LeXonomica - Journal of Law and Economics
Vol. V, No. 1, pp. 5 - 24, June 2013

Interim Measures in Arbitration Proceedings: Facing the Challenge to Amend the Macedonian Arbitration Legislation

TATJANA ZOROSKA – KAMILOVSKA & TATJANA SHTERJOVA

Abstract

Interim measures in arbitration proceedings are intended to provide protection of the parties' rights in the course of the proceedings before the final award is rendered. This issue for a long time has been regarded to be rooted in public policy concerns, but gradually this power is being transferred to the arbitral tribunal itself. In the Republic of Macedonia, the issue of interim measures in international commercial arbitration is regulated in the Law on International Commercial Arbitration. The provisions of the law expressly provide for the power of the arbitral tribunal to grant interim measures, however many questions in regard of arbitral interim relief are left unsettled. The authors give an analysis of the currents state over this issue in the Republic of Macedonia, and make an attempt to provide a solid answer to the question – will the amended provisions of the UNCITRAL Model Law on International Commercial Arbitration be a good basis to overcome the perceived problems, or an approach similar to the Slovenian should be rather accepted.

Keywords: • arbitration proceedings • concurrent jurisdiction • enforcement • interim relief • interim measures • preliminary orders • UNCITRAL Model Law on International Commercial Arbitration

CORRESPODENCE ADDRESS: Dr. Tatjana Zoroska-Kamilovska, associate professor, Faculty of Law "Iustinianus Primus" in Skopje, Bul. Goce Delcev 9b, MK-1000 Skopje, Republic of Macedonia, e-mail: ztanja@pf.ukim.edu.mk; Tatjana Shterjova, LL.M (and Ph.D student), teaching and research fellow, Faculty of Law "Iustinianus Primus" in Skopje, Bul. Goce Delcev 9b, MK-1000 Skopje, Republic of Macedonia, e-mail: tsterjova@hotmail.com

ISSN 1855-7147 Print / 1855-7155 On-line © 2013 LeXonomica (Maribor)
UDC: 347.918:347.919.6
JEL: K40
Available on-line at http://www.lexonomica.com

LeXonomica - Revija za pravo in ekonomijo
Let. V, št. 1, stran 5 - 24, junij 2013

Začasne odredbe v arbitražnem postopku: izziv sprememb arbitražne zakonodaje v Makedoniji

TATJANA ZOROSKA – KAMILOVSKA & TATJANA SHTERJOVA

Povzetek

V arbitražnem postopku pravice strank v postopku pred izdajo končne odločbe zagotavljajo začasni ukrepi. Dolgo se je štelo, da za ta vprašanja obstajajo zadržki v javnem redu, toda počasi je bilo pooblastilo za izdajanje začasnih ukrepov preneseno na arbitražni senat. Vprašanje izdajanja začasnih ukrepov v mednarodnih trgovinskih arbitražah je v Republiki Makedoniji urejeno z Zakonom o mednarodni trgovinski arbitraži. Določbe zakona izrecno določajo pooblastila arbitražnega senata za izdajanje začasnih ukrepov, toda mnogo vprašanj ostaja neurejenih. Avtorici podajata analizo trenutnega stanja ureditve tega vprašanja v Republiki Makedoniji, skušata pa tudi podati zanesljiv odgovor na vprašanje, ali bi bile spremenjene določbe UNCITRAL Vzorčnega zakona o mednarodni trgovinski arbitraži primerno izhodišče za reševanje teh problemov, ali pa bi bilo primerneje prevzeti slovenski pristop.

Ključne besede: • arbitražni postopek • istočasna pristojnost • izvršitev • začasno varstvo • začasni ukrepi • predhodne odredbe • UNCITRAL Vzorčni zakon o mednarodni trgovinski arbitraži

KONTAKTNI NASLOV: Dr. Tatjana Zoroska-Kamilovska, izredna profesorica, Pravna fakulteta »Iustinianus Primus« Skopje, Bul. Goce Delcev 9b, MK-1000 Skopje, Makedonija, e-pošta: ztanja@pf.ukim.edu.mk; Tatjana Shterjova, LL.M, doktorska študentka, asistentka, Pravna fakulteta »Iustinianus Primus« Skopje, Bul. Goce Delcev 9b, MK-1000 Skopje, Makedonija, e-pošta: tsterjova@hotmail.com

ISSN 1855-7147 Print / 1855-7155 On-line
UDK: 347.918:347.919.6
JEL: K40
Available on-line at http://www.lexonomica.com

1. A need for interim measures in arbitration – introductory remarks

The efficacy of the arbitration proceedings would be severely harmed if, after the completion of the arbitral proceedings, the party that succeeded in the dispute can not exercise its rights, due to the reason that the assets which could satisfy the claim were sold or placed out of reach, and consequently made unavailable for that party. Even more, the mere course of the proceedings might be affected, if evidences that might influence the resolution of the dispute are hidden or destroyed by one of the parties to the dispute, or by a third party. Interim relief, or the lack thereof, can have a substantial or even determinative effect on the outcome of any case, whether submitted to litigation or arbitration (Werbicki, 2010: 89). It is therefore necessary to vest certain bodies with the power to grant interim measures in arbitration proceedings, sought to restrain or stay an activity, order specific performance or provide security for costs.

The power to grant interim measures has traditionally been prescribed exclusively for the state courts. However, the increasing need to enhance the efficacy of the arbitration proceedings presumes the proper regulation of this issue which can essentially affect the final outcome of the dispute. States tend to leave the position that the power to issue an interim measure is rooted in concerns of public policy, thus should be dealt by state courts, and begin to recognize the powers of arbitral tribunals over this issue. As it was stated by UNCITRAL:

> "Parties are seeking interim measures in an increasing number of cases. This trend and lack of clear guidance to arbitral tribunals as to the scope of interim measures that may be issued and the conditions for their issuance may hinder the effective and efficient functioning of international commercial arbitration. . . . This may lead to undesirable consequences . . . and may also prompt parties to seek interim measures from courts instead of the arbitral tribunals in situations where the arbitral tribunal would be well placed to issue an interim measure; this causes unnecessary cost and delay . . . ."[1]

[1] UNCITRAL, Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement, Report of the Secretary General, delivered to the General Assembly, U.N. Doc. A/CN.9/WG.II/WP.108 http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V00/501/85/PDF/V0050185.pdf?OpenElement (accessed: 05.03.2013).

The Republic of Macedonia has not been left outside these tendencies – however, there are many aspects of the interim measures in arbitration that are still left unsettled. A review of the current regulation over this issue in Macedonia will be given in addition, with an attempt to give answer to the question whether the solutions contained in the amended provisions of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter: UNCITRAL Model Law) should be adopted in the legislation of the Republic of Macedonia in its entirety, or conversely, a model similar to the Slovenian should be borne in mind by the legislators in the event of subsequent amendments of the Macedonian arbitration legislation.

2. The power to grant interim measures in arbitration proceedings

The power to grant an interim relief in arbitration proceedings for a long time has been seen to fall outside the scope of the competence of the arbitral tribunal and incompatible with the agreement to arbitrate. On the other hand, a party's request to a state court for granting an interim relief has been regarded as a waiver of the right to arbitrate[2]. In some jurisdictions it was even believed that once a party agreed to arbitrate, it had no right to seek court-ordered provisional relief in support of arbitration (Moses, 2008: 100). However, the trend of globalization and the expansion of trading frontiers have resulted in the abandonment of these perceptions.

Generally speaking, the power to grant an interim relief can be allocated in three possible ways. One option would be to empower the courts exclusively to grant interim measures in arbitration proceedings[3] (Emanuele, Molfa, 2011: 57). The second diametrically opposite option would be to shift the interim measures exclusively to the sphere of arbitration, and thus empower solely the arbitrators to decide upon these issues. Finally, the option that is most widely accepted is to give concurrent jurisdiction of state courts and arbitral tribunals in regard of the interim relief in arbitration proceedings. The latter option may be performed in two models of interaction between the courts and arbitral tribunals in applying interim measures in arbitration proceedings (Schaefer, 1998: 6). Under the court-subsidiarity model (applied, for example, in English Arbitration Law) the court intervention is the last resort – interim measures should primarily be granted by the same authority deciding the

[2] See *McCreary Tire & Rubber Co. v. CEAT, S.p.A., 501 F.2d 1032*, 1032 (*3d Cir. 1974*) http://law.justia.com/cases/federal/appellate-courts/F2/501/1032/254893 (accessed: 05.03.2013).

[3] Such solution is accepted, for example in Italy – see Art. 818 of the Italian Code on Civil Procedure "Arbitrators may not grant attachments or other interim measures, unless otherwise agreed by the parties".

merits of the dispute – the arbitral tribunal. The jurisdiction of state courts to grant interim measures is subsidiary and depending on the arbitrator's power to act effectively. On the contrary, the free-choice model (under which the concept of interim measures is constructed in the UNCITRAL Model Law) provides that interim measures in arbitration proceedings can be issued by either the arbitral tribunal or the state court at any point during the proceedings, and the party is not required to seek permission from the arbitral tribunal to apply to the court requesting the issuance of interim measures. This system provides the parties with the possibility to agree otherwise – they can agree to preclude the arbitral tribunal from issuing interim measures, but it is however arguable whether they can refuse their right to a court protection.

Before the Law on International Commercial Arbitration[4] was enacted in 2006, the arbitration proceedings in the Republic of Macedonia were regulated in the Law on Civil Procedure[5], which did not contain a provision regulating the issuance of interim measures in arbitration proceedings (see Art. 439–460 of the LCP). Under the provisions of the LCP, bearing in mind the autonomy of the will of the parties, they are free to agree on the jurisdiction of the arbitral tribunal to issue interim measures, but in case the parties do not expressly agree upon this issue they will have to address the state court in situations when the need for provisional protection is imminent. The provisions of the LCP are still applicable for disputes without international element.

As the arbitration legislation in regard of international commercial arbitration in the Republic of Macedonia today is based on the provisions of the UNCITRAL Model Law (without incorporation of the amendments adopted in 2006), the regime of interim measures in arbitration proceedings in Macedonia is construed upon the free-choice model. The LICA expressly provides for the jurisdiction of the arbitral tribunal to order interim measures (Art. 17 of the LICA – "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject- matter of the dispute"), and at the same time it does not exclude the possibility to apply to state court (Art. 9 of the LICA – "It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection

[4] The Law on International Commercial Arbitration (Official gazette of the Republic of Macedonia, no. 39/2006) will be hereafter referred to LICA.

[5] The Law on Civil Procedure (Official gazette of the Republic of Macedonia, no.79/2005, 110/2008, 83/2009 and 116/2010; consolidated text in no. 7/11) will be hereinafter referred to LCP.

and for a court to grant such measure"). A request to the court is not a waiver of the right to arbitrate nor does the existence of an arbitration agreement allow the court to deny its jurisdiction (Yesilirmak, 2005: 75).

The parties' will is the primary regulator of the arbitration proceedings. The wording of Art. 17 ("unless otherwise agreed by the parties…") clearly states that the parties are free to deprive the arbitral tribunal from its power to grant interim relief, and such agreement is not subject to any formal requirements. The parties are therefore free to opt-out from arbitral interim measures of protection (Böckstiegel, Kroll, Nacimiento, 2007: 264). This is simply an application of the general principle that the parties are free to define the scope of their arbitration agreement as they see fit (Gaillard, Savage, 1999: 718). However, a mere reference to arbitration rules which are silent over the power of the arbitral tribunal to order interim measures should not be considered sufficient to demonstrate the parties' intent to deprive the arbitral tribunal of the power presumed under the provision of the LICA. On the contrary, it is questionable whether the parties in arbitration proceedings can deprive the national courts from their jurisdiction to issue interim measures. Exclusion of the jurisdiction of the state court might eventually contravene the right of access to court, which, is universally guaranteed procedural right, and which might be endangered in situations when the arbitral tribunal is unable to provide the relief requested (for example, in situations when the arbitral tribunal has not yet been constituted, and there is an urgent need for protection). Nevertheless, arbitration theory takes the stand that parties are as well free to agree not to apply to the state courts for provisional or protective measures during the course of the arbitration (Gaillard, Savage, 1999: 718).

The concurrent jurisdiction of the arbitral tribunal and state court brings about another issue – how should a possible contradiction of the measures ordered by the arbitral tribunal and a state court over the same subject-matter of the dispute be resolved? Should priority be given to autonomy of the will of the parties (i.e. the interim measures issued by the arbitral tribunal), to the power of state sovereignty (i.e. interim measures issued by state courts), or some other circumstance should be taken into consideration (the time priority of issuance, for example)? It is often stated that the jurisdiction of the courts does not deprive the arbitral tribunals of the possibility of ruling in the last resort, thus the provisional nature of the interim orders enables the arbitrators to review measures taken by the courts (Gaillard, Savage, 1999: 723). The decision of the arbitral tribunal should prevail, since it has the jurisdiction to decide the merits of the dispute[6]. Taking the opposite stand

[6] Amco Asia v. Indonesia, ICSID Case No. ARB/81/1.

would, in the bottom line, mean that the decision of the state court might be prejudicial to the final resolution of the dispute by the arbitral tribunal, who has been vested with the power to decide upon the dispute arising between the parties, and that is unacceptable.

Faced with the concurrent jurisdiction of both bodies to provide the necessary protection – the arbitral tribunal and the state court – it is up to the party to decide which body will it address to get the protection required. When the arbitral tribunal is in existence, it is appropriate to apply first to the tribunal for interim measures, unless the measures sought are ones that the tribunal itself does not have the power to grant or if international enforcement may be required (Blackaby, 2009: 450). Yet, there are no formal limitations to this parties' right. Nevertheless, there may be several circumstances in the course of the arbitral proceedings which may limit or prevent an arbitral tribunal from granting interim measures, and thus, to affect the parties' choice:

- **The arbitral tribunal may not be yet constituted** – there may be situations where the need for protection is urgent, and is needed from the outset of the proceedings, or in some situations, even before the formal commencement of the arbitral proceedings. Under Art. 17 of the LICA, it is the arbitral tribunal itself which is the body authorised to grant interim measures. Therefore, if the need to acquire protection arises prior to the formation of the arbitral tribunal, the party will have to address the competent national court to get the protection required. This procedure of constitution of an arbitral tribunal may take up to two or three months,[7] a time-limit in which there may be an urgent need for providing protection of the rights to a party in the proceedings. During this time the status of things may change substantially and it cannot be taken for granted that the disputed assets will remain at the time of referral. There are attempts to over-bridge this gap by introducing a pre-arbitral referee who serves as an emergency arbitrator (see for example, the ICC Arbitration Rules or the SCC Arbitration rules). The whole

http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC663_En&caseId=C126: the stating of the Tribunal was that it enjoys the right to evaluate and examine the position without accepting any *res iudicata* effect of a national court, and in its evaluation therefore, the judgments of a national court can be accepted as one of the many factors which have to be considered by the arbitral tribunal (accessed: 05.03.2013).

[7] According to Art. 11 of the LICA, a party may appoint the arbitrator within thirty days of receipt of a request to do so from the other party; and further on the two party-appointed arbitrators can agree on the third arbitrator within thirty days of their appointment. If they fail to do so, the appointment shall be made by the state court.

procedure is set in very short time limits in order to satisfy the need for urgent resolution of the request – however, once the arbitral tribunal is constituted, it may reconsider or modify the interim measures granted by the emergency arbitrator (Gaillard, Pinsolle, 2004:14). The relevant provisions in Macedonian arbitration law do not provide for such a possibility.

- **There may be an objection to the jurisdiction of the arbitral tribunal** – In case the jurisdiction of the arbitral tribunal has been contested, and one of the parties has filed a request for granting interim measures, it is arguable whether that tribunal whose jurisdiction is brought into question can grant the relief requested. If the tribunal, after a *prima facie* review is satisfied that a valid arbitration agreement exists, then it should be considered to be allowed to decide on the interim measures requested before the issue on its jurisdiction has been heard (Beraudo, 2005: 247). Conversely, a possible decision rendered by the arbitral tribunal in regard of interim relief sought might be found to be arbitrary.

- **The interim measures can not be granted in *ex parte* proceedings** – Arbitral proceedings are, in their foundation, adversarial proceedings. Art. 18 of the LICA provides that the arbitral tribunal is obliged to give each party an opportunity to fully present its case and to plead upon the statements of the opposing party. It is often even stated that *ex parte* interim measures are incompatible with the consensual nature of the arbitration (Van Houtte, 2004: 89). Therefore, in arbitration proceedings in Macedonia the possibility to grant interim measures without notice to the other party against whom the measure is directed is, at the time being, not allowable. By exception, interim measures can be granted in *ex parte* proceedings only if there was an express consent by both parties in the arbitration agreement in that direction. However, even in those circumstances, it is arguable whether *ex parte* interim measures can be achieved in arbitration[8]. In cases of utmost urgency when very purpose of the interim measure could be defeated by notifying the other party in advance of the request, the party would have to address the state court to obtain the relief requested.

[8] The issue will be particularly specific for the arbitrators – they might become prejudiced as regards the case on the merits. Even more, secrecy, which is the basic condition for ex parte decision, will be hard to achieve – there is always the possibility that the party-appointed arbitrator might inform the party that appointed him that such request has been filed – For the reasons against the application of ex parte interim measures in arbitration, see Van Houtte, 2004: 85–95.

- **Involvement of third parties** – As the jurisdiction of the arbitral tribunal is based on the consent of the parties, the tribunal does not have authority to make any orders affecting persons who are not parties to the arbitration. On the contrary, only a state court will be in a position to grant an order requiring a third party to act in a certain way (Werbicki, 2010: 95). This standing is based in the provisions of the Macedonian jurisdiction itself since Art. 17 provides that the …arbitral tribunal may, at the request of a party, *order any party*…. An interim measure directed at a third party might be considered as an action of the arbitral tribunal *ultra vires*.

- **Enforcement of arbitrator granted interim relief** – Strictly formally speaking, the arbitral tribunal lacks the coercive power of a court of law to secure the enforcement of the interim measures it grants. The LICA (Art. 17 para. 2) provides the opportunity to address the state court for the enforcement of the interim measure (the issue of the enforceability of arbitrator granted interim measures will be discussed further in this article). However, it should be borne in mind that only a brave (or a foolish) party shall deliberately choose to ignore interim measures ordered by the tribunal which will judge the merits of its dispute (Blackaby, 2009: 450) – by non-compliance that party will risk to attract negative attitude towards it by the tribunal deciding the subject-matter of the dispute.

Concurrent jurisdiction often remedies the shortcomings of arbitration and ensures the effectiveness of the arbitration proceedings (Gaillard, Savage, 1999: 711). As a matter of fact, parties should not be deprived of the expediency of court action solely because of the existence of an arbitration agreement. However, very often judges might be reluctant to make a decision that would risk prejudicing the outcome of the arbitration proceedings. As it was found in arbitration case law:

> "There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them

> alone. In the present instance I consider that the latter consideration must prevail…"[9]

In spite of the concerns that concurrent jurisdiction may allow national courts to unnecessarily impose on arbitral disputes, concurrent jurisdiction does not allow courts to rule on the substance of the dispute and thereby intervene in matters under the arbitral tribunal's jurisdiction (Yesilirmak, 2005: 68). Nevertheless, the concurrent jurisdiction should be precisely defined in order to allow arbitral tribunals to focus on the substantive and procedural issues necessary to effectively resolve a dispute, while the courts would be precluded from making factual determinations and focus solely on enforcing the tribunal's decisions[10].

3. The features of interim relief in arbitration proceedings

Generally speaking, interim relief is a remedy or a relief that is aimed at safeguarding the rights of parties to a dispute pending its final resolution[11]. Every measure intended to protect parties' ability to obtain the final award falls within the notion interim measure (Moses, 2008: 101). A measure can be generalised as an interim measure if it is intended to be temporary by nature not providing a final resolution of the subject matter of the dispute, and if it is applied in case where there is a real danger of irreparable harm to be suffered if interim measures are not granted (Kaminskiene, 2010: 246). The basic concept lying beneath of the need for granting interim measures is that the parties' decision to submit their dispute to arbitration should not subject them to damages while awaiting the final resolution of the dispute, which they would not have incurred in litigation (Yesilirmak, 2005: 62). Their effect is to distribute the risk for the time of the procedure between on the one hand the party who demands the issue of the order and on the other hand the passive party (Rijavec, 2011: 81).

There is no generally accepted term to denote this temporary protection of rights in arbitration proceedings. The expressions "interim measures",

---

[9] Channel Tunnel group Ltd v. Balfour Beatty Construction Ltd [1993] Adj.L.R. 01/21, http://www.nadr.co.uk/articles/published/AdjudicationLawReports/Channel%20Tunnel%20v%20Balfour%20Beatty%201993.pdf (accessed: 05.03.2013).

[10] UNCITRAL, Report of the Working Group on Arbitration on the Work of its Thirty-Second Session, delivered to the General Assembly, U.N. Doc. A/CN.9/468 (Apr. 10, 2000), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/530/64/PDF/V0053064.pdf?OpenElement, para. 71 and 82 (accessed: 05.03.2013).

[11] Ibidem.

"provisional measures", "protective measures", "preliminary injunctive measures", "interlocutory measures", "conservatory measures" are often used interchangeably. However, a distinction should be made between the terms – while the terms interim, preliminary or provisional refer to the nature of the decision made (in terms that it does not affect the final resolution of the dispute), the terms protective and conservatory measures refer to the purpose of the decision (as they are aimed at the preservation of party's rights or the *status quo* between them).

In the Republic of Macedonia, the LICA uses the term interim measure to denote the type of provisional relief that can be granted in arbitration proceedings. However, the provisions of the LICA do not contain any further specifications as to the types of interim measures that can be granted in arbitration proceeding, nor the conditions for granting interim measures in every particular dispute. Therefore, in regard of these issues, a distinction should be made whether the interim measures in the course of the arbitration proceedings are being granted by a state court or by the arbitral tribunal itself.

If one of the parties in arbitration proceedings, at any time during the course of the arbitration proceedings, addresses a state court with a request for granting interim measures, the state court will take actions upon the submitted request in accordance with its own procedural law – *lex fori.* It that situation, the provisions of the legislation of the Republic of Macedonia regulating the securing of claims should be applied – the Law on Security of Claims.[12] The Law on Security of Claims provides for several instruments for securing claims, including previous measures[13] and interim measures for securing monetary[14] and non-monetary claims,[15] and it precisely determines the types of measures that may be granted. Yet, one issue remains unresolved in case the interim relief is requested from state courts rather than the arbitral

[12] The Law on Security of Claims is published in Official gazette of the Republic of Macedonia, no. 87/2007.

[13] Previous measure may be granted on basis of a decision referring to a monetary claim, which has not become final or enforceable, if the creditor renders the danger probable or if there is an assumed danger that without such securing the effectuation of the claim would be thwarted or significantly hindered (see Art. 21 of the Law on Security of Claims).

[14] Interim measure for securing a monetary claim may be granted in case the creditor renders probable the existence of the claim and the danger arising from the absence of such measure that the debtor is to thwart or significantly hinder the collection of the claim, by alienating, covering or in any other way using his/her property, i.e. his/her funds (see Art. 33 of the Law on Security of Claims).

[15] Interim measure may be granted for securing a non-monetary claim should the creditor render probable the existence of the claim and the danger that the effectuation of the claim shall be thwarted or significantly hindered otherwise (see Art. 35 of the Law on Security of Claims).

tribunal deciding the merits of the dispute. This is to which court should the party turn to, in order to obtain the requested protection? The provisions of the LICA regulate the issue of the court authorised to perform certain functions of arbitration assistance and supervision - the Primary Court in Skopje.[16] However, the issuance of interim measures in arbitration proceedings is not listed in the group of powers prescribed for that court (*arg. ex.* Art. 9 of the LICA - the functions referred to in Art. 11 para. 3 and 4, Art. 13 para. 3, Art. 14, Art. 16 para. 3 and Art. 26 para. 3 referred to in this law shall be performed by…). Therefore, the question arises whether the party requesting such protection should address this court provided in Art. 6 of the LICA, or it should be guided by the provisions of the Law on Security of Claims in determining which court shall have the jurisdiction. Since the issue is not expressly regulated in the applicable law, the party should be guided by the provisions of the Law on Security of Claims, although we consider that it might be a more practical solution if this function is enlisted in the authorities of the court for certain activities for arbitration assistance and supervision.

The situation is left rather unresolved in regard of the powers of arbitral tribunals to grant interim measures. The LICA does not provide for the conditions for allowing this type of protection of the parties' rights, not the types of measures that might be granted. The arbitral tribunal should decide upon these issues by applying the rules for determination of the rules of the procedure – "…the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate" (Art. 19 para. 2 of the LICA). This authorisation of the arbitral tribunal should enable it to tailor the interim measures to the specific circumstances of every particular dispute and to best fit the needs of the parties. It should be taken that arbitral tribunal may grant an interim relief upon a request of a party[17] if the circumstances demonstrate urgency and the risk of serious or irreparable harm is imminent. The tribunal must as well be prima facie satisfied that there is a reasonable possibility that the applicant will succeed on the merits on the claim.

[16] There is a certain inconsistency in regard of this issue in the LICA. Namely, the provisions of the LICA provide that the authorized court for performing these duties is the Primary court Skopje 1 – Skopje. However, after the LICA was adopted, there was a change in the organization of the courts in the Republic of Macedonia, pursuant to which the Primary court Skopje I – Skopje acts as a criminal court for the territory of several municipalities in the area of Skopje, while the Primary court Skopje II – Skopje acts as a civil court for the same area.

[17] The possibility the tribunal to grant interim measures on it sown motion is excluded (*arg. ex* - Art. 17 of the LICA).

The Arbitral tribunal should be empowered to grant a wide variety of measures of protection,[18] including:

- measures that are aimed at facilitating the conduct of arbitral proceedings (for example orders for inspection of documents, goods or property, orders for the preservation of evidence, and orders to protect the privacy of the proceedings),
- measures to avoid loss or damage or those aimed at preserving the *status quo* until the dispute is resolved (these might include orders to continue performance of the contract notwithstanding the commencement of arbitral proceedings, orders to stop a party from taking any further action in respect of the subject matter of the dispute until the resolution of the dispute, orders to safeguard goods or property and orders to take appropriate measures to avoid the loss of a right) and
- measures to facilitate the subsequent enforcement of the award (including orders for the attachment of assets, orders not to move the assets or the subject matter of the dispute out of a jurisdiction, orders for depositing in a joint account the amount in dispute or for depositing movable property in dispute with a third person and orders for a party or parties to provide security for costs).

4. Enforcement of the interim measures granted by the arbitral tribunal

It is often said that effectiveness of arbitral decisions on provisional relief lies in their persuasive effect, or in their potential to induce a party's voluntary compliance (Kojovic, 2001: 512). Even though the authority of the body that will finally decide upon the merits of the dispute is not to be overlooked, the arbitral tribunal itself does not have the power to set measures of coercion in order to secure that the interim measures it grants shall be carried out by the parties. Therefore, if enforcement of the interim relief is needed, the assistance of the court will be necessary. Art. 17, para. 2 of the LICA expressly states that if the party does not agree to carry out the interim measure voluntarily, then the party upon whose request the measure has been granted may address the competent court for its enforcement. The system of enforcement of interim measures granted by the arbitral tribunal must be reviewed separately depending on whether the arbitral decision on interim measures is domestic or foreign.

[18] UNCITRAL, supra no. 1, para. 104.

If enforcement is sought of interim measures issued in the Republic of Macedonia, the procedure is to be conducted in accordance with the applicable law over this issue in the Republic of Macedonia – The Law on Enforcement.[19] For enforcing arbitral awards in the Republic of Macedonia it is not needed to obtain a leave of enforcement, issued by a state court (*arg. ex.* Art. 36 of the LICA), so a leave of enforcement will not be required for the enforcement of interim measures either. Notwithstanding the nomination of the decision rendered upon the request for interim relief (whether is issued as award or order) the interim relief should be considered as enforcement title in accordance with Art. 12 of the LE.[20]

The situation is however, a little more complicated with regard to the interim measures issued in another country. The LICA does not provide for a separate set of rules in regard of the recognition and enforcement of foreign arbitral awards. It only refers to the provisions of the New York Convention on recognition and enforcement of foreign arbitral awards[21]. Therefore, the provisions of the NYC must be reviewed in order to determine whether an interim measure issued abroad can be recognised and enforced in the Republic of Macedonia. The NYC expressly regulates the scope of its application by stating: "this Convention shall apply to the recognition and enforcement of arbitral awards…" (Art. 1, para. 1 of the NYC). The question arises whether interim measures issued by arbitral tribunal can fall under the term arbitral award. A decision on interim measures should not be considered to be an award simply because it is labelled award, and *vice-versa*.

In determining whether an arbitral decision is enforceable in courts as an award, several elements should be taken into consideration: the procedure employed in its rendition, its form and elements, as well as its effect on the disputed issue (Kojovic, 2001: 527). As a matter of fact, the finality of the decision on interim measures is most usually contested. Interim measures do not finally resolve the dispute and the legal rights of the parties. Even more, they can be rescinded, suspended, varied or reopened by the arbitral tribunal which pronounced them (Kojovic, 2001: 520). However, it is often stated that the fact that interim measures do not finally determine any aspect of the

---

[19] The Law on Enforcement (Official gazette of the Republic of Macedonia, no. 35/2005, 50/2006, 129/2006, 8/2008, 83/2009, 50/10, 83/10, 88/10 and 171/10; consolidated text no. 59/11) will be hereinafter referred as LE.

[20] Art. 13 of the LE expressly states that the awards and orders issued by arbitral tribunals, as well as the settlements concluded in arbitration proceedings fall within the term enforcement title.

[21] The Convention on recognition and enforcement of foreign arbitral awards signed on 10 June 1958 in New York (Official gazette of the SFRJ, international agreements, No. 11/81) will be hereinafter referred to as NYC.

parties' underlying dispute does not make it any less final with respect to the limited question it does determine (Bensaude, 2005: 360). The fact that the ruling can be revoked or modified subsequently by a decision with different terms or by the final award on the merits should not matter for the purpose of enforcement (Kojovic, 2001: 524). As it was found in one case "such an award is not 'interim' in the sense of being an 'intermediate' step toward a further end. Rather, it is an end in itself, for its very purpose is to clarify the parties' rights in the 'interim' period pending a final decision on the merits"[22]. This standing is not however widely accepted in practice. It is undeniable that the primary purpose of the NYC is to facilitate the recognition and enforcement of arbitral awards on the merits of a certain dispute. Therefore, the NYC is not an appropriate tool for the recognition and enforcement of foreign decisions of arbitral tribunals over interim measures. Thus, the issue of enforceability of foreign decisions on interim measures is left rather unresolved in the legislation of the Republic of Macedonia.

5. The amended provisions of the UNCITRAL Model Law – a proposed solution

The amended provisions of the UNCITRAL Model Law, as they were adopted in 2006, offer a proposal for settling the most of the issues connected to the issuance of interim measures in arbitration proceedings[23]. The adopted provisions are relatively detailed and extensive[24]. They regulate the issuance of interim measures by the arbitral tribunal itself (Art.17–17I) or by state courts (Art. 17J).

In regard of interim measures issued by arbitral tribunal, the provisions offer solutions for several problems. First of all, the provisions provide for a definition of interim measures, and the types of interim measures that can be granted in arbitration proceedings. Pursuant to Art. 17, para. 2 of the 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

---

22 Southern Seas Navigation Limited of Monrovia v. Petroleos Mexicanos of Mexico City, United States District Court, S.D. New York. April 25, 1985. http://www.leagle.com/xmlResult.aspx?xmldoc=19851298606FSupp692_11166.xml&docbase=CSLWAR1-1950-1985 (accessed: 05.03.2013).

23 Although it was expected that these provisions will be widely accepted by national legislators, they were met with poor turnout – see Status of the UNCITRAL Model Law http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (accessed: 05.03.2013).

24 The chapter on Interim measures and preliminary orders consists of 11 articles, making it the most extensive chapter in the UNCITRAL Model Law.

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.

Furthermore, the provisions expressly regulate the conditions for granting interim measures (Art. 17A of the UNCITRAL Model Law). The party requesting an interim measure under Art. 17(2)(a), (b) and (c) bears the burden of proof, and it should satisfy the arbitral tribunal that two preconditions are complied with: that harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and that such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted and there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

The provisions also contain a regulation of one of the issues mostly debated in the regard of interim measures issued in arbitration proceedings – the issuance of interim measures without the notice to the other party. The *ex parte* preliminary measures are set as an opt-out provision (unless otherwise agreed by the parties… – Art. 17B of the UNCITRAL Model Law). The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure (Art. 17B, para. 2 of the UNCITRAL Model Law).

The provisions contain several safeguards in order to prevent abuse of process by the requesting party and also to safeguard the interest of the party that is subject to an order for interim measures (Art. 17 D-E)[25].

[25] These include the following: (1) allowing the arbitral tribunal at any time to modify, suspend or terminate an interim measure of protection granted, be it on the application of any party or even on its own initiative in exceptional circumstances; (2) the power of the arbitral tribunal to require the requesting party to provide appropriate security; (3) requiring the requesting party to make prompt disclosure of any material change in circumstances on the basis of which the request was made or the measure was requested or granted; and (4) providing for the requesting party's liability for costs and damages caused by the interim measure of protection, where the arbitral tribunal determines that the interim measure ought not to have been granted.

Lastly, but presumably most importantly, the provisions offer a solution for the recognition and enforcement of interim measures issued by arbitral tribunals. An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued (Art. 17H of the UNCITRAL Model Law). The courts, in deciding over the recognition and enforcement of interim measures, shall be prevented from reviewing the substance of the interim measure (Art. 17 I, para. 2).

6. The Slovenian model – a swifter manner to regulate the issue

Slovenia has enacted the Law on Arbitration[26] in 2008, being one of the first countries to reform its arbitration legislation of the basis of the proposed solutions of the amended UNCITRAL Model Law. From the perspective of interim measures two articles from the LA are relevant – Art. 20 (regulating the interim measures in arbitration), and Art. 43 (regulating the issue of enforcing interim measures), which do not recite the UNCITRAL Model Law word-for-word, but are substantively rooted in the solutions provided in the UNCITRAL Model Law (Walsh, 2010: 234).

Primarily, the LA does not make a terminological distinction between interim measures and preliminary relief. The law uses the term "*začasni ukrep*" to denote both types of measures. However, that does not mean that the Slovenian arbitration legislation does not allow issuance of *ex parte* interim relief (Art. 20, para. 2 from the LA). Those measures have not been modelled identically after the amended UNCITRAL Model Law due to assessment that since *ex parte* interim relief had not been opposed to by Slovenian arbitration theorists or practitioners, there was no need to regulate this type of arbitral action more extensively than arbitral procedure in general (Damjan, 2011: 80).

Regarding the scope of the interim measures and the conditions for granting those measures, the LA does not adopt the 2006 definition, and furthermore, does not enlist the categories of interim measures, but rather maintains the initial version of the UNCITRAL Model Law provision from 1985. Namely, Art. 20, para. 1 from the LA provides that "The arbitral tribunal may, at the request of a party, at any time before the issuance of the final award, grant

[26] The Law on Arbitration (Official gazette of the Republic of Slovenia, no. 45/2008) will be hereinafter referred to LA.

against the other party an interim measure it considers appropriate having regard to the subject matter of the dispute."

Finally, in regard to the enforcement of the interim measures (except for interim measures issue *ex parte*, which are not subject to enforcement by a court), Art. 43 from the LA provides that enforcement of an interim measure may be refused on any of the grounds due to which a court could refuse the declaration of enforceability of a domestic arbitral award or the recognition of a foreign arbitral award (which are effectively the grounds provided in the NYC, as regulated in Art. 42, para. 2 from the LA), and thus basically expand the use of the NYC so that, under Slovenian law, its rules now also apply to the enforcement of foreign arbitral interim measures (Damjan, 2011: 84).

7. Conclusion

The possibility to order provisional relief in the course of the arbitration proceeding is undoubtedly of essential importance for the proper protection of the rights of the parties while the proceedings are still pending. The current regulation of this issue in the Republic of Macedonia in regard of this issue leaves many questions unresolved, which may consequently have detrimental effect on the efficacy of the arbitration procedure itself. If parties are unable to obtain comparable interim relief in the arbitral context and are instead forced to rely on courts to secure such relief, they may eventually be dissuaded from submitting their disputes to arbitration (Gaillard, Savage, 1999: 718).

The amended provisions of the UNCITRAL Model Law provide sound basis for resolution of the problems that might emerge in issuance of interim measures in arbitration proceedings, and most importantly they tend to cover all the "grey areas" in regard of this issue. Therefore, these provisions could be a good starting point for the future legislative work on the Law on International Commercial Arbitration, but that however does not mean that they should be cited word-to-word in order to accomplish the goal of appropriate regulation of this issue – the Slovenian arbitration legislation is a good example of that.

Literatura / References

Bensaude, D. (2005) S.A. Otor Participations v. S.A.R.L. Carlyle (Luxembourg) Holdings 1: Interim Awards on Provisional Measures in International Arbitration, Journal of International Arbitration 22(4), 357–362.

Beraudo, J.P. (2005) Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals – A Comparison with the Republic of Congo Pre-Arbitral Referee Case, Journal of International Arbitration 22(3), 245–254.

Blackaby, et al. (eds.) (2009) Redfern and Hunter on International Arbitration (Oxford: Oxford University Press).

Böckstiegel, K.H., Kroll, S.M., and Nacimiento, P. (2007) Arbitration in Germany: The Model Law in Practice (The Hague: Kluwer Law International).

Damjan, M. (2011) Arbitral Interim Measures and the Right to be Heard, Czech (& Central European) Yearbook of Arbitration 2011, Vol.1, 71–86.

Emanuele, F., Molfa, M. (2011) Arbitral Interim Measures in International Arbitration: the Italian Perspective, The European and Middle Eastern Arbitration Review 2011, http://www.cgsh.com/files/Publication/513572e6-7b32-4cd5-8a35-917fa31cdf4a/Presentation/PublicationAttachment/882e185c-8b24-451f 8e90-937bd6661393/179849_1(EMEA%20Arbitration%20Review%202011_Italy%20(FEE%2BMIM)).PDF (accessed: 05.03.2013)

Gaillard, E. and Savage, J. (eds.) (1999) Fouchard, Gaillard, Goldman on International Commercial Arbitration (The Hague: Kluwer Law International).

Gaillard, E., Pinsolle, P., (2004) The ICC Pre – Arbitral Referee: First Practical Experiences, Arbitration International Vol. 20, N.1, 13–37.

Kaminskiene, N. (2010) Application of Interim Measures in International Arbitration: The Lithuanian Approach, Jurisprudence 1(119), 243–260.

Kojovic, T. (2001) Court Enforcement Of Arbitral Decisions On Interim Relief – How Final Is Provisional?, Journal of International Arbitration 18(5), 511–532.

Lew, J.D.M, Mistelis, L.A, Kroll, S.M (2003) Comparative International Commercial Arbitration (The Hague: Kluwer Law International).

Moses, M. (2008) The Principles and Practice of International Commercial Arbitration (Cambridge: Cambridge University Press).

Rijavec, V. (2011) (Rijavec, V., Ivanc, T.; eds.) Cross-border Effects of Provisional Measures in Civil and Commercial Matters, in: Cross-border Civil Proceedings in the EU (Conference Papers), November 17, 2011 - November 18, 2011).

Schaefer, J. New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared, Electronic Journal of Comparative Law, http://www.ejcl.org/22/art22-2.doc
(accessed: 05.03.2013).

Van Houtte, H. (2004) Ten Reasons against a Proposal for Ex-parte Interim Measures of Protection in Arbitration, Arbitration International Vol.20, No.1 85–95.

Walsh, T.W. 2006 UNCITRAL Model Law: Are States Adopting the Law in Letter and Spirit?. Arbitration and ADR Review, 2010, Issue 3, 215–234.

Werbicki, R.J. (2010) Arbitral Interim Measures – Fact or Fiction, AAA Handbook on International Arbitration & ADR, 89–103.

Yesilirmak, A. (2005) Provisional Measures in International Arbitration (The Hague: Kluwer Law International).

UNCITRAL, Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement, Report of the Secretary General, delivered to the General Assembly, U.N. Doc. A/CN.9/WG.II/WP,
http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V00/501/85/PDF/V0050185.pdf?OpenElement (accessed: 05.03.2013)

UNCITRAL, Report of the Working Group on Arbitration on the Work of its Thirty-Second Session, delivered to the General Assembly, U.N. Doc. A/CN.9/468 (Apr. 10, 2000),
http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/530/64/PDF/V0053064.pdf?OpenElement (accessed: 05.03.2013)