



ISSN 1392–6195 (print)  
ISSN 2029–2058 (online)  
JURISPRUDENCIJA  
JURISPRUDENCE  
2010, 1(119), p. 243–260

## APPLICATION OF INTERIM MEASURES IN INTERNATIONAL ARBITRATION: THE LITHUANIAN APPROACH

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Received 1 February 2010; accepted 20 March, 2010

**Abstract.** *In international arbitration, timely application and enforcement of interim measures can have a substantial effect on the possibility of the enforcement of final arbitration award, especially when issues relating to the protection of assets or evidence arise before or during the course of arbitration proceedings. Though the substantive amendments to the UNCITRAL Model Law on International Commercial Arbitration concerning the application and enforcement of interim measures in international arbitration were made in 2006, the legal regulation of these matters in Lithuania by the Law on Commercial Arbitration remained as previous. Hence, the purpose of this article is to provide a brief analysis of the contemporary universal legal doctrine and international practice regarding the availability, application and enforcement of interim measures in international arbitration; to examine and evaluate the Lithuanian law and court practice, their compliance with the analyzed contemporary universal legal doctrine and international practice on the application and enforcement of interim measures in international arbitration.*

**Keywords:** *interim measures, international arbitration, enforcement, anti-suit injunctions, UNCITRAL Model Law on International Commercial Arbitration, Law on Commercial Arbitration.*

## Introduction

In international arbitration, timely application and enforcement of interim measures<sup>1</sup> can have a substantial effect on the possibility of the enforcement of final arbitration award, especially when issues relating to the protection of assets or evidence arise before or during the course of arbitration proceedings. A classic example is when evidence which could influence the result of a case may be hidden or destroyed. Another example is when there is a risk that assets which could satisfy a claim may be sold or placed out of reach and, therefore, would not be available if the claim was to succeed.

The majority of the litigation and arbitration practitioners and academics agree on the importance of interim measures in international arbitration and share the concern that if interim measures are not implemented or are unenforceable, a final award might become meaningless.<sup>2</sup> Moreover, some authors believe that the importance of interim measures has additionally increased in recent years (as more parties are seeking them<sup>3</sup>) and is likely to continue to grow in the coming years<sup>4</sup>. Thus, the application and enforcement of interim measures in international arbitration has become one of the relevant problems to be solved in order to guarantee the effectiveness and reliability of arbitration.

Recently, interim measures, i.e. measures applied before making the final award to ensure enforcement of the latter, were only available through the courts. Moreover, in some jurisdictions, once a party sought such interim measures from the courts, particularly, if the relief was needed on an urgent basis before the tribunal was constituted, the party would be held to have waived its right to arbitrate. In other jurisdictions it was believed that once a party agreed to arbitrate, it had no right to seek court-ordered interim measures in support of arbitration. Today, however, it is generally accepted that parties can obtain interim measures from a court when needed without losing their right to arbitrate. At the same time, the arbitral tribunal itself has the right to apply interim measures or, at least, the parties are given the right to agree that such powers are given to the arbitral tribunal. The latter trend is explained by the recognition that in most cases the arbitral tribunal, once appointed and confirmed, is the best place to assess and decide on the basis of the factual and legal details of a case whether and which interim measures should be ordered.

The Republic of Lithuania Law on Commercial Arbitration<sup>5</sup> adopted in 1996 has a simple one line provision regarding the rights of the parties of the arbitration agreement to approach state courts for the application of interim measures. Article 12 of this law makes such a request to the state courts compatible with the agreement to arbitrate, while Article 20 deals with the powers of arbitrators to order only one type of interim

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1 Synonyms 'provisional' or 'temporary' measures can also be used.

2 Schwartz, I. M. Interim and emergency relief in arbitration proceedings. *Dispute Resolution Journal*. 2008, 63: 57; Wang, W. International arbitration: the need for uniform interim measures of relief. *Brooklyn Journal of International Law*. 2003, 28: 1061, etc.

3 Werbicki, R. J. Arbitral interim measures: fact or fiction? *Dispute Resolution Journal*. 2002-2003, 57: 64.

4 Ferguson, S. M. Interim measures of protection in international commercial arbitration: problems, proposed solutions, and anticipated results. *Currents International Trade Law Journal*. 2003, 12: 55.

5 The Republic of Lithuania Law on Commercial Arbitration. *Official Gazette*. 1996, No. 39-961; 2001, No. 28-894; 2008, No. 87-3463.

measures, i.e. make the other party pay a deposit to secure the claim. Such limited provisions leave many important aspects out of their purview. They do not say anything about the conditions for granting interim measures by an arbitral tribunal, their recognition and enforcement in Lithuania, etc. Furthermore, the restriction for an arbitral tribunal to order only one particular type of interim measures seems out-of-date in comparison with the scope of interim measures that can be ordered by courts and even arbitral tribunals themselves according to the amendments made to the UNCITRAL Model Law on International Commercial Arbitration<sup>6</sup> (originally adopted in 1985) (hereinafter referred to as the UNCITRAL Model Law) in 2006.

Being enacted on the basis of the UNCITRAL Model Law, the Law on Commercial Arbitration, in principle, reproduced the provisions stipulated in Articles 9 and 17 of the original version of the UNCITRAL Model Law of 1985. Though the substantive amendments to the UNCITRAL Model Law concerning the application and enforcement of interim measures in international arbitration were made in 2006, the legal regulation of these matters in Lithuania under the Law on Commercial Arbitration remained as previous.

The same critical remarks can also be expressed regarding the legal regulation of the application of interim measures in arbitration under the rules of the biggest and, in author's opinion, at the moment the only actually working permanent arbitration institution in Lithuania—the Vilnius Court of Commercial Arbitration<sup>7</sup>.

Hence, the purpose of this article is:

(1) to provide a brief analysis of the contemporary universal legal doctrine and international practice regarding the availability, application and enforcement of interim measures in international arbitration; and

(2) to examine and evaluate the Lithuanian law and court practice, their compliance with the analyzed contemporary universal legal doctrine and international practice on the application and enforcement of interim measures in international arbitration.

## 1. Application of Interim Measures in International Arbitration

### 1.1. Definition and Types of Interim Measures Applied in International Arbitration

In most international conventions, institutional rules and national arbitration laws the term 'interim measures'<sup>8</sup> has traditionally been used without a very precise defini-

6 UNCITRAL Model Law on International Commercial Arbitration. *United Nations Commission on International Trade Law* [interactive]. 1985, 2006 [accessed 13-01-2010]. <[http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)>; <[http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf)>.

7 Vilnius Court of Commercial Arbitration Rules of Arbitration [interactive]. [accessed 13-01-2010]. <<http://www.arbitrazas.lt/index.php?handler=en.ar.regulation>>.

8 In different international documents and institutional rules of arbitration different terms for interim measures are used. For example, in the original text of the 1985 UNCITRAL Model Law on International Commercial Arbitration two different terms were used: 'interim measures of protection' and 'interim measures' (Art. 9, 17). The current terminology of the UNCITRAL Model Law on International Commercial Arbitration still

tion. Only in 2006 after amendments to the UNCITRAL Model Law, a clear enough definition of interim measures was formed. According to Article 17 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 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.

According to such a definition, interim measures are those measures intended to protect the ability of a party to obtain the final award.<sup>9</sup>

With reference to the given definition, interim measures can be characterized by the following features: firstly, they are intended to be temporary by nature and are not supposed to represent a final resolution of the dispute at stake; secondly, they are applied in case there is a real danger of irreparable harm to be suffered if interim measures are not taken.

It should be noted that Article 17 Part 2 Clause (b) of the UNCITRAL Model Law includes anti-suit injunctions which are alien to many national legal systems, including the legal system of Lithuania. This measure, which is unknown in civil law countries but commonplace in the common law systems, consists of an injunction forbidding the party bringing an action before an ordinary court from proceeding. The party must, therefore, refrain from initiating or pursuing the dispute before state courts. The effect that the state courts' involvement will have at this stage depends on the penalty applicable if the injunction is not complied with. Non-compliance amounts to the contempt of the court and entails consequences that will affect property and may also have an effect on the legal status of the party in non-compliance.<sup>10</sup>

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lacks consistency. While the not amended Art. 9 still uses the terms 'interim measures of protection' and 'interim measures', the amended Art. 17-17J refers only to the term 'interim measures'. In the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce the term 'interim relief' is used (Art. 1-10 of Appendix II). In the International Chamber of Commerce Rules of Arbitration interim measures are referred to as 'conservatory and interim measures' (Art. 23). The term 'temporary injunction' is used in the official translation of the Law on Commercial Arbitration (Art. 12). Different authors also use different terminology to name interim measures. For example, Markus Wirth uses terms 'interim or preventive measures' (Wirth, M. *Interim or Preventive Measures in Support of International Arbitration in Switzerland* [interactive]. [accessed 13-01-10]. <<http://www.homburger.ch/fileadmin/publications/INTERIM.pdf>>); Ira M. Schwartz uses the term 'interim and emergency relief' (Schwartz, I. M., *supra* note 2, p. 56); Michael F. Hoellering uses the term 'conservatory and provisional measures' (Hoellering, F. M. *Interim measures and arbitration: the situation in the United States*. *Arbitration Journal*. 1991, 46: 22), etc.

9 Moses, M. L. *The Principles and Practice of International Commercial Arbitration*. Cambridge University Press, 2008, p. 101.

10 Rozas, J. C. F. *Anti-Suit Injunctions Issued by National Courts Measures Addressed to the Parties or to the Arbitrators*. In *Anti-Suit Injunctions in International Arbitration*. Gaillard, E. (ed.). Berna: Staempfli Verlag, p. 75-76.

The UNCITRAL Working Group on Arbitration and Conciliation stated in its Report that there were reservations expressed about including Clause (b) of Part 2 of Article 17 into the amendments of the UNCITRAL Model Law ‘given that such injunctions were unknown or unfamiliar in many legal systems and that there was no uniformity in practice relating thereto. As well, it was said that anti-suit injunctions did not always have the provisional nature of interim measures’.<sup>11</sup> Nonetheless, the Working Group decided to include Clause (b) into Part 2 of Article 17 and the UNCITRAL adopted it. Thus, at the moment this provision permits a party to bypass domestic anti-suit injunction law and simply get an anti-suit injunction from an arbitral tribunal. It could then be enforceable in another country under Articles 17 H and 17 I of the UNCITRAL Model Law.

As it was already noted, anti-suit injunctions are inadmissible in Lithuania. Neither national courts nor arbitral tribunals may order such measures (either in the form of interim measures or in any other form) under the present legal regulation in our country. Under Article 137 Part 2 Clause 6 of the Republic of Lithuania Code of Civil Procedure<sup>12</sup> (hereinafter referred to as the Code of Civil Procedure) and Article 10 of the Law on Commercial Arbitration, a national court refuses to accept a civil claim if an agreement between the parties to the dispute exists to solve a dispute by arbitration, the respondent is against the hearing of the case in the court and requires compliance with the agreement on arbitration. Despite the fact that Article 145 Part 1 Clause 6 of the Code of Civil Procedure entitles the party to require interim measures in the form of a ban to the defendant to take certain actions, such a ban could hardly cover the prohibition to the party to initiate or pursue the hearing of dispute before state courts. Though anti-suit injunction finds its justification in the general theory of contract law (as the arbitration agreement is a contract that binds two private persons and its non-performance constitutes a breach of contract), national courts in Lithuania have no right to obligate any of the parties to refrain from bringing a civil claim to the court as long as they cannot prohibit an access of a person to justice. Such a strong and hardly changeable position of the Lithuanian legislator and courts is based on one of the essential principles of civil procedure, i.e. that refusal of a right to access to justice is not valid.

Thus, though, in author’s opinion, it is doubtful, it remains to be seen if Lithuania on the basis of the latest amendments of the UNCITRAL Model Law could adopt Clause (b) of Part 2 of Article 17 of this act in the future.

In the scientific literature interim measures applied in international arbitration are classified rather similarly on the basis of their purpose. Authors M. Young and C. Dupeyron group interim measures as follows: (1) measures to prevent or preserve evidence; (2) measures to provide security for costs (for example, in the event a party is suspected to have financial difficulties from which recovery will be unlikely); (3) measures aimed

11 Report of the Working Group II (Arbitration and Conciliation) on the Work of Its Forty-fourth session [interactive]. [accessed 20-01-2010]. <[http://209.85.129.132/search?q=cache:CiOon5VtCF4J:www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html+report+of+the+uncitral+working+group+on+arbitration+and+conciliation+on+the+work+of+its+fory-fourth+session&cd=1&hl=lt&ct=clnk&gl=lt&client=firefox-a](http://209.85.129.132/search?q=cache:CiOon5VtCF4J:www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html+report+of+the+uncitral+working+group+on+arbitration+and+conciliation+on+the+work+of+its+fory-fourth+session&cd=1&hl=lt&ct=clnk&gl=lt&client=firefox-a)>.

12 The Republic of Lithuania Code of Civil Procedure. *Official Gazette*. 2002, No. 36-1340.

at preserving the *status quo*; (4) measures to secure enforcement.<sup>13</sup> C. Branson categorizes interim measures into the following types: (1) measures to facilitate the conduct of arbitral proceedings; (2) measures to avoid loss or damage; (3) measures to preserve a certain state of affairs until the dispute is resolved; and (4) measures to facilitate later enforcement of the award.<sup>14</sup> W. Semple distinguishes three general types of interim measures in international arbitration: (1) measures preserving the *status quo* to ensure the effective enforcement of the award, including measures to conserve goods such as their deposit with a third person, the sale of perishable goods, the opening of a banker's credit, the use of maintenance of machinery or works, posting of a security deposit for any foreseeable damages; (2) measures stabilizing legal relations between the parties throughout the proceedings, including requiring continued observance of contractual obligations, protection of trade secrets and propriety information; (3) measures preserving evidence that would otherwise be unavailable at a later stage of the proceedings.<sup>15</sup>

When it comes to the power of arbitrators to order interim measures in practice, most of the major permanent international arbitration institutions permit them to apply the widest and unclosed scope of interim measures. The International Chamber of Commerce (ICC) Arbitration Rules give the arbitral tribunal the power to 'order any interim or conservatory measure it deems appropriate'<sup>16</sup>. The American Arbitration Association (AAA) International Arbitration Rules allow the arbitrator to take whatever interim measures he/she deems necessary, including injunctive relief and measures for the protection or conservation of property.<sup>17</sup> The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce permit the arbitral tribunal to grant any interim measures it deems appropriate.<sup>18</sup> Despite the fact that the London Court of International Arbitration (LCIA) Arbitration Rules give the arbitral tribunal the list of interim measures it can apply (including orders for security of the amount of the dispute, preservation of property, etc.), the wording of Article 25.1 allows concluding that the arbitral tribunal, in fact, is permitted to apply on a provisional basis any relief which the arbitral tribunal would have power to grant in an award, including the provisional order for the payment of money or the disposition of property as between any parties.<sup>19</sup>

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- 13 Young, M.; Dupeyron, C. Interim Measures to Prevent Irreparable Harm: What Can Be Done by The Arbitral Tribunal? *Swiss Arbitration Association* [interactive]. [accessed 13-01-2010]. <<http://www.arbitration-ch.org/below-40/pdf/interim-measures-mycd.pdf>>.
  - 14 Branson, C. Interim measures of protection in a changing international commercial arbitration world. *Croatian Arbitration Yearbook*. 2002, 9: 10.
  - 15 Morek, R. *Interim Measures in Arbitration Law and Practice in Central and Eastern Europe: the Need for Further Harmonization. Interim Measures in International Commercial Arbitration*. Antwerp-Apeldoorn: Maklu Publishers, 2007, p. 77.
  - 16 Article 23, International Chamber of Commerce Rules of Arbitration [interactive]. [accessed 18-01-2010]. <[http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules\\_arb\\_english.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf)>.
  - 17 American Arbitration Association International Arbitration Rules [interactive]. [accessed 25-01-2010]. <<http://www.adr.org/sp.asp?id=33994#INTERNATIONAL%20ARBITRATION%20RULES>>.
  - 18 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce [interactive]. [accessed 25-01-2010]. <[http://www.sccinstitute.com/filearchive/3/30366/2010\\_Arbitration\\_Rules.pdf](http://www.sccinstitute.com/filearchive/3/30366/2010_Arbitration_Rules.pdf)>.
  - 19 The London Court of International Arbitration Arbitration Rules [interactive]. [accessed 25-01-2010]. <<http://www.lcia-arbitration.com>>.

Such liberal practice enables the arbitral tribunal on the request of the party to tailor interim measures under the application to the needs of the parties of the constantly changing commercial relations and specific disputes, also equates the rights of national courts with the rights of arbitral tribunals in the field of choice of the type of interim measures to be applied in international arbitration. Thus, arbitration receives new impetus for functioning effectively.

The situation in Lithuania regarding the scope of interim measures applied by the arbitral tribunal is rather problematic. Article 20 of the Law on Commercial Arbitration gives the arbitral tribunal the power to order only one particular type of interim measures, i.e. ‘make the other party pay a deposit to secure the claim’. Therefore, in order to apply other types of interim measures in arbitration, for example, to attach the respondent’s assets, to prohibit the respondent to perform certain actions, etc., a party or the arbitral tribunal (on the request of a party) has to apply to the court.

It should be noted that Article 20 of the Law on Commercial Arbitration by name (‘Powers of Arbitral Tribunal Pertaining to Temporary Injunction’) and by content is designed to determine the functions of the arbitral tribunal in applying interim measures. However, Article 8 Part 1 of the Law on Commercial Arbitration, which deals with the functions of the court and the chairman of the arbitral tribunal, stipulates that functions provided in Article 20 of the Law on Commercial Arbitration shall be performed by a district court operating in the same location as the arbitral tribunal. Such a wording of Article 8 Part 1 of the Law means that the application of interim measures in arbitration in Lithuania is vested in the court, not the arbitral tribunal.

Moreover, the second statement of Article 20 of the Law on Commercial Arbitration permits the arbitral tribunal itself ‘at the request of any party, unless otherwise agreed by the parties, address the district court operating in the same location as arbitral tribunal to grant [not to enforce!] an injunction’. Such a statement undoubtedly once again directs the parties to the application of interim measures in arbitration to the national courts using arbitral tribunal only as a ‘middle-man’ and not treating it seriously as a subject that can apply interim measures independently from the court.

Such provisions, especially the fact of the existence of the second statement of Article 20 and Article 8 Part 1 in the Law, heavily restrict the powers of the arbitral tribunal in the application of interim measures, intentionally direct the parties to the agreement on arbitration to the national courts and thus undeservedly devalue arbitration making it less desirable for the parties than national courts. In author’s opinion, the following steps should be taken in Lithuania in order to improve current legal regulation of the application of interim measures according to the Law on Commercial Arbitration:

- firstly, the second statement of Article 20 of the Law on Commercial Arbitration should be abolished thus allowing the parties to the agreement on arbitration to choose without prejudice the subject (arbitral tribunal or national court) to apply interim measures directly;
- secondly, significantly expand the scope of interim measures the arbitral tribunal may grant under the Law on Commercial Arbitration allowing the arbitral tribunal to order any interim measure it deems appropriate except the interim

measures that cannot be applied and enforced under the laws of the Republic of Lithuania (otherwise, there is a risk that the order of the arbitral tribunal to apply interim measures inadmissible in Lithuania would be contested in the national courts of Lithuania);

- thirdly, Article 8 Part 1 of the Law on Commercial Arbitration should be amended deleting the existing reference to Article 20 of the Law. Subsequently, Article 12 of the Law on Commercial Arbitration should be supplemented with the statement: ‘In that case interim measures at the request of the party are applied by district or county court operating in the place of arbitration and chosen under the rules of substantive jurisdiction determined by the Code of Civil Procedure’<sup>20</sup>.

Mainly the same critical remarks can be expressed regarding the legal regulation of the scope of interim measures applied by the arbitral tribunal and the procedure of their application embedded in the Rules of Arbitration of the Vilnius Court of Commercial Arbitration (Article 26), which mainly repeat imperfect and biased against arbitration provisions of the Law on Commercial Arbitration.

### 1.2. Arbitral Tribunal or National Court: Which Subject for the Application of Interim Measures in International Arbitration to Choose?

Today most arbitration laws and rules assume that the court and the arbitral tribunal have concurrent jurisdiction to grant interim measures in international arbitration. There are, however, variations among jurisdictions as to how and when each decision-maker should be involved.<sup>21</sup>

Two main models of interaction between the court and the arbitral tribunal in applying interim measures in international arbitration are usually distinguished in the legal literature<sup>22</sup>: *court-subsidiarity model* and *free-choice model*.

English law<sup>23</sup> provides an approach that is usually called a *court-subsidiarity model*. Interim measures should in the first place be applied for before the arbitrator. Court intervention is the last resort. The court’s jurisdiction is restricted; it depends on the arbitrator’s power to act effectively and is, therefore, subsidiary to it. This approach shifts interim measures as far as possible to the realm of arbitration.

German law<sup>24</sup> follows a *free-choice model*, stipulated in the UNCITRAL Model Law. Parties may seek interim measures from either the arbitral tribunal or the court at

20 Part of the proposal that deals with the choice of the court that decides issues of the application of interim measures will be justified in section 1.2. of this article.

21 See Moses, M. L., *supra* note 9, p. 102.

22 Schaefer, J. K. New solutions for interim measures of protection in international commercial arbitration: English, German and Hong Kong law compared. *Electronic Journal of Comparative Law* [interactive]. [accessed 12-01-2010]. <<http://www.ejcl.org/22/abs22-2.html>>.

23 English Arbitration Act [interactive]. [accessed 25-01-2010]. <[http://www.opsi.gov.uk/acts/acts1996/Ukpga\\_19960023\\_en\\_1](http://www.opsi.gov.uk/acts/acts1996/Ukpga_19960023_en_1)>.

24 German Code of Civil Procedure [interactive]. [accessed 25-01-2010]. <<http://www.zpo.de>>.

any point during the proceedings, unless the parties themselves have provided otherwise. Legislation provides for mechanisms that make arbitrator-granted relief as far as possible equally effective as court-ordered relief. It provides a real alternative for the parties. There are no restrictions imposed on court access. There is no need for a party to seek permission from the arbitral tribunal to apply to the court for granting interim measures. While parties' agreement can preclude an arbitral tribunal from issuing interim measures, parties cannot refuse their right to the court protection.

In some jurisdictions, such as Argentina<sup>25</sup> and Italy<sup>26</sup>, arbitrators do not have the power to issue interim measures at all. In author's opinion, such an order of the application of interim measures in international arbitration constitutes the third model that can be named a *judicial model*.

After the examination of the three described models of the application of interim measures in international arbitration, a conclusion can be drawn: following an example of the UNCITRAL Model Law, Lithuania has nominally adopted a *free-choice model* of the application of interim measures in arbitration. Under the Law on Commercial Arbitration both national courts and arbitral tribunals are granted the right to apply interim measures in arbitration.<sup>27</sup> However, these rights vested in the court and the arbitral tribunal are far from being equal. As it was already noted before, national courts enjoy the legislator's preference regarding the application of interim measures in arbitration: arbitral tribunals are restricted to the application of the single possible interim measure, i.e. the payment of deposit to secure the claim, whereas courts have the right to apply a wide scope of interim measures under the Code of Civil Procedure; courts have the right to apply interim measures both before and during arbitral proceedings, whereas arbitral tribunals grant interim measures only after being constituted; parties may ask an arbitral tribunal to approach the court for granting interim measures. Consequently, the mechanism provided by the Lithuanian legislator for arbitrator-granted relief is less effective than court-ordered relief. Thus, looking at the real content of the model of applying interim measures in arbitration adopted by Lithuania, it is possible to draw a conclusion that the parties have no real alternative in Lithuania to choose between the court and the arbitral tribunal for granting interim measures in arbitration and, therefore, are forced to choose national courts for that purpose. Hence, in author's opinion, the model of the application of interim measures in arbitration adopted in Lithuania can be called a *judicial model with minor exceptions*.

What regards the application of interim measures before the commencement of arbitral proceedings, it should be noted that in most jurisdictions including Lithuania if the tribunal has not yet been constituted, parties may choose to seek interim measures from a court to protect against some immediate harm. In such a case, if urgent relief is needed,

25 Argentine Code of Civil Procedure [interactive]. [accessed 25-01-2010]. <<http://www.infoleg.gov.ar/infolegInternet/anexos/15000-19999/16547/texact.htm#21>>.

26 Italian Code of Civil Procedure [interactive]. [accessed 25-01-2010]. <[http://www.studiocellentano.it/codici/cpc/codicedpc004\\_2.htm](http://www.studiocellentano.it/codici/cpc/codicedpc004_2.htm)>.

27 The Republic of Lithuania Law on Commercial Arbitration. *Official Gazette*. 1996, No. 39-961; 2001, No. 28-894; 2008, No. 87-3463.

it may only be attainable through a local court. Once an arbitral tribunal is constituted, interim measures generally can be applied both by the court and the tribunal. Thus, before the formation of an arbitral tribunal even in the countries of a *free-choice model* of the application of interim measures, arbitration becomes useless in protecting the parties against some immediate harm during the early stages of arbitration proceedings.

Therefore, in order to increase the effectiveness of arbitration during the early stages of arbitration proceedings several major permanent international arbitration institutions provided the possibility of obtaining interim measures prior to the constitution of an arbitral tribunal with the help of the ‘emergency arbitrator’ specifically appointed for that purpose.<sup>28</sup> This possibility is designed as an opt-out solution which is to be applied unless the parties expressly agree otherwise. The ‘emergency’ interim measures are applied within a short period of time (for example, within five days<sup>29</sup> or two working days of appointment<sup>30</sup>) by the ‘emergency arbitrator’ who, in its turn, is promptly appointed by the administration of the permanent international arbitration institution (for example, within one working day<sup>31</sup> or twenty four hours<sup>32</sup>). Once the arbitral tribunal is constituted, it may reconsider, modify or vacate the interim award issued by the ‘emergency arbitrator’. The ‘emergency arbitrator’ may not serve as a member of the tribunal unless the parties agree otherwise.

Despite the fact that such efforts to keep as much power of decision-making as possible under the aegis of the arbitral tribunal are positive, the author of the article strongly doubts about the use of possible inclusion of the ‘emergency arbitrator’ rules into the Rules of Arbitration of the Vilnius Court of Commercial Arbitration or any other permanent arbitration institution of Lithuania. While the Law on Commercial Arbitration of Lithuania does not allow arbitral tribunal to grant any interim measure it deems appropriate except the interim measures that cannot be applied and enforced under the laws of the Republic of Lithuania, there is no use of introducing the discussed novelty into the legal system of Lithuania. The ‘emergency arbitrator’ rules could be of value in strengthening the institute of arbitration in Lithuania if implemented together with the amendments of the Law on Commercial Arbitration in Lithuania proposed by the author in section 1.1. of this article.

A question arises: which court of general jurisdiction in Lithuania has the right to apply interim measures on request of a party or of an arbitral tribunal? Article 8 Part 1 of the Law on Commercial Arbitration sets forth a rule that the application of interim measures in arbitration is performed exclusively by district courts operating in the place of arbitration. Despite such a provision, the Supreme Court of Lithuania has formed a judicial precedent that in part contradicts the above mentioned rule: ‘under Part 1 of

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28 ICC Rules for a Pre-Arbitral Referee Procedure [interactive]. [accessed 26-01-2010]. <[http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules\\_pre\\_arbitral\\_english.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_pre_arbitral_english.pdf)>; *supra* note 18, Appendix II; *supra* note 17, Article 37.

29 *Supra* note 18, Article 8, Appendix II.

30 *Supra* note 17, Article 37 (d).

31 *Ibid.*, Article 37 (c).

32 *Supra* note 18, Article 4, Appendix II.

Article 8 of the Law on Commercial Arbitration, submission for the application of interim measures should be heard by a district court operating in the place of arbitration. It can be seen from the claim that the price of the claim is more than LTL 100000, thus, a O.G.S. submission for interim relief is to be referred to the Vilnius County Court (Article 136 Part 1 Clause 1 of the Code of Civil Procedure<sup>33</sup>)<sup>34</sup>. Thus the Supreme Court of Lithuania, while interpreting the Law on Commercial Arbitration, in fact changed it transferring the part of the competence of district courts to county courts. As long as the Supreme Court of Lithuania only forms a uniform judicial practice in applying laws but not enacts or changes the laws, such law practice is perverse though was readily accepted by the Lithuanian courts of lower instance.<sup>35</sup>

In the present Draft Proposal of the Law on Amendments of the Code of Civil Procedure, the Ministry of Justice of the Republic of Lithuania proposes to solve the discussed problem by vesting the right to apply interim measures in international arbitration in the competence of district courts establishing submission for the application of interim measures according to the place of living of the respondent or the presence of his/her assets on the territory of Lithuania.<sup>36</sup>

However the author of the present article agrees with the idea that if district courts in Lithuania are the courts of first instance for the civil cases where the price of the claim is more than LTL 100000 and, hence, are responsible for the application of interim measures in such cases, the problem should be looked for not in the interpretations of the law by the Supreme Court of Lithuania but in the Law on Commercial Arbitration itself. In author's opinion, the problem lies in the wording of Article 8 Part 1 of the Law on Commercial Arbitration, which was not harmonized with the Code of Civil Procedure and which makes the application of interim measures by the courts independent from the price of the claim (and, respectively, from the price of interim measures to be granted). Thus, contrary to the proposal of the Ministry of Justice of the Republic of Lithuania mentioned before and bearing in mind the proposals of the author made at the end of section 1.1. of this article, Article 12 of the Law on Commercial Arbitration should be supplemented with the provisions that direct the party or the arbitral tribunal to a particular court that has jurisdiction to grant interim measures in arbitration.<sup>37</sup>

It should be noted that, according to the Lithuanian case law,<sup>38</sup> if a party wants to apply to the Lithuanian court for granting of interim measures after an arbitral award

33 Under Article 136 Part 1 Clause 1 the 1964 Code of Civil Procedure of Lithuania and Article 27 Part 1 Clause 1 of the present Code of Civil Procedure, district courts as the courts of first instance hear civil cases where the price of the claim is more than LTL 100000, except for family law cases regarding division of property.

34 Ruling of the Supreme Court of Lithuania of 3 February 1999, civil case No. 3K-8-1999.

35 For example, ruling of the Lithuanian Court of Appeal of 20 April 2009, civil case No. 2-521/2009; ruling of the Lithuanian Court of Appeal of 9 June 2005, civil case No. 2-225/2005; ruling of the Lithuanian Court of Appeal of 29 April 2004, civil case No. 2-249/2004, etc.

36 Draft Proposal of the Law on Amendments of the Code of Civil Procedure No. XIP-1409 of 16 November 2009 by the Ministry of Justice of the Republic of Lithuania [interactive]. [accessed 30-01-2010]. <[http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=357980&p\\_query=&p\\_tr2](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=357980&p_query=&p_tr2)>.

37 See the third proposal in section 1.1. of this article.

38 For example, ruling of the Lithuanian Court of Appeal of 20 April 2009, civil case No. 2-521/2009; ruling of the Lithuanian Court of Appeal of 29 April 2004, civil case No. 2-249/2004, etc.

has already been made, the Lithuanian Court of Appeal is the proper court to apply to as long as a submission to apply interim measures is directly related to safeguarding the enforcement of the arbitral award. In such a procedural situation Article 8 Part 1 of the Law on Commercial Arbitration is no longer applied. Such court practice is also supported by the wording of Article 40 Part 3 of the Law on Commercial Arbitration which stipulates that the Lithuanian Court of Appeal may, on the application of the party claiming recognition or enforcement of the award, obligate the other party to pay the deposit necessary to secure the enforcement of the award, or may apply other measures to secure the enforcement of the award.

### 1.3. Conditions for Granting Interim Measures

Interim measures in international arbitration are granted on the basis of certain conditions. Article 17 A of the UNCITRAL Model Law sets forth detailed legal requirements for granting interim measures. The party requesting an interim measure must prove to the arbitral tribunal that:

- firstly, harm not adequately reparable by an award of damages is likely to result if the measure is not granted and such harm outweighs the harm that is likely to result to the party against whom the measure is directed;
- secondly, there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

Despite the fact that the second condition deals with the evaluation on the merits of the claim which is supposed to be done by the tribunal after hearing the case in the award, the UNCITRAL Model Law clarifies that the determination of this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination during the course of the case or making an award. Article 17 D of the UNCITRAL Model Law allows the arbitral tribunal to require from the party requesting an interim measure to provide appropriate security in connection with the interim measure and obliges the arbitral tribunal to require security when the party seeks a preliminary order, unless the tribunal decides that security would be inappropriate.<sup>39</sup>

By contrast to the UNCITRAL Model Law, the Lithuanian Law on Commercial Arbitration stipulates the possibility of applying interim measures in arbitration either by a court or, nominally, by an arbitral tribunal, but does not state any conditions for interim measures to be taken, except a request of a party to an arbitral tribunal or a court (or of an arbitral tribunal to the court) to apply interim measures. Thus, in case the arbitral tribunal applies interim measures, it is up to arbitrators to decide under what conditions or circumstances interim measures are necessary.

Article 26 Part 2 of the Rules of Arbitration of the Vilnius Court of Commercial Arbitration stipulates several additional conditions for interim measures to be granted in

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<sup>39</sup> According to the UNCITRAL Model Law, preliminary order is essentially the same as an interim measure with one exception: preliminary order is granted on *ex parte* basis, i.e. without hearing the position of the responding party, in order to prevent possible negative actions from the responding party in case he/she knows in advance that interim measure will be granted (for example, hides assets, destroys evidence, etc.).

this permanent arbitration institution: firstly, if the interim measure is not granted, the enforcement of the arbitral award becomes impeded or impossible; secondly, a party that requests for interim measure to be granted must substantiate the submission.

If a court is requested to apply interim measures in arbitration, the general rules of the application of interim measures in civil procedure under the Lithuanian Code of Civil Procedure are applied. The last conclusion can be supported by part 5.3. of the Summarized Review of the Case Law of the Republic of Lithuania applying the legal norms of international private law approved by the ruling of the Supreme Court of Lithuania of 21 December 2000,<sup>40</sup> which states that when a foreign court is hearing a case that is outside of the jurisdiction of Lithuanian courts and the claimant asks for interim relief in Lithuania, the Lithuanian court has the power to decide that question on a common basis. Due to such an interpretation of the law, a similar rule was adopted in the Lithuanian case law while deciding the questions of the application of interim measures in arbitration: ‘the same rule applies and when the case is brought not before a foreign court, but before an arbitral tribunal as the case is outside of the jurisdiction of Lithuanian courts, but Article 12 and Article 1 Part 3 of the Law on Commercial Arbitration gives Lithuanian courts the right to apply interim measures, regardless of the place of arbitration’<sup>41</sup>.

## 2. Enforcement of Interim Measures in International Arbitration

Arbitration is a voluntary submission to an arbitral tribunal based on an agreement between parties. Thus, the enforcement of interim measures ordered by an arbitral tribunal first and foremost relies on the good will and voluntary compliance of parties. The problem arises when a party refuses to comply with the orders of an arbitral tribunal. As long as an arbitral tribunal is unable to enforce its own order, an obvious weakness of arbitration emerges.

Sometimes in international practice arbitrators use their own legal means not assisted by national courts to enforce their orders. For example, an arbitral tribunal may use negative procedural sanctions if a party refuses to follow the order of interim measures (presume negative inference if a party fails to present necessary evidence to the tribunal, etc.). However, such self-sufficient actions of arbitral tribunals directed to the enforcement of their orders are more an exception than a rule. In most of the cases, in order to enforce orders of interim measures, arbitral tribunals and, in some cases, the parties have to apply for the assistance of national courts. Therefore, the position of national courts and national legislation in the process of the enforcement of orders of interim measures made by arbitral tribunal become important.

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40 Summarized Review of the Case Law of the Republic of Lithuania Applying Legal Norms of International Private Law No. A2-14 approved by the ruling No. 28 of the Supreme Court of Lithuania of 21 December 2000.

41 For example, ruling of the Lithuanian Court of Appeal of 29 April 2004, civil case No. 2-249/2004; ruling of the Lithuanian Court of Appeal of 9 June 2005, civil case No. 2-225/2005, etc.

The answer to the question whether the interim measures granted by foreign arbitral tribunals are enforceable depends to a large extent on the form in which a given measure is granted.<sup>42</sup> No problems arise if interim measures are granted by an arbitral tribunal in the form of an award or at least partial award as the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards<sup>43</sup> (the New York Convention) was intended by its drafters to facilitate the recognition and enforcement of binding and final foreign arbitral awards, not orders, decrees or other interim and not final procedural decisions made by the arbitral tribunal. That means that the interim measures granted by a foreign arbitral tribunal not in the form of an award cannot be recognized and enforced under the New York Convention.

In the UNCITRAL Model Law countries, this gap in legal regulation is successfully compensated for by the provisions of the UNCITRAL Model Law and respective national laws tailored after the UNCITRAL Model Law. Article 17 Part 2 of the UNCITRAL Model Law allows interim measures to be taken in the form of an award or any other form. The same or a very much alike approach has been accepted in many institutional arbitral rules.<sup>44</sup> Thus, if a measure corresponds to the definition of interim measures presented by Part 1 of Article 17 of the UNCITRAL Model Law<sup>45</sup>, it is 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, unless there are limited reasonable grounds for refusing recognition and enforcement set forth in Article 17 I of the UNCITRAL Model Law (Article 17 H of the UNCITRAL Model Law). The grounds for non-enforcement of interim measures issued by an arbitral tribunal are essentially the same as for non-enforcement of foreign arbitral awards under the New York Convention.

Even though the Republic of Lithuania is considered to be one of the UNCITRAL Model Law countries, the Law on Commercial Arbitration neither has any special provisions regulating the enforcement of interim measures ordered by an arbitral tribunal, nor indicates the procedural form according to which interim measures could be taken by an arbitral tribunal.

Article 41 of the Rules of Arbitration of the Vilnius Court of Commercial Arbitration provides that issues which do not constitute the resolution of the dispute in essence are decided by an arbitral tribunal in the form of rulings. On the questions of further recognition and enforcement of the rulings of arbitral tribunals on the application of interim measures in international arbitration the Rules of Arbitration of the Vilnius Court of Commercial Arbitration are silent.

As long as the rules of the recognition and enforcement of foreign arbitral awards in the Lithuanian Code of Civil Procedure are based on the provisions of the New York

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42 See Morek P., *supra* note 15, p. 88.

43 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards [interactive]. [accessed 30-01-2010]. <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)>.

44 For example, *supra* note 28, Articles 2 and 23; *supra* note 18, Article 32, etc.

45 The definition of interim measures according to the UNCITRAL Model Law was presented in section 1.1. of this article.

Convention, the present wording of the Code of Civil Procedure does not literally allow for the recognition and enforcement of interim measures ordered by an arbitral tribunal in international arbitration, unless they are in the form of an award. Therefore, there is no case law on the recognition and enforcement of interim measures ordered by an arbitral tribunal in international arbitration in Lithuania.

The current situation in Lithuania shows that the legal regulation of the enforcement of interim measures in international arbitration is insufficient and there is a need for extensive revision and substantive amendments to the Laws of the Republic of Lithuania, namely:

- Articles 17, 17 H and 17 I of the UNCITRAL Model Law to be adopted or to be referred to as guidelines while supplementing and amending the out-to-date wording of the Law on Commercial Arbitration;
- respective amendments should also be made to the Code of Civil Procedure allowing the Lithuanian Court of Appeal to recognize and enforce not only foreign awards but also procedural decisions of foreign arbitral tribunals on interim measures made in any procedural form.

These actions could allow and insure the enforcement of interim measures issued by an arbitral tribunal in international arbitration in Lithuania.

## Conclusions

1. Present provisions of the Lithuanian Law on Commercial Arbitration heavily restrict the powers of the arbitral tribunal in the application of interim measures, intentionally direct the parties of the agreement on arbitration to national courts and thus undeservedly devalue arbitration making it less desirable for the parties than national courts.

2. In Lithuania, the parties to an agreement on arbitration have no real possibility to choose between the court and the arbitral tribunal for granting interim measures in arbitration and, therefore, are forced to choose national courts for that purpose. Hence, the model of applying interim measures in arbitration adopted by Lithuania can be called a *judicial model with minor exceptions*.

3. As long as the rules of the recognition and enforcement of foreign arbitral awards in the Lithuanian Code of Civil Procedure are based on the provisions of the New York Convention, the present wording of the Code of Civil Procedure does not literally allow for the recognition and enforcement of interim measures ordered by an arbitral tribunal in international arbitration, unless they are in a form of final award.

The present analysis and evaluation of the Lithuanian law and court practice shows that the legal regulation of the application and enforcement of interim measures in international arbitration in Lithuania is not in line with the contemporary universal legal doctrine and international practice of international arbitration, thus, there is a strong need for extensive revision and substantive amendments proposed by the author of the present article to the laws of the Republic of Lithuania.

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## LAIKINŲJŲ APSAUGOS PRIEMONIŲ TARPTAUTINIAME ARBITRAŽE PROBLEMOS LIETUVOJE

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**Santrauka.** *Laikiniųjų apsaugos priemonių tarptautiniame arbitraže taikymas laiku gali turėti lemiamos reikšmės galimybei įvykdyti arbitražo sprendimą, ypač tais atvejais, kai arbitražo proceso metu arba iki jam prasidedant iškyla poreikis apsaugoti kurios nors iš šalių turtą arba užtikrinti esamų įrodymų saugumą. Nepaisant to, kad 2006 m. UNCITRAL Tarptautinio komercinio arbitražo pavyzdinis įstatymas buvo papildytas svarbiomis laikinų-*

*jų apsaugos priemonių taikymo tarptautiniame arbitraže nuostatomis, šių klausimų teisinis reglamentavimas Lietuvoje remiantis Lietuvos Respublikos komercinio arbitražo įstatymu liko nepasikeitęs. Todėl šis straipsnis yra skirtas: atlikti laikinųjų apsaugos priemonių priėmimo, taikymo ir įgyvendinimo tarptautiniame arbitraže esamos teisės doktrinos bei tarptautinės praktikos trumpą analizę; išnagrinėti laikinųjų apsaugos priemonių taikymo ir įgyvendinimo tarptautiniame arbitraže teisinį reglamentavimą bei teismų praktiką Lietuvoje vertinant jų atitikimą šiuolaikinei teisės doktrinai ir tarptautinio arbitražo srities tarptautinei praktikai.*

*Straipsnio pabaigoje autorė pateikia išvadą, jog: 1) esamos LR Komercinio arbitražo įstatymo nuostatos nepagrįstai riboja arbitražo teismo galias taikyti laikinąsias apsaugos priemones ir tendencingai nukreipia arbitražinio susitarimo šalis į teismą laikinųjų apsaugos priemonių taikymui; 2) arbitražinio susitarimo šalys neturi Lietuvoje realaus pasirinkimo, į kurį iš dviejų subjektų – arbitražą ar teismą – kreiptis dėl laikinųjų apsaugos priemonių taikymo ir yra priverstos laikinosioms apsaugos priemonėms taikyti rinktis teismus, todėl Lietuvos laikinųjų apsaugos priemonių taikymo arbitražo procese modelis gali būti apibūdintas kaip „teisminis modelis su nežymiomis išimtimis“; 3) Niujorko Konvencijos pavyzdžiu esamos Lietuvos Respublikos civilinio proceso kodekso nuostatos tiesiogiai nustato tik užsienio arbitražų sprendimų pripažinimo ir vykdymo Lietuvoje procedūras, todėl LR Civilinio proceso kodeksas neleidžia pripažinti ir vykdyti Lietuvoje užsienio arbitražų procesinius dokumentus dėl laikinųjų apsaugos priemonių taikymo, jeigu jie neturi galutinio arbitražo sprendimo formos.*

*Autorės šiame straipsnyje atliktas mokslinis tyrimas leido teigti, kad esamas laikinųjų apsaugos priemonių taikymo ir įgyvendinimo tarptautiniame arbitraže teisinis reglamentavimas ir teismų praktika Lietuvoje neatitinka šiuolaikinės pasaulinės teisės doktrinos reikalavimų bei tarptautinio arbitražo tarptautinės praktikos nuostatų, todėl Lietuvos Respublikos teisės aktuose būtina atlikti esminius, straipsnyje autorės pasiūlytus pakeitimus.*

**Reikšminiai žodžiai:** laikinosios apsaugos priemonės, tarptautinis arbitražas, draudimas kreiptis su ieškiniu į teismą, UNCITRAL Pavyzdinis tarptautinio komercinio arbitražo įstatymas, Komercinio arbitražo įstatymas.

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