French courts have accepted that, unless otherwise agreed between the parties, such a procedure may also be applied in the circumstances of the arbitration agreement, in case the Arbitral Tribunal has not yet been formed[103].

However, there are certain interim measures that the Arbitral Tribunal has no authority to grant. Accordingly, an arbitrator cannot grant an interim relief against a third party to a dispute. Moreover, an arbitrator is not entitled to take such an interim measure as ensuring the enforcement of his future decision on the merits.

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[101] *Atlantic Triton v Republique populaire revolutionnaire de Guinee*, Cass le Civ [1987] https://arbitrationlaw.com/library/cour-de-cassation-first-civil-chamber-18-november-1986-société-atlantic-triton-v-république accessed 1 December 2017

[102] See *Code de procédure civile* <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070716&dateTexte=20080118> accessed 1 December 2017

[103] *Republique islamique d`Iran v Commissariat a l'Energie Atomique*, Cass le Civ [1984] <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007013482&fastReqId=493659757&fastPos=5> accessed 1 December 2017

On the contrary, the arbitrators under the French procedural law have the authority to provide one of the parties with all possible interim measures. There is only one limitation in this process, which is manifested in the need for serious reasons for the use of the appropriate relief, for example the choice of a legal entity without any assets to initiate arbitration or to justify an order for the placement of financial assets (securities)[104].

In my opinion, French procedural law gives broad powers to arbitrators in applying interim measures, with reasonable limitations.

D. Austrian law on international business arbitration

The most important normative provisions of Austrian arbitration law are contained in Paragraphs 577-618 of the Austrian Civil Procedural Code.

Moreover, in 2006 the Arbitration Law ("*SchiedsRÄG 2006*") came into force, the provisions of which apply to all arbitration agreements, regardless of whether it is an international or national arbitration. Austrian law was used to prohibit the grant of arbitral interim measures in Articles 588 and 589(1) of the Code of Civil Procedure 1895. This law has made important changes to the regulation of interim measures in international business arbitration and undoubtedly reflects the change in attitude of the Austrian legislature to arbitration, *i.e. inter alia*, to come into line with the current trends in arbitration and further improve Austria's position as an arbitration-friendly country, thereby promoting arbitration[105].

The Austrian Arbitration Act does not define the exact concept of "interim" or "protective" measures[106]. But Article 593(1) explicitly states that the Arbitral Tribunal is empowered to use the interim measures. In addition, decisions that grant an interim relief are binding for enforcement in domestic courts of the Austrian Federation and equated with the force to the decisions of the state courts.

Another positive regulation of the Austrian Arbitration Act is that the Arbitral Tribunal is also authorized to apply such measures that are not known to the Austrian procedural law, given that the list of possible interim measures is not provided by the Austrian legislator[107].

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[104] E. Gaillard, *Arbitrage commercial international – instance arbitrale – organisation et developpement de la procedure arbitrale – intervention du jude etatique* (J-Cl Proc Civ, Fasc), 609.
[105] A. Yesilirmak, *Provisional Measures in International Commercial Arbitration* (The Hague: Kluwer Law International 2005), 53.
[106] G. Zeiler, *Austria Arbitration Guide* (IBA Arbitration Committee 2014), 13.
[107] C. Hausmaninger, H. Fashing and A. Konency, *Practitioner's Handbook on International Commercial Arbitration* (Oxford University Press 2009), 771.

In Austrian procedural law there are some limitations on the use of interim measures by arbitrators. Thus, the Arbitral Tribunal cannot grant such measures without a preliminary hearing of the parties[108]. Another limitation is the absence of the formed composition of the Arbitral Tribunal.

Austrian state courts may intervene in an arbitration process only when they are expressly authorized in accordance with the aforementioned Austrian Civil Procedure Code. In accordance with its regulations, the arbitrator or a party to the dispute authorized by him may apply to the national court for legal assistance (support) - for example, in case of granting such an interim measure as the preservation of evidence[109]. Another type of interference by the domestic court in the arbitration process in this area can be called a situation in which the Arbitral tribunal refused to grant one or another type of interim relief. In such a case, the party concerned may file the same petition to the state court.

In my opinion, the legislation of Austrian Federation is a vivid example of inheritance of the traditions of the continental family of law, which is clearly reflected in the Arbitration Law.

E. Vienna International Arbitral Centre Rules of Arbitration

Austrian international business arbitration is known for certain areas of arbitration, in which it operates successfully, and for its arbitrators, which are recognized as one of the best in the German-speaking countries.

Article 33 of the current Vienna Rules stipulates that, unless the parties have agreed otherwise, as soon as the case is referred to the Arbitral Tribunal, the arbitrator may, upon the request of one of the parties, grant interim measures, and also make changes, suspend or cancel any of them[110]. The rest of the participants in the process must be heard before the arbitrator makes any decision on the interim measures, which means that the arbitral tribunal has no power to make ex parte decision. Moreover, the provisions of this article do not prohibit parties to apply for any interim relief to the state court. Such actions, in accordance with the Vienna Rules, are not a violation or refusal of an arbitration agreement and do not affect the powers of the Arbitral Tribunal.

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[108] B. Kloiber and H. Haller, *Das neue Schiedsrecht* (Practitioner`s Guide 2006), 201.

[109] See *Gesamte Rechtsvorschrift für Zivilprozessordnung* <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001699> accessed 1 December 2017

[110] See *Vienna International Arbitral Centre Rules of Arbitration* <http://www.viac.eu/en/arbitration/arbitration-rules-vienna> accessed 1 December 2017

F. Provisions of English law on international business arbitration

In England, there is a tendency to extend the powers of the arbitrators regarding interim measures. In the United Kingdom, regulation of international business arbitration is introduced in two basic laws: the 1996 Arbitration Act and the Scottish Arbitration Act, adopted in 2010. The 1996 Arbitration Act applies to England, Wales, and Northern Ireland. It is worth noting that the tendency to grant arbitrators additional rights (in particular, the right to grant interim relief) is clearly reflected in the 1996 Arbitration Law, but the issue of the enforceability of such orders by arbitrators in the absence of a sanction of the state court remains unresolved.

The provisions of Article 39 of the Arbitration Act of 1996 provide the Arbitral Tribunal with the authority to apply interim measures[111]. These powers are solely based on the written consent of the parties.

In the framework of the dispositive method of application of interim measures by international business arbitration in England, the arbitrators have the following powers:

1) **unless otherwise agreed by the parties to the arbitration agreement** - the right to oblige the plaintiff to ensure the security of arbitrational costs (paragraph 3); give instructions on any property under consideration, or on the property in respect of which any question arises during the proceedings and which is owned by one of the parties to the case, in particular, in order to preserve this property by Arbitral Tribunal (paragraph 4); to oblige one of the parties to preserve any evidence that is stored by it or under its control (paragraph 6);

2) **only in the case of existence of an agreement between the parties to empower Arbitral Tribunal with the relevant authority** – an interim order regarding cash payments or the distribution of property between the parties; an order to make a temporary payment to the Arbitral Tribunal.

The authors of the commentary on the Law, British lawyers B. Harris, R. Planterose and J. Tecks note that even if the power to grant interim relief is provided by the parties in an arbitration agreement, the Law does not provide guidance as to how the Arbitral Tribunal should exercise the discretion regarding the application of interim measures[112]. In particular, the English legislator has avoided any reference to norms or precedents related to the application of interim measures by the state court. It can be assumed that arbitrators can use

[111] See Arbitration Act of 1996, art 39.
[112] B. Harris, R. Planterose and J. Tecks, *The Arbitration Act 1996: A Commentary* (4th edn, Blackwell Publishing 2007), 195.

their discretion very flexibly, and in a way, that is different from the position of the state court[113].

According to the provisions of Articles 42-44 of Arbitration Act[114], the party's suit to the state court for the imperative decision on interim measure is valid only in case it has the permission of Arbitral Tribunal or the permission of all other parties, unless the case is urgent. As *urgent*, under English law, are recognised the cases of urgent character, for example, if, due to the delay caused by the expectation of consideration, the main dispute becomes "irrelevant[115]".

Therefore, an analysis of the legislation of England, which provides broad powers of the Arbitral Tribunal during granting interim measures, indicates the desire to create favourable conditions for the development of international business arbitration.

G. London Court of International Arbitration Rules of Arbitration

It should be emphasized that not only the legal culture and business qualities of the parties, but also the impartiality of the arbitrators may be the determining factors in choosing the place of arbitration. Therefore, when appointing an Arbitral Tribunal, the LCIA conducts a procedure for checking the existence of a conflict of interest in order to establish a possible bias between the arbitrators to one of the parties or to the subject of the dispute. LCIA has a recognized reputation as one of the most effective arbitral institutions in the world.

Although the LCIA is based in the capital of the United Kingdom, it is an international organization that provides administration of dispute resolution for all parties, regardless of their location, and with respect to any system of law[116]. Article 25 of its Arbitration Rules stipulates the norms, which give the arbitrators the authority to grant interim measures.

According to statistics of 2011-2013, less than 100 applications were filed to the arbitrators of this institutional arbitration in relation to interim measures; while only 50 percent of these applications received a positive response (mostly in the form of an interim order)[117].

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[113] ibid.

[114] See Arbitration Act 1996, arts 42-44.

[115] Н. Эндрюс, *Система гражданского процесса Англии: судебное разбирательство, медиация и арбитраж* (М.: Инфотропик Медиа 2012), 106.

[116] Ö. Atlıhan, 'The Main Principles Governing Interim Measures In The Pre-Arbitral Proceedings – Specifically, The ICC Emergency Arbitrator Rules' [2012] Annales de la Faculté de Droit d'Istanbul, <http://istanbul.dergipark.gov.tr/download/article-file/7029> accessed 1 December 2017

[117] D. Ziyaeva, I.A. Laird and B. Sabahi, 'Interim and Emergency Relief in International Arbitration' [2015] International Law Institute Series on International Law, Arbitration and Practice, 78.

This is due to the fact that before granting an interim relief, the arbitrator must analyse its effectiveness in a particular case. The rules do not provide for any sanctions for failure to comply with such an order of the Arbitral Tribunal by a party, however, it is believed that such non-compliance indicates violation of the arbitration agreement as a whole[118]. Moreover, Article 25 of the LCIA Arbitration Rules lacks any mention of the "*ex parte*" interim measures, but the practice confirms the approach that the arbitrators should hear from both parties in order to use such measures.

H. Law of Swiss Confederation on international business arbitration

Swiss international business arbitration is popular with international business companies and is distinguished by its neutral and effective legal framework. Historically, the Swiss law on domestic (national) arbitration for a long time denied the parties to the arbitration to file a suit to an arbitrator about the application of interim measures. Today, however, the new Swiss Civil Procedural Code provides that a state court or, if the parties have not agreed otherwise, an Arbitral Tribunal may, at the request of one of the parties, grant an interim relief[119]. Thus, the Swiss legislator gave the arbitrators partial powers to apply interim measures. That is, in Switzerland today, there are also competitive powers of state courts and arbitrators in this area[120].

As for international arbitration, Swiss law provides the same solution to this issue: in accordance with the Swiss Federal Act on Private International Law, there is a parallel jurisdiction of courts and arbitrators regarding interim measures unless the parties have agreed otherwise[121]. As an addition, Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed by Switzerland and the European Union in the Swiss city of Lugano in 2007, stipulates that Swiss courts are entitled to grant interim relief, even in cases where they do not have international jurisdiction over the merits of the dispute[122].

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[118] J.F. Poudre and S. Besson, *Comparative law of international arbitration* (London: Sweet & Maxwell 2017), 639.

[119] See Swiss Civil Procedure Code <https://www.admin.ch/opc/en/classified-compilation/20061121/201701010000/272.pdf> accessed 1 December 2017

[120] J.F. Poudre and S. Besson, *Comparative law of international arbitration* (London: Sweet & Maxwell 2017), 639.

[121] See Swiss Federal Act on Private International Law <http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_amended_until_1_7_2014.pdf> accessed 1 December 2017

[122] See Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=13041> accessed 1 December 2017

Consequently, the powers of the Arbitral Tribunal in Switzerland are limited to the needs of the parties to particular arbitration, but this cannot be confirmed even by practice, since today there are very few examples of the application of one of the parties for such a request in the context of the Swiss international business arbitration[123].

I. Swiss Rules of International Arbitration

Swiss chambers stand among the most prestigious arbitral institutions. The Swiss rules confirm the existence of the parallel competence of the Arbitral Tribunal and the competent judicial authorities, which can grant an interim measure in international business arbitration. They also provide for the possibility of a shortened review procedure, subject to the existence of an agreement between the parties (Article 42) in all cases where the amount of the claim does not exceed 1 million Swiss francs[124].

On the other hand, the parallel jurisdiction of arbitrators is also provided by the provision that arbitrators have direct jurisdiction, in case the parties obey the Rules of arbitration, which grant the arbitrators the right to grant interim relief[125]. However, Swiss rules presuppose only the existence of such competence of the arbitrators, but do not stipulate the criteria that should apply to ensure that interim measures have been applied.

In general, interim measures are granted to direct the party to fulfil its obligations, or refrain from performing certain actions. Nevertheless, according to Swiss researchers, such orders (decisions) of the Arbitral Tribunal can be regarded as "*Lex imperfecta*", since arbitral tribunals do not have the right to enforce their orders directly without the assistance of state courts[126].

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[123] G. Segesser and C. Kurth, *Interim Measures // Wolters Kluwer Law and Business: International Arbitration in Switzerland – a Handbook for Practitioners 2013*, 118.

[124] See The Swiss Rules of International Arbitration <https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf> accessed 1 December 2017

[125] See Swiss Federal Act on Private International Law <http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_from_1_1_2017.pdf> accessed 1 December 2017

[126] E. Geisinger, *Les relations entre l'arbitrage commercial international et la justice étatique en matière de mesures provisionnelles* (Paris: La Semaine judiciaire 2005), 377.

J. Ukrainian legislation on granting interim measures in international business arbitration

In Ukraine, the application of interim measures by arbitration is regulated, in particular, by Articles 9 and 17 of the Law of Ukraine "On International Commercial Arbitration", Article 4 of the Arbitration Rules of the ICAC at the Chamber of Commerce and Industry of Ukraine and paragraph 5 of the Regulations on the ICAC at the Chamber of Commerce and Industry of Ukraine.

The Law of Ukraine "On International Commercial Arbitration" and the Arbitration Rules of the ICAC at the Chamber of Commerce and Industry of Ukraine provide the party to arbitration who filed a suit with the ICAC at the Chamber of Commerce and Industry of Ukraine after the admission of the case and payment in full amount of the arbitration fee, the right to apply for an interim relief to the ICAC Chairman at Ukrainian Chamber of Commerce, and after the formation of the Arbitral Tribunal - the arbitrators. However, the procedure and timing of consideration of applications are not regulated; there are also no legally specified types interim measures that can be granted by an Arbitration Tribunal.

In accordance with Article 4 of the Arbitration Rules of the ICAC at the Chamber of Commerce and Industry of Ukraine, the chairman of the ICAC, and after the formation of the Arbitral Tribunal - the Arbitral Tribunal, at the request of either party, if it considers such a request justified, may decide on the size and form of interim measure. The decision of the ICAC on interim relief is binding to the parties and is valid until the final arbitration award is made. However, the detailed mechanism for the application of such measures is not proposed by the Arbitration Rules of the ICAC at the Chamber of Commerce and Industry of Ukraine.

Z. Lytvynenko emphasizes that the ICAC at the Chamber of Commerce and Industry of Ukraine, which is not a state court, does not have the authority to impose arrest on money and property of the debtor. Therefore, in a number of cases, the ICAC at the Chamber of Commerce and Industry of Ukraine recommends the party to request such an interim measure directly to the state court, since, in accordance with Article 9 of the Law of Ukraine “On International Commercial Arbitration”, such an appeal prior to or during the arbitration proceedings is not incompatible with an arbitration agreement[127]. The local court has the right, but is not obliged to satisfy such a request. The ICAC's ruling on the granting an interim relief is compulsory for

[127] З. Литвиненко, ‘Подання позову до Міжнародного комерційного арбітражного суду при Торгово-промисловій палаті України’ [2011] №1 Право України, 77.

the parties to the dispute, is in force until the final decision is made by the arbitrators in the case, but it does not have a mandatory force.

So, the legislation of Ukraine does not prohibit parties to arbitration to file an application n for interim measures before a state court. The relevant application may be filed both before and during the arbitration proceedings. Part 2 of Article 6 of the Law of Ukraine "On International Commercial Arbitration" stipulates that the bodies for the enforcement of the arbitration tribunal's functions, determined by the law, are district courts at the location of arbitration. Moreover, part one of Article 394 of the Civil Procedure Code of Ukraine provides that a local court, in which the application for an enforcement of a foreign judgment is proceeded, may grant interim measures suggested by this Code. Interim relief is allowed at any stage of processing of such a petition, if failure to grant interim measures may complicate or make it impossible to enforce a court decision.

Ukrainian **case law** shows that there are different approaches to resolving the issue of interim measures granted by the Arbitral Tribunal.

Refusal to accept the relevant applications for review and return to the applicant, mainly for reasons of ineligibility. One can cite an example, when, in particular, the application of the party to arbitration on granting permission to enforce the decision of the chairman of the ICAC at the Chamber of Commerce and Industry of Ukraine on the granting of interim measures was filed with the commercial court (not a civil court) with a desecration of jurisdiction and the court refused to accept the application for review[128]. In 2008, the commercial court of Donetsk region received an application for interim measures in the form of monetary arrest in a case initiated by the ICAC at the Chamber of Commerce and Industry of Ukraine. According to the results of the case, the commercial court declared the application "non-procedural" in the sense of the norms of the Commercial Procedure Code of Ukraine and refused to consider it, referring to Articles 66-67 of the Code of Commercial Procedure of Ukraine, the norms of which allow the commercial court to grant interim relief only in the case, if the failure to take such measures may make it difficult or impossible to enforce the decision of the pertinent commercial court[129]. The Pechersk district court of Kyiv in 2008 also refused to accept an application for interim measure in support of arbitration proceedings before the Vienna International Arbitral Centre concerning the defendant - the owner of a company registered in the Pechersk district of Kyiv

[128] Ухвала Господарського суду Закарпатської області від 04.09.2007 р. у справі № 02.04/3-: [Електронний ресурс]. Режим доступу: http://reyestr.court.gov.ua.
[129] Ухвала Печерського районного суду міста Києва від 22.05.2008 р. у справі № 2-з-1-1/08: [Електронний ресурс]. Режим доступу: http://reyestr.court.gov.ua.

– because, due to the contents of the application and materials, the court came to the conclusion that the claim should be decided by a local commercial court, and the application is not subject to review by the courts in accordance with the civil proceedings[130].

Submission of the application for interim measures claim and granting of them in a way of arresting the property and prohibiting its alienation within the limits of relevant claim. On May 17, 2012, the Illichivsky district court of Odessa region issued a decision on granting an interim measure (imposition of arrest on the debtor's property) in support of arbitral Awards of the appellate body of the arbitration under the Federation of Oils Seeds and Fats Associations[131]. In June 2015, the commercial court of Dnipropetrovsk region considered the relevant claim, with the help of which the plaintiff (the company with a registered office in Vienna, Austria) requested to grant an interim measure by seizing the property of the defendant (companies with a registered place in Malmo, Sweden). Claims were substantiated by the defendant's non-compliance with the obligations stipulated by the agreement between the parties, which also established that any disputes, disagreements or claims will be settled by arbitration in accordance with the LCIA Rules. Referring to the provisions of Article 9 of the Law of Ukraine "On International Commercial Arbitration", Articles 66-67 of the Code of Commercial Procedure of Ukraine and the financial reporting materials of the defendant (there were significant unpaid liabilities of legal entities, the participant and the shareholder of which was the defendant), the court granted an interim measure in this case[132].

There is the next approach in Ukrainian law: the right of the party to the arbitration to apply on the basis of Article 9 of the Law of Ukraine "On International Commercial Arbitration" for an interim measure before a state court does not create a duty for such a court, which only under its responsibility may consider such an application and make a corresponding decision about its satisfaction. In addition, the Law of Ukraine "On International Commercial Arbitration" regulates the activity of the international arbitration in Ukraine and does not contain any imperative norms obliging state courts to be involved in solving issues that arise during the arbitration process and the implementation of its specific procedural actions.

There were several attempts in Ukrainian Parliament to increase the attractiveness of international business arbitration as an alternative way of resolving disputes by bringing

[130] Ухвала Іллічівського міського суду Одеської області від 17.05.2012 р. у справі № 1511/2458/2012: [Електронний ресурс]. Режим доступу: http://reyestr.court.gov.ua.
[131] Ухвала Господарського суду Дніпропетровської області від 3.06.2015 р. у справі № 904/4600/153а: [Електронний ресурс]. Режим доступу: http://reyestr.court.gov.ua.
[132] Т. Видоборець, 'Забезпечення позову при розгляді справи в МКАС: міф чи реальність?' <http://www.ulclegal.com.ua/uk/novini/pres-centr/2896-zabezpecennja-pozovu-pri-rozgljadi-spravi-v-mkas-mif-ci-realnist> accessed 1 December 2017

national legislation into line with international standards. Recent Law No. 6232 of March 23, 2017 details the jurisdiction of courts and arbitrators regarding civil cases, in the area of application of interim measures. In particular, Chapter 10 of the new Civil Procedure Code of Ukraine clearly provides a party to international business arbitration the right to apply for an interim measure to a state court. The new Law defines the mechanism, grounds and procedure for granting an interim relief, changing and abolishing of already granted interim measures by the appropriate courts.

In my opinion, such changes to the Civil Procedural Code of Ukraine are very relevant and meet the requirements of the international business arbitration community. Moreover, it is an impetus for Ukraine to develope on the way to a modern state, which promotes arbitration on its territory.

CHAPTER IV – CASE STUDY ON INTERIM MEASURES IN INTERNATIONAL BUSINESS ARBITRATION

Coherence and predictability of dispute settlement decisions is a crucially important aspect of any judicial or arbitration mechanism – they lead to confidence in the system and enhance its perception of being legitimate and just[133]. Because interim relief in international business arbitration encompasses the junction of national procedural law and powers of Arbitral Tribunal, case law plays immense role in regulation of the process of granting such measures. There are several famous cases that are important to be analysed in the perspective of controversial nature of interim measures and, in particular, of competitive powers of Arbitral Tribunal and local court.

1. The *Channel Tunnel* case

One of the main questions regarding interim measures is, of course, - in which particular case does the party to arbitration apply to the Arbitral Tribunal and in which case does it apply to the national (local) court. In a case where there is an arbitration clause, the practical difficulty is to establish the "division of powers," so to speak, with respect to interim measures[134].

The well-known English case of *Channel Tunnel Group Limited v. Balfour Beatty Construction Limited*[135] is a great illustration of a case where a local court dealt with the issue of whether to grant an interim measure in s form of preserving the Status Quo.

This case involves TransManche Link (Cross Channel Link), the consortium building the Channel Tunnel, and Eurotunnel, the owner. It went on appeal to the court of first instance to the Court of Appeal, and then to the highest English court, the House of Lords. Each court gave its own answer to the question asked. Here, the application for interim measures was made to a court, but the judge was reluctant to make a decision that would risk prejudicing the outcome of the arbitration – if the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide[136].

TransManche Link threatened to interrupt work on the cooling system after a dispute arose with Eurotunnel over the sufficiency of payments under a change order. Eurotunnel

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[133] A. Reinisch, 'The Role of Precedent in ICSID Arbitration' <http://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Publikationen/role_precedents_icsid_arbitrationaayb_2008.pdf> accessed 1 December 2017

[134] R. Werbicki, 'Arbitral Interim Measures: Fact or Fiction' [2010] 2nd ed. AAA Handbook on International Arbitration & ADR <www.steptoe.com/assets/htmldocuments/11-ch8-Werbicki.pdf> accessed 1 December 2017

[135] *Channel Tunnel Group Limited v. Balfour Beatty Construction Limited* [1993] AC 334 (Lord Mustill).

[136] G. Born, *International Arbitration: Cases and Materials* (Wolters Kluwer 2011), 1149.

applied to the English High Court for an interim measure to forbid TransManche Link the suspension of works. TransManche Link responded with a cross-application. The High Court refused to stay the action pending arbitration and indicated that it would be inclined to grant an interim relief if TransManche Link gave notice to suspend the work[137]. The Court of Appeal found that it was without jurisdiction to grant such an interim measure, given that the parties had chosen arbitration under the dispute resolution clause[138]. The House of Lords decided that although the court had jurisdiction to grant interim measures, it would not be appropriate to use that jurisdiction since doing so could pre-empt the ultimate decision by the arbitrators[139]. The House of Lords decided next:

> *"The 1950 Act did not give power to a court to provide interim measure operative over a foreign arbitration, but such was available under the 1981 Act, but the effect here would be to pre-empt the arbitration and relief was not appropriate. As to the Siskina case[140] (The Court could not grant interlocutory relief when the substantive proceedings were taking place abroad. English courts had no jurisdiction to grant a freezing injunction in a case in which there was no claim for substantive relief before the English courts): 'the doctrine of The Siskina, put at its highest, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependent on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action'. Lord Browne-Wilkinson: 'Although the respondents have been validly served (i.e., there is jurisdiction in the court) and there is an alleged invasion of the appellants' contractual rights (i.e., there is a cause of action in English law), since the final relief (if any) will be granted by the arbitrators and not by the English court, the English court, it is said, has no power to grant the interlocutory injunction. In my judgment that submission is not well founded.' and 'the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body'."*[141]

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[137] American Arbitration Association, *Handbook on International Arbitration and ADR* (Second Edition Juris Publishing, Inc. 2010), 97.

[138] R. Werbicki, 'Arbitral Interim Measures: Fact or Fiction' [2010] 2nd ed. AAA Handbook on International Arbitration & ADR <www.steptoe.com/assets/htmldocuments/11-ch8-Werbicki.pdf> accessed 1 December 2017

[139] ibid.

[140] See <http://www.localcourt.nt.gov.au/judgements/documents/2005NTMC038.pdf> accessed 1 December 2017

[141] See <http://swarb.co.uk/channel-tunnel-group-ltd-v-balfour-beatty-construction-ltd-and-others-hl-17-feb-1993/> accessed 1 December 2017

It is clear that in 1993, when the Channel Tunnel case was decided, the House of Lords did not consider this to be an appropriate case to grant interim relief, primarily because if interim relief were granted, there would be little left for the arbitrators to decide[142]. Regrettably, the court's grounds do not provide any sufficient guidance in case of granting an interim measure when there is an arbitration clause. The involvement of the courts should be one of carefully calibrated support to the arbitral process[143]. Lord Mustill`s famous statement in the *Channel Tunnel* case reflects that courts and arbitral tribunals are not jurisdictional competitors: *"The purpose of interim measures of protection […] is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute"*[144]. This extract was quoted also in other case[145], where the New Zealand High Court concluded that "*the purpose of interim measures is to complement and facilitate the arbitration, not to forestall or to substitute for it. The Court`s role is ancillary, to be exercised only to the extent that it is not possible or practicable for the arbitrator to deal with the issue*[146]".

2. The *Track and Field Athlete* case

Interim relief is conservatory by its definition and it must – subject to very few exceptions – not foreclose the outcome of the main proceedings[147]. Actual performance of one party`s obligations at issue can therefore only in very rare cases be ordered by way of interim measures[148]. As an example of such exceptional cases the decision of the Court of Appeal Frankfurt am Main on 5 April 2001[149] concerning the right of an athlete barred for doping to complete in a major championship can be named. The claimant, a professional track and field athlete, had been suspended by the International Association of Athletics Federations for negligent use of stimulant drugs[150]. Following the suspension, the German Track and Field Federation, overruled his request to join a German championship competition. The ensuing dispute concerning this decision led to a temporary injunction by a German Track and Field

[142] American Arbitration Association, *Handbook on International Arbitration and ADR* (Second Edition Juris Publishing, Inc. 2010), 98.
[143] M.C. Pryles, and M. J. Moser, *Asian Leading Arbitrators' Guide to International Arbitration* (Juris Publishing, Inc. 2007), 236.
[144] L.W. Newma and C. Ong, *Interim Measures in International Arbitration* (Juris Publishing, Inc. 2014), 550.
[145] *Sensation Yachts Limited v Darby Maritime Limited* [2005] Auckland High Court.
[146] L.W. Newma and C. Ong, *Interim Measures in International Arbitration* (Juris Publishing, Inc. 2014), 550.
[147] Baker & McKenzie, *International Arbitration Yearbook: 2012-2013* (Juris Publishing, Inc. 2013), 195.
[148] ibid.
[149] Court of Appeal Frankfurt am Main *case* on 5 April 2001, file no. 24 Sch 1/01, NJW-RR 2001 <http://www.uncitral.org/clout/clout/data/deu/clout_case_565_leg-1777.html> accessed 1 December 2017
[150] Baker & McKenzie, *International Arbitration Yearbook: 2012-2013* (Juris Publishing, Inc. 2013), 195.

Federation arbitral tribunal ordering the respondent to authorize the claimant to take part in the tournament[151]. Upon the claimant's request, the Higher Regional Court of Hamburg declared this order enforceable in expedited proceedings, according to §1063(3) and §1041(2) of the German Code of Civil Procedure[152]. The player took part in the contest and announced the argument settled subsequently. The respondent opposed this declaration and asked the Court to reject the claimant's application to declare the tribunal's temporary injunction enforceable[153]. The Court defined the prerequisites under which a State Court can declare interim measures of protection, rendered by an arbitral tribunal in accordance with § 1041(1) German Code of Civil Procedure, enforceable[154]. Firstly, the actions have to be categorized as interim measures. In this particular case, the arbitral tribunal defined the measures as interim measures and the Court, as it is common practice of German Courts, found itself not entitled to evaluate the substance of the tribunal's decision[155]. Even though the claim was satisfied by the interim measure this did not prevent from defining them as protective ones: the player's rights could only be safeguarded with the consent to take part in the competition. Secondly, the interim measures must be judged by the Arbitral Tribunal. The Court defined an arbitral tribunal as a separate body from the State Court system, empowered by the parties to settle a civil law dispute concerning pecuniary claims with a binding and final decision[156]. In this specific case, the respondent's procedural terms, agreed upon by both parties, stated that the tribunal's decision would be binding and final, regardless of the fact that the tribunal was a body of the Federation itself. Recourse to the State Court system was explicitly ruled out[157]. Furthermore, the respondent had consented that any award rendered by the arbitral tribunal could be declared enforceable by State Courts in accordance with the provisions of the German Code of Civil Procedure concerning arbitration[158]. Therefore, the German Track and Field Federation Tribunal had to be considered as the Arbitral Tribunal.

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[151] ibid.

[152] Court of Appeal Frankfurt am Main *case* on 5 April 2001, file no. 24 Sch 1/01, NJW-RR 2001 <http://www.uncitral.org/clout/clout/data/deu/clout_case_565_leg-1777.html> accessed 1 December 2017

[153] Baker & McKenzie, *International Arbitration Yearbook: 2012-2013* (Juris Publishing, Inc. 2013), 195.

[154] Court of Appeal Frankfurt am Main *case* on 5 April 2001, file no. 24 Sch 1/01, NJW-RR 2001 <http://www.uncitral.org/clout/clout/data/deu/clout_case_565_leg-1777.html> accessed 1 December 2017

[155] Baker & McKenzie, *International Arbitration Yearbook: 2012-2013* (Juris Publishing, Inc. 2013), 195.

[156] Court of Appeal Frankfurt am Main *case* on 5 April 2001, file no. 24 Sch 1/01, NJW-RR 2001 <http://www.uncitral.org/clout/clout/data/deu/clout_case_565_leg-1777.html> accessed 1 December 2017

[157] Baker & McKenzie, *International Arbitration Yearbook: 2012-2013* (Juris Publishing, Inc. 2013), 195.

[158] Court of Appeal Frankfurt am Main *case* on 5 April 2001, file no. 24 Sch 1/01, NJW-RR 2001 <http://www.uncitral.org/clout/clout/data/deu/clout_case_565_leg-1777.html> accessed 1 December 2017

Finally, the principle of good faith, which is also applicable in proceedings according to 1041(2) German Code of Civil Procedure, would have been violated if the respondent, at a later time, had claimed that the tribunal was not an arbitral tribunal in the sense of 1041(1) German Code of Civil Procedure[159]. Together with that, the Court considered that the player, by following the procedural terms established by the German Track and Field Federation, had abstained from following his claims before State Courts.

[159] Court of Appeal Frankfurt am Main *case* on 5 April 2001, file no. 24 Sch 1/01, NJW-RR 2001 <http://www.uncitral.org/clout/clout/data/deu/clout_case_565_leg-1777.html> accessed 1 December 2017

CONCLUSIONS

Master Thesis presents a theoretical generalization of a scientific problem, the essence of which is to define the concept of interim measures in international business arbitration, and a comprehensive study of the principles and legal nature of such a segment of arbitration.

The conducted research allowed to formulate the following main conclusions that have both theoretical and practical significance:

1. Without an effective mechanism for enforcing procedural arbitration awards regarding the use of interim measures, the benefits of international business arbitration as an alternative dispute resolution mechanism can be eliminated. Therefore, today the power of the arbitrators to grant the parties an interim relief is guaranteed both by national regulations and by the arbitration rules of recognized institutions.

2. Interim measures are used in different institutional rules under different names. Their application is aimed to preserve the existing state of relations between the parties, which is extremely important for their future business relations, and ensuring the enforcement of the future decision of the arbitrators on the merits. In addition, the complex functions of such important part of arbitration have to be emphasized - including the protection of the arbitration process, the preservation of evidence, the preservation of assets and the preservation of the Status Quo.

3. While I agree with proposed definitions of interim measures worldwide, the most relevant, in my opinion, is the definition proposed by G. Prusenko, namely, measures envisaged by law that may be applied by the authorized Arbitral Tribunal or the national court in support of the arbitration proceedings in order to preserve the Status Quo between the parties and/or to ensure the enforcement of the future Arbitral Award[160].

4. Consequently, I believe that interim measures in its legal nature are a material institute with such characteristics as *temporality* (they are limited in time), *proportionality* (what is displayed in their types and purpose) and *dispositivity* (as the parties can provide in their arbitration agreement a list of possible interim measures).

5. The biggest difficulty in granting of interim measures in international business arbitration by the Arbitral Tribunal, in particular in Ukraine, is the lack of appropriate powers of the arbitrator, as has been repeatedly pointed out by leading Ukrainian scholars. In most of

[160] Г.Є. Прусенко *Забезпечувальні заходи у міжнародному комерційному арбітражі* (Київ: Дисертація на здобуття наукового ступеня к. ю. н. 2016), 25.

the leading jurisdictions, if the Arbitral Tribunal has not yet been formed, the parties to arbitration agreement have the right to apply to the national court regarding interim relief due to the direct threat from the other party to the dispute. In such circumstances, if there is a real need for an immediate interim measure, this is done by a local court. However, bill No. 6232 of March 23, 2017 (signed by President of Ukraine in November 2017) details, in particular, the jurisdiction of courts and arbitrators regarding the hearing of civil cases in the area of application of interim measures. Chapter 10 of the new Civil Procedure Code of Ukraine provides the party to arbitration with the right to apply for an interim measure to the national court in accordance with the procedure and for the reasons established by this Code[161], which, in my opinion, is a significant step for Ukraine forward a state that facilitates international business arbitration in general.

6. While different rules of arbitration institutions are quite similar, the problem of the application of interim measures is not resolved efficiently by any of them. Master Thesis deal with Ukrainian legislation and legislation of other countries by comparative analysis. Moreover, attention was also drawn to the most successful Arbitration Rules of Arbitration Institutions in this area. The latest edition of the UNCITRAL Arbitration Rules has taken into account the needs of the arbitral practice and determined the right of the Arbitral Tribunal to require the applicant to cover the costs of granting any interim relief. The latest version of Article 26 also provides an inexhaustible list of circumstances in which the party may apply for an interim measure. To date, the ICC Rules stipulate that the arbitrator is the principal authority for making such a decision (order). In accordance with English procedural law, parties to a dispute may apply for any type of interim measure, including the freezing of a bank account, unless otherwise provided by the parties in arbitration clause. Therefore, in light of the analysis of the norms of international law, new changes to the civil procedural legislation of Ukraine are relevant with the requirements of the international arbitration community.

7. If the Arbitral Tribunal grants an interim measure, and, accordingly, the party must enforce such a decision within the national court, then, as a rule, the local court at the place of arbitration will enforce such an order. But there is a rather important issue when it has to be enforced in another jurisdiction. The enforcement of decisions on interim relief in international

[161] *Про внесення змін до Господарського процесуального кодексу України, Цивільного процесуального кодексу України, Кодексу адміністративного судочинства України та інших законодавчих актів:* проект Закону № 6232 від 23.03.2017 // Офіційна інтернет-сторінка Верховної Ради України. – Режим доступу: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61415.

business arbitration is governed by international conventions, domestic laws of countries, arbitration agreements and *lex arbitri*, which traditionally is the law of the place of arbitration.

Therefore, one the most significant theoretical and practical problems in the field of arbitration is determined in the work, namely, interim measures in international business arbitration. It is done on the basis of a profound analysis of the material and case law of many countries, as well as the completion of civil law scientists, arbitrators; on the grounds of formation of theoretical conclusions and providing scientifically substantiated recommendations for improvement of legislation in this area, its separate norms and institutes. The concepts and legal nature of interim measures in international business arbitration were also characterized and classified; it is clarified which theoretical views of foreign scientists and lawyers of Ukraine exist regarding the legal nature, concept and types of interim measures in international business arbitration; the mechanisms of using such interim relief in Ukraine and abroad are explained; the level of effectiveness of the enforcement of arbitrator`s decisions on interim measures in international business arbitration has been defined; gaps and problems of practical application of the current legislation of Ukraine which regulates this sphere of arbitration law are described.

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ANNEXES

ABSTRACT

Master Thesis presents a theoretical generalization of a scientific problem, the essence of which is to define the concept of interim measures in international business arbitration, and a comprehensive study of the principles and legal nature of such a segment of arbitration.

Without an effective mechanism for enforcing procedural arbitration awards regarding the use of interim measures, the benefits of international business arbitration as an alternative dispute resolution mechanism can be eliminated. Therefore, the concepts and legal nature of interim measures in international business arbitration were also characterized and classified; it is clarified which theoretical views of foreign scientists and lawyers of Ukraine exist regarding the legal nature, concept and types of interim measures in international business arbitration; the mechanisms of using such interim relief in Ukraine and abroad are explained; the level of effectiveness of the enforcement of arbitrator`s decisions on interim measures in international business arbitration has been defined; gaps and problems of practical application of the current legislation of Ukraine which regulates this sphere of arbitration law are described.

ABSTRAKT

Die Masterarbeit stellt eine theoretische Verallgemeinerung eines wissenschaftlichen Problems dar, dessen Kernstück darin besteht, den Begriff der einstweiligen Maßnahmen in der internationalen Geschäftsschiedsgerichtsbarkeit zu definieren, sowie die Prinzipien und die Rechtlichkeit der Schiedsgerichtsbarkeit zu untersuchen.

Ohne einen wirksamen Mechanismus zur Durchsetzung von Schiedssprüchen im Zusammenhang mit dem Einsatz vorläufiger Maßnahmen können internationale Schiedsgerichtsvorteile als alternativer Streitbeilegungsmechanismus als hinfällig erachtet werden. Daher werden die Begriffe und die Rechtmäßigkeit von einstweiligen Maßnahmen in der internationalen Geschäftsschiedsgerichtsbarkeit ebenfalls charakterisiert und klassifiziert, Es wirderklärt, welche theoretischen Ansichten ausländische Wissenschafter und Juristen in der Ukraine hinsichtlich der Rechtmäßigkeit, des Konzepts und der Art der einstweiligen Maßnahmen in der internationalen Geschäftsschiedsgerichtsbarkeit haben. Weiters werden die Mechanismen der Verwendung solcher vorübergehenden Erleichterung in der Ukraine und im Ausland dargelegt. Außerdem wird der Grad der Wirksamkeit der Vollstreckung von Schiedsrichterentscheidungen bei einstweiligen Maßnahmen in internationalen Geschäftsschiedsverfahren definiert. In einem weiteren Schritt werden die Lücken und Probleme der praktischen Anwendung der aktuellen Gesetzgebung der Ukraine, die dieses Schiedsgerichtsgebiet regeln, beschrieben.