“Interim Measures as a preliminary step of successful recognition and enforcement of Arbitral Award"

Master’s Thesis

By Megi Murgulia

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SUPERVISOR: Professor Markus Petsche

Central European University- Private University

Quellenstrasse 51-55, 1100 Vienna, Austria

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Acknowledgment

"I hereby confirm that, this thesis is my own work and that all sources I have consulted are clearly identified for the reader. All quoted material is inside quotation marks and all material I refer to, but do not quote from directly is clearly identified by naming the author or source near the place, where I refer to that source.

I would like to devote this thesis to my home country, Georgia, which is paving the way to becoming a valuable member of the European Union and facing many obstacles while building a comprehensive legal system, including but not limited to, the law on arbitration. I hope my observations and recommendations will contribute to improving the regulatory framework.

Throughout the thesis writing process, I am deeply grateful to my supervisor, Professor Markus Petsche, for providing me with invaluable feedback and guidance on such a narrow and underexplored topic.

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List of Abbreviations

ADR- Alternative dispute resolution

U.S.- United States of America

NYC- New York Convention

ICC- International chamber of commerce

FAA- Federal Arbitration Act

Abstract

The primary objective of this master's thesis is to dig the connection between Interim Measures and Substantive Arbitral Awards, with a particular focus on their respective roles in mitigating risks for involved parties and preserving assets. Emphasis is placed on analyzing the approaches of the United States and Georgia in this context, while also addressing the notable absence of regulatory provisions concerning interim measures within the framework of the New York Convention.

This study endeavors to provide a comprehensive understanding of the continuous dynamics surrounding the circulation between interim measures and substantive arbitral awards in the realm of international arbitration. Methodologically, it employs a multifaced approach, including Legislative History Review, Expert Opinions and Commentary, Analysis of Case Law, Comparative Framework Assessment, empirical Data Collection, Institutional Guidelines and Practices, Historical Comparative Analysis, as well as Policy and Public Interest Considerations.

The research mandates the pivotal role of interim measures in maintaining the status quo and asset preservation during arbitration proceedings, thereby facilitating the enforcement of arbitral awards. It also highlights challenges associated with enforcing interim measures in foreign jurisdictions, particularly those situated outside the arbitral seat. The practical complexities may influence arbitrators' decisions regarding the issuance of interim measures.

Furthermore, the study underscores the collateral relationship between effective interim measures and the successful recognition and enforcement of arbitral awards in international arbitration. The absence of specific provisions addressing interim measures within the New

York Convention underscores the necessity for regulatory enhancements to boost the efficiency of the international arbitration regime.

Moreover, the examination of challenges within Georgia's domestic legal framework reveals significant obstacles to enforcement, necessitating comprehensive regulatory reforms to address strategic maneuvers aiming at impeding the enforcement process.

In conclusion, this thesis aims for regulatory improvements to address existing gaps and challenges surrounding interim measures in international commercial arbitration. By enhancing the regulatory framework, assurance in the ability to enforce arbitral awards can be strengthened, thereby fostering greater trust and effectiveness in the international arbitration system.

Introduction

In an era marked by swift transformations, professionals in the business realm seek a conflict resolution approach that not only keeps pace with the rapid changes, but also embodies traits such as enhanced reliability, efficiency in terms of time and cost, enforceability, confidentiality, and adaptability to global scenarios. Hence, the imperative arose to establish a stable legal safeguard system and explore alternative avenues for dispute resolution. Employing methods like alternative dispute resolution, conflicts find resolution based on mutually agreed terms, with options ranging from arbitration to mediation.

Among five methods of dispute resolution, Arbitration gets mostly used besides litigation. Statistics and practice showed to us that, international commercial Arbitration requires the tools, which make it safer and efficient. In that sense, it can be said that interim measures play crucial role by securing the object to make the reward “come true” in reality. Still, even businesspeople lack the knowledge regarding above-mentioned tool, which can make their lives “easier” and secure. The reason behind it can be said to be no written regulation under “New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards". Which itself guarantees successful recognition and enforcement among contracting states. The main question which can be asked is: how can successful award get enforced in practice, if there is no existing asset behind it?!

The nexus between interim measures and the subsequent enforcement stage is undeniably pivotal, representing a dynamic interplay integral to the seamless progression of the arbitration process. It is imperative to acknowledge that the fulfilment of enforcement obligations relies heavily on the prior execution of effective interim measures. These measures function as a pre-

emptive safeguard, restraining the potential for misconduct by a party seeking to manipulate or dispose of evidence or assets crucial to the arbitration proceedings.

Throughout this thesis, my objective is to emphasize the critical significance of interim measures in arbitration. This examination will delve into the regulatory frameworks dictating interim measures and their practical implementations. The primary emphasis will be on clarifying the complex role of the court in overseeing the application of these measures, drawing insights from both domestic and international perspectives.

By comprehensively analysing these aspects, this research seeks to contribute to a deeper understanding of the dynamics surrounding interim measures in arbitration and their implications for effective dispute resolution.

A comparative analysis of case law, particularly drawing parallels between the United States and Georgia, will be integral to unravelling the nuances of how interim measures have been wielded and interpreted in different legal landscapes. The main reason behind choosing U.S. case law in comparison with Georgian one lays behind the fact that arbitration is mostly and effectively used in this system, which is part of common law family, that I think can be a good example for post-soviet developing country like, Georgia, from where author of this thesis comes from. This comprehensive exploration will shed light on the diverse approaches and judicial precedents, that have shaped the understanding and application of interim measures in practice.

Furthermore, this thesis endeavours to contribute practical recommendations fostered specifically for the legal system of Georgia. By synthesizing insights from the broader study,

it aspires to offer nuanced guidance on optimizing the use of interim measures within the legal framework of Georgia. Through this comprehensive examination, the thesis aims to provide a thorough understanding of the collateral relationship between interim measures and the successful recognition and enforcement of arbitral awards, fostering a more informed and effective arbitration landscape in the Georgian legal system.

1. Interim measures to preserve the Assets and Evidence as an Additional Tool for Raising Efficiency of International commercial Arbitration

Arbitration proceedings can be time-consuming, creating a risk for one party that the other might take advantage of the delay. This could involve actions like transferring assets, cessation of operations, destroying the subject of the dispute, or manipulating with evidence. This risk becomes more significant, if the opposing party resorts to deceptive tactics to avoid responsibility, seeks to harm the other party, or tries to disrupt the arbitration process and the enforcement of the decision. Consequently, there are instances, where it is necessary to implement security measures to protect the rights of both parties until the dispute is settled. Therefore, most major legal systems have established laws to safeguard the interests of parties involved in arbitration or court proceedings, including provisions for security arrangements within arbitration procedures.[1]

[1] O. Machaidze, *Conditions for the Use of Security Measures and Notice-Execution in Arbitration Proceedings* (Tbilisi, 2019), 30.

The risk escalates after the arbitration award has been issued, but before it is enforced, because the award must be recognized and enforced by a competent court. This introduces additional time constraints, during which the party against whom the award was issued may have the opportunity to dispose of assets or utilize funds, that could be used to enforce the decision. In essence, the risk grows during this interim period post-award, but pre-enforcement.

This institutional framework enhances the effectiveness of international commercial arbitration by building trust among the parties that the resolution will be enforceable in practice. Due to the increased likelihood of asset hiding during disputes, it is insufficient to rely only on recognition and enforcement procedures. Therefore, since parties can ensure the enforceability of future judgments through arbitration, as well as through litigation, thanks to interim remedies, both litigation and arbitration are equally reliable and secure avenues for dispute resolution.

Interim measures require rapid actions from the parties, which can be quite challenging. In the sense that, first assets of the opposing parties should be identified, risks of avoiding from them and legal tools to opt for it and which type of interim measure will be more suitable. Initially, the parties are required to carry out a comprehensive investigation in order discover the assets of the opposing party. This investigation must include both tangible and intangible assets, such as bank accounts, real estate, and intellectual property. This can be achieved by analysing information recorded in public registries regarding the financial status of the company in question. Performing a comprehensive risk analysis to assess the likelihood of the opposite party engaging in asset destruction or hiding is essential. This involves evaluating previous conduct, financial condition, and any documented legal tactics, while considering the nuances

that arise from international matters where assets may be distributed across different legal systems. [2]

To sum up, interim measures play a pivotal role in international commercial arbitration, particularly in safeguarding assets and evidence, thus enhancing efficiency in resolving large-scale business disputes. The delay inherent in arbitration proceedings poses a risk of asset transfer, evidence tampering, or disruptive tactics by opposing parties. To mitigate such risks, legal systems worldwide have established provisions for interim measures, ensuring the protection of parties' rights until the dispute is settled.

1.1 Types of Interim measures and Its Legal Meaning in International Commercial Arbitration

UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments in 2006) provides a framework for the conduct of international commercial arbitration. Article 17 of the Model Law empowers arbitral tribunals to grant several types of interim measures, including injunctions and orders for the preservation of assets or evidence.[3] In line with the protocols observed in international arbitration, arbitrators are empowered with broad discretion to employ various security measures aimed at safeguarding the interests of the parties involved. This approach affords arbitrators the opportunity to select the most suitable type of security measure based on the specific circumstances of the case.[4]

[2] Farallon Law Corporation, "Interim Measures in International Arbitration," last modified 2024, accessed June 4, 2024, https://fl.sg/resource/interim-measures-in-international-arbitration/.
[3] UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments in 2006), art. 17.
[4] O. Machaidze, *Conditions for the Use of Security Measures and Notice-Execution in Arbitration Proceedings* (Tbilisi, 2019), 97.

A variety of interim measures are available in international commercial arbitration. Injunctions, for instance, are court orders that prohibit a party from engaging in certain actions, such as publishing defamatory material. Alternatively, injunctions may prevent someone from leaving the country or disposing of assets. These measures are employed, when one party anticipates that the other may take extreme measures, to avoid payment of the final amount determined in the arbitration award. Security for costs is typically sought by the respondent, if there are reasonable grounds to suspect that the claimant may be insolvent and unable to cover expenses, if the arbitration is unsuccessful. This sum includes arbitration costs. [5]

While less common, applications for property preservation or detention may be equally significant. Arbitrators must exercise caution in such cases, as property preservation or detention could have substantial adverse effects on a party, that needs to use or sell their property. Alternatively, a request for a property inspection may pose fewer risks. Arbitrators must carefully balance the benefits and drawbacks of imposing such interim measures.

Active interim measures, also known as "maintaining the status quo," require a party to undertake or refrain from specific actions. For example, arbitrators may order a party to continue fulfilling contractual obligations, such as construction work, shipping goods, or providing intellectual property, or conversely. Passive interim measures, on the other hand, assist both parties in establishing procedural rules for the arbitration process, albeit in a more formal manner, than through oral agreements.[6]

[5] "Emergency Arbitrator ICC Rules," accessed April 10, 2024, https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/emergency-arbitrator/.

[6] "Kinds of Interim Measures in Arbitration," accessed April 10, 2024, https://expert-evidence.com/kinds-of-interim-measures-in-arbitration/#:~:text=Common%20types%20of%20interim%20measures,of%20an%20award%2C%20and%20injunctions.

Different situations call for different types of interim measures to ensure that hearings proceed in accordance with the law. Hence, it is crucial for parties to be aware of the types of interim measures available to them. Selecting the appropriate interim measure contributes to the successful recognition and enforcement of arbitral awards. Interim measures enhance the attractiveness and reliability of arbitration, thereby reducing the burden on courts.

1.2 Urgency and Necessity nature of Interim measures in International Commercial Arbitration

In practical terms, interim measures are employed, when there is a significant risk of one party's procedural rights being violated, potentially leading to the avoidance of addressing the main dispute. In such situations, a sole arbitrator or a tribunal may declare that these measures need to be urgently implemented. The party requesting these measures bears the responsibility of proving that the intervention of the tribunal is necessary and that waiting for the final decision would cause harm. The severity of the harm is often assessed alongside the urgency of the situation.[7]

It's important to note that the UNCITRAL Model Law does not recognize the necessity for such measures, as the requirement for "urgent necessity" was intentionally omitted by the group that developed it.[8] Nevertheless, in practical scenarios, this requirement is not strictly adhered to. The rationale behind this omission, according to José Mara Abascal, the head of the working group, is the difficulty in defining what constitutes an urgent necessity. What a party needs to

[7] O. Bernard Adafu, *Interim Measures in International Arbitration* (Nigeria, 2021), 3.
[8] O. Machaidze, *Conditions for the Use of Security Measures and Notice-Execution in Arbitration Proceedings* (Tbilisi, 2019), 91.

establish is that there is a significant likelihood of suffering harm before the relevant issue is addressed.[9]

1.2.1 The principle of res judicata

Courts frequently enforce these interim measures to prevent further disputes over the same issues and to comply with res judicata. Interim measures enhance arbitration efficiency by promptly resolving imperative issues, thereby preventing the initiation of multiple proceedings. Additionally, they ensure the effective enforcement of the final award and minimise the probability of additional litigation by safeguarding assets and evidence.

Interim measures ensure that the tribunal's final decisions are respected and that consistent and equitable decisions are made, thereby strengthening its authority. This connection is instrumental in the preservation of the arbitration's integrity and the principle of res judicata, as it prevents repetitive litigation and guarantees the closure of the arbitration process.

The principle of Res Judicata assumes a nuanced dimension when considered in the context of arbitral interim measures, particularly when parallel court proceedings are ongoing. This scenario underscores the complex interaction between judicial and arbitral bodies in administering justice and ensuring procedural fairness. Interim measures, being provisional and adaptable instruments aimed at preserving the status quo pending final resolution, may encounter the doctrine of res judicata, when their issuance or enforcement clashes with ongoing court actions.

[9] *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Arbitration* (Kluwer Law International, 2015), 171.

The combination of arbitration and court proceedings brings about complications when applying the principle of res judicata to interim remedies. Arbitral tribunals, which have the power to provide temporary relief, must carefully navigate an evolving legal environment while maintaining the integrity of the arbitration process. As a result, temporary actions that are initially approved by courts may be altered or revoked by arbitration tribunals, if there are changes in the situation or new evidence that arises during the arbitration process.

The dynamic interaction between interim remedies and the arbitral framework highlights the inherent flexibility of these measures. This allows courts to adjust relief mechanisms based on changing circumstances and procedural developments. Therefore, although the principle of res judicata influences the decision-making process, it does not completely prevent the flexibility and responsiveness of temporary relief options in arbitration. Instead, it underscores the imperative for arbitral tribunals to exercise judicious discretion in balancing the principles of finality and fairness, thereby upholding the integrity and efficiency of international arbitration.[10]

Furthermore, unlike in traditional court proceedings, interim measures issued by arbitrators only apply to the disputing parties themselves and not to any third parties involved. Because arbitration is chosen by the parties as an alternative to litigation, typically through an arbitration clause, these measures are voluntarily followed to maintain credibility with the arbitrator, who ultimately holds authority over the matter.[11]

[10] L. G. Radicati di Brozolo, "Res judicata and international arbitral awards," 2011, p. 1.
[11] "A. Jan Van Den Berg, ed., 'International Arbitration 2006 - Back to Basics?'" (International Council for Commercial Arbitration), p. 759.

1.3 Instrument of interim measures as a Preliminary Step of Successful Recognition and Enforcement of Arbitral Award

As discussed above, interim measures play a crucial role in facilitating the recognition and enforcement of arbitral awards. Even if an arbitrator rules in favour of the claimant, the practical enforcement of the award may be impossible without access to possessions or assets. However, it is essential that interim measures are not sought merely to harm the respondent without legal justification. The decision to employ interim measures depends partly on the ability of the party seeking them to demonstrate a legitimate legal interest, as well as the risk of rendering the arbitral decision difficult or impossible to enforce.

Moreover, relying solely on interim measures does not guarantee the successful recognition and enforcement of an arbitral award. However, it can be seen as a preliminary step for the winning party to reclaim their restricted rights. If harm occurs to a party because of interim measures, what remedies are available to regain these rights? Several remedies are available to resolve and regain the rights of a party, if harm occurs because of interim measures in arbitration. The harmed party has the right to pursue compensation for any losses, that have been incurred because of the interim measures. This includes direct financial losses and other quantifiable damages. If the interim measures are causing undue harm or are no longer necessary, they may also request the arbitral tribunal modify or revoke them.[12]

At the United Nations' 40th anniversary commemoration of the New York Convention in 1998, several speakers highlighted the need to improve interim measures as a crucial step in

[12] J. Castello and R. Chahine, "Enforcement of Interim Measures," 2023, Global Arbitration Review, https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/3rd-edition/article/enforcement-of-interim-measures#:~:text=Indeed%2C%20it%20will%20most%20likely,breach%20of%20the%20arbitration%20agreement(accessed June 6, 2024).

strengthening the Convention's support for international arbitration. V V Veeder cautioned that, there had been persistent challenges in enforcing an arbitrator's order for interim measures, primarily because the prevailing interpretation of the New York Convention excludes provisional orders for interim measures from enforcement abroad as a Convention award.[13]

In summary, interim measures serve as indispensable tools in international arbitration, safeguarding parties' rights and assets and facilitating the enforcement of arbitral awards. However, the current regulatory framework within the New York Convention regarding interim measures lacks clarity, potentially hindering parties' awareness and understanding of their availability and procedures.

Enhancing the regulation of interim measures within the New York Convention would provide a more structured and predictable framework for parties engaged in arbitration proceedings. Clearer guidelines regarding the types of interim measures available, the criteria for their issuance, and the procedures for seeking and enforcing such measures would promote consistency and fairness in arbitration practice.

Moreover, a written regulatory framework for interim measures in the New York Convention would contribute to the broader objectives of promoting international arbitration as a reliable and efficient method for resolving cross-border disputes. By installing confidence in the arbitration process and ensuring the enforceability of arbitral awards, parties are more likely to opt for arbitration as their preferred method of dispute resolution, thereby reducing the burden on national courts and promoting global commerce.

[13]"Enforcement of Interim Measures," *Global Arbitration Review*, https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/3rd-edition/article/enforcement-of-interim-measures (accessed April 10, 2024).

Improving the regulation of interim measures within the New York Convention is essential for raising awareness, enhancing efficiency, and fostering trust in international arbitration, ultimately contributing to a more effective and equitable resolution of international disputes.

2 The New York Convention and The Model law: Nexus to Interim Measures

From 1958 to the present, the New York Convention on the "Recognition and Enforcement of Foreign Arbitral Awards" guarantees recognition and enforcement of arbitral awards in different countries, allowing a party to enforce the judgement in any member country, where the defendant possesses property/assets. However, we can find no records regarding granting interim relief, despite the fact that, enforcement procedure is collaterally connected to successful interim measures. Despite, absence of the record, New York convention supports successful enforcement, meaning that it does not ignore existence of interim measures, rather supports granting in implicitly.

On the other hand, we can find massive record on interim measures in the "UNCITRAL Model Law on International Commercial Arbitration 1985, With amendments as adopted in 2006". Article 17A of the Model Law aims to embody the widely acknowledged legal principles regarding the provision of interim protective measures. These principles have been long recognised by the international community as an integral component of the established framework for international commercial arbitration.[14] However, Model law does not set

[14] I. Bantekas, P. Ortolani, S. Ali, Manuel A. Gomez, and M. Polkinghorne, "Article 17A - Conditions for Granting Interim Measures," (Cambridge: Cambridge University Press, 2018), 344.

binding regulatory records, its nature consists of guideline one, which can be said to have a big place in the heart of Arbitration sphere.

In the following paragraphs, I will delve into the regulatory impact of interim measures in New York Convention and Model law. Also, will try to analyse strategic importance of interim measures, for parties to foresee upcoming outcomes. Looking ahead, while the New York Convention's lack of explicit guidance on interim measures may raise questions, the Model Law offers a solid framework. Interim measures, such as injunctions or temporary orders, are typically addressed in the procedural rules of the arbitration itself or in the national laws governing arbitration in the relevant jurisdiction. It is also crucial to stipulate, whether New York Convention regulation is needed for further awareness and successful acquisition of interim measures.

2.1 Overview of the New York Convention and lack of regulatory record regarding Interim Measures

As already stipulated New York Convention The "Recognition and Enforcement of Foreign Arbitral Awards" ensures that arbitral awards are recognized and enforced across various countries. This mechanism enables parties to enforce judgments in any member country, where the defendant holds property or assets. But it does not say anything about regime of interim measures. Some scholars stipulate that, convention does not deliberately ignore the record, rather implicitly strengthens the link between interim measures and enforcement.[15]

[15] "Enforcement of interim measures", Global Arbitration Review, 2021. https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/enforcement-of-interim-measures accessed 08th of May 2024.

Does the convention leave regulating of interim measures to domestic laws on purpose or to Model law, that does not have any legal binding force? While, some scholars say that convention is not nihilist to it, others state vice versa. According to its name, we may assume that convention has nothing to do with interim measures and its whole procedure. Especially, since ICC rules also regulate granting of interim measures by Emergency Arbitrators.[16]

Lack of regulatory record was critised by Mr. Veeder, believed the New York Convention did not cover interim awards. However, not everyone agreed. Albert Jan van den Berg, an expert on the Convention, criticized UNCITRAL's report, stating it lacked evidence for its claims. He noted that as of 2000, there was not a clear consensus on whether the Convention applied to interim awards, with only one Australian court case mentioned as support, which was not very convincing.[17]

To sum up, while the New York Convention effectively ensures the recognition and enforcement of arbitral awards globally, it remains silent on the regulation of interim measures. Some scholars argue that this omission strengthens the link between interim measures and enforcement, leaving their regulation to domestic laws or non-binding model laws like, the UNCITRAL Model Law. However, opinions are divided on whether the Convention deliberately excludes interim measures or not. Critics, like Mr. Veeder, believe it, while others, like Albert Jan van den Berg, argue that there is not enough evidence to support this claim. As of today, there is not a clear consensus on whether, the Convention covers interim awards, highlighting a need for further clarity and discussion in this area.

[16] Article 29 of the ICC Rules and Appendix V "Emergency Arbitrator Provisions" 2021; https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/ ; accessed 08th of May 2024.
[17] Ibid.

2.2 The Model law approach to interim measures

Uncitral Model law on International Commercial Arbitration sets principles, which has a non-binding nature, unlike New York convention Model law offers a detailed regulation on interim measures. Article 17 of the UNCITRAL Model Law on International Commercial Arbitration, which is largely acknowledged as a comprehensive foundation for international arbitration, deals with interim measures. This article grants arbitral tribunals the power to issue interim measures to safeguard the rights of the parties involved in the arbitration proceedings. Interim measures include various acts such as injunctions, seizure of assets, and similar procedures.

Important aspects of interim measures under the UNCITRAL Model Law are: Article 17 of the scope proposes both domestic and international arbitrations, ensuring a uniform framework for interim measures, independent of the jurisdiction of the arbitration. The Model Law imposes upon the arbitral tribunal the power to issue interim measures upon the request of a party, unless the parties have agreed otherwise. Model law sets criteria for awarding Provisional Measures: When issuing interim measures, the arbitral tribunal has the authority to set conditions, which may include demanding the seeking party to furnish security or other forms of assurances.

It also stipulates the enforcement from the courts having the authority to enforce the interim measures ordered by the arbitral tribunal, following the procedures of the applicable jurisdiction. In summary, Article 17 of the UNCITRAL Model Law offers a comprehensive

and solid structure for parties engaged in international arbitration to request and secure temporary measures to safeguard their rights and interests, until their dispute is fully resolved.[18]

Even though, Uncitral model law is a "soft law", it has a big use and influence on the parties, who bring their dispute in international arbitration. The Model Law serves as a guiding book for arbitration agreements and proceedings worldwide, providing a common language and set of principles, that facilitate the resolution of international disputes. As such, parties often look to the Model Law for guidance and assurance when drafting arbitration clauses or navigating the arbitration process. Its influence extends beyond mere legal considerations, playing a pivotal role in fostering predictability, efficiency, and fairness in international commercial arbitration. Therefore, while it may not carry the force of binding law, its impact on the conduct and outcomes of arbitration proceedings cannot be undestimated.

3 Interim relief granted by arbitrators v. Interim relief granted by courts

Interim relief requires short-period time reaction and granting based on its nature and urgency. Usually, parties refer to appointed arbitrator(s) to grant or reject it. Based on article 28 (1) of ICC Arbitration rules[19] and UNCITRAL model law article 26 (1)[20]; Unless the parties have agreed alternatively, the arbitral tribunal may, at a party's request, order any interim measure

[18] Uncitral Model law on International Commercial Arbitration, (1985, with amendments in 2006) Chapter IV. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf accessed 10th of May 2024.
[19] Article 28 (1) of ICC Arbitration rules, 2021, https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/ , accessed 10th of May 2024.
[20] UNCITRAL model law (1985, with amendments in 2006) article 26 (1). https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf accessed 10th of May 2024.

as soon as the file is sent to them. This provision strengthens the independence and autonomy of arbitration proceedings from intervention of any judicial authorities. Since, arbitration is private and mostly confidential proceeding, disputing parties prefer to refer to their "supervisor" for any concerns, rather to external parties. In general, the arbitration clause in the contractual agreement does not give the arbitrators particular authority over interim measures. Still, the clause might be referring to a specific set of regulations, which frequently contain clauses about these kinds of actions. The rules of the major bodies now tend to give the arbitrators express authority to impose a wide range of interim measures.[21]

But what happens if the tribunal is not constituted, when seeking interim measures or institutional set of rules does not allow arbitrators to grant the measures?! Designating an arbitral panel can sometimes take weeks or months. Unless the parties' arbitration agreement includes clauses enabling the appointment of such emergency arbitrator, a party in need of emergency assistance during this period may only apply for interim remedies to local courts.[22] Does applying to the court goes against the main feature of arbitration? Since, the court proceedings are public, interim measure hearings can be slightly different and usually decided within a day. Only infringement of the "privacy" can be involving the external party, judge in the circumstances of the case, but more in procedural part, rather than merits. On the other hand, court-granted measures will have an enforceable weight and non-compliance may have strict consequences.[23]

[21] Grégoire Marchac, "Interim measures in international commercial arbitration under the ICC, AAA, LCIA and UNCITRAL rules," *American Review of International Arbitration* 1999, p. 2.
[22] C. I. Florescu, "Emerging tools to attract and increase the use of international arbitration" (Romania: Publisher Name, 2020), 267.
[23] N. Lisney (Herbert Smith Freehills LLP), "The Limits of Court-Ordered Interim Relief in Support of Arbitration?," 2020.

Interim relief requires prompt action to protect parties' interests. While arbitration aims to address these needs privately and efficiently, there are instances when courts must intervene, for instance when the arbitral tribunal is not yet constituted or lacks the authority to act. Although court intervention should be a last resort, it does not undermine the integrity of arbitration. Instead, it preserves the interests of the parties and ensures that potential victories are secured, making court involvement a practical and supportive measure when necessary.

3.1 Role of emergency arbitrators in granting the interim measures

If the arbitrator(s) are not selected, parties have the option to incorporate a clause that applies to an emergency arbitrator instead of resorting to court. Emergency arbitrators are essential figures in the arbitration procedure, especially in issuing interim measures prior to the formation of the arbitral panel. Their function ensures that, urgent matters are addressed promptly and efficiently.

The ICC Arbitration Rules provide a procedure for parties to seek emergency measures through an Emergency Arbitrator. ICC Emergency Arbitrator Provisions offer a significant expedited process for parties in need of urgent interim measures during arbitration proceedings.[24]

An emergency arbitrator's authority is restricted to making decisions regarding temporary measures and does not include any decisions regarding the merits of the case. Furthermore, the decision made by an emergency arbitrator does not have a binding effect on the actual arbitrators. They have the authority to alter, suspend, or revoke any judgement made by the

[24] ICC Rules and Appendix V "Emergency Arbitrator Provisions" 2021; https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/ ; accessed 20th of May 2024.

emergency arbitrator. It is important to note that, the ruling of the emergency arbitrator is temporary and will remain in force, until the final decision is made by the tribunal.[25]

Although emergency arbitrator hearings are being used more frequently, there are still concerns regarding the enforceability of the findings given in such proceedings. Specifically, there is uncertainty about whether these opinions may be regarded “final and binding” and thus capable of being enforced. According to the ICC Rules, the judgement of the emergency arbitrator is given as an order. This order is legally binding on the parties involved, and they are obligated to follow it. The ICC Arbitration Rules and their Appendix V, which includes the Emergency Arbitrator Rules, do not provide any guidance on the enforcement of the emergency arbitrator's order. It is uncertain whether the order holds the same legal weight as an order for interim measures issued by an arbitral tribunal under Article 28(1) of the ICC Arbitration Rules.[26]

Despite the uncertainties evolving around interim measures granted by emergency arbitrators, use of it can be more efficient and less time or money consuming, than asserting this issue to the court. Moreover, staying “inside” the insitution of arbitration, will ensure maintaining confidientiality of the procedure for the entire period of time. Additionally, Arbitrators are frequently experts in the field of the dispute, which allows them to properly understand the nuances of the scenario and develop temporary solutions accordingly.

[25]C. I. Florescu, "Emerging Tools to Attract and Increase the Use of International Arbitration" (Romania, 2020), 268.
[26] Doug Jones, "Emergency Arbitrators and Interim Relief in International Commercial Arbitration," p. 8.

3.2 Role of judges in case of non-existing (appointed) arbitrator(s)

Currently, it is widely established in international practice, that courts have the necessary authority to issue and enforce temporary measures in arbitration. This is a rare instance, where the court can intervene in arbitration procedures. The court's power is widely acknowledged and affirmed according to Article 17(J) of the UNCITRAL Model Law. In the United States (specifically New York), courts have the power to enforce temporary measures regarding arbitration claims, but only if the measures implemented by the arbitration process are not successful.[27]

Despite, courts' permission to intervene arbitration proceedings on an early stage, their power to dig into details is limited to what is asked for. In that sense, international regulations endeavour to strike a balance between privacy of arbitration and publicity of the court. According to the ICC Rules, the parties are allowed to request intervention from the national courts only under "Appropriate circumstances", as stated in Article 28.2, after the file has been sent to the tribunal.[28] Seems like, appropriate circumstances should have a broad definition, but still limited to the main purpose of interim measures, while defining urgent and emergency events of court intervention.

Court intervention may be less-time consuming, since applicant party does not have a freedom to choose the judge and randomly allocated judge usually decides the application on interim

[27] Carter J. and Fellas J., *International Commercial Arbitration in New York* (Oxford: Oxford University Press, 2010), 250.

[28] J. E. Castello and R. Chahine, "Enforcement of Interim Measures," 2023, https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/3rd-edition/article/enforcement-of-interim-measures (accessed June 3, 2024).

measure within a day. Time-speed is important in the way to preserve the asset from "disappearance". Even though, court intervention may shake the attractiveness of arbitration, yet it is limited to the principle of proportionality, where intervention should be the last possible tool, after exhausting all possibilities on the circle of arbitration background.

4 Enforcement of Interim measures and its importance for final recognition of an Arbitral award

The use of temporary measures is vital for ensuring the efficiency of the arbitration process and the eventual acknowledgment and implementation of the final arbitration decision. Interim measures frequently include directives to safeguard crucial assets or evidence, that are necessary for the resolution of the arbitration. Failure to implement these steps could result in the disposal of vital assets or the destruction of evidence, so compromising the arbitration process. For instance, a freezing order can prohibit a party from transferring assets outside of the jurisdiction, so guaranteeing the availability of assets to fulfil the ultimate award.

Interim measures can be implemented to preserve the existing situation and prevent any actions that could undermine the significance of the arbitration process. In the absence of enforcement, parties may undertake activities that substantially modify the circumstances around the dispute. An example would be a court order preventing ongoing construction or breaches of a contract, until the arbitration process is completed. Interim solutions are frequently required to avoid irreversible damage, that cannot be adequately compensated through monetary compensation alone. It is crucial to make sure that, these procedures can be enforced to safeguard the interests

of the parties involved. For example, it is essential to prevent the disclosure of trade secrets or sensitive information, that could potentially damage a party's competitive position.[29]

Enforcing interim remedies effectively guarantees, that the parties adhere to the tribunal's orders during the arbitration procedure, so upholding the fairness and integrity of the proceedings. Adhering to interim measures can make the enforcement process for the outcome more efficient, as it shows that the parties acknowledge and respect the authority of the arbitral tribunal. Effective implementation of interim measures strengthens the credibility of arbitration as a dependable and efficient means of resolving disputes. Consequently, this increases the likelihood of willing compliance to the ultimate decision and minimises the necessity for coercive enforcement measures. The willingness of domestic courts to uphold provisional remedies indicates strong judicial endorsement for arbitration, cultivating a favourable atmosphere for the acknowledgment and execution of ultimate judgements.

4.1 The need of preserving the assets during the whole process

Arbitration just like the court proceedings is all about developing strategies, to get the desired outcome and make it work in practice. The whole process is not about knowing the laws and rules or other disputed areas but foreseeing upcoming threats. Such kind of threat can be destroying the key targets. Usually, responding party may develop legally admissible strategy by transferring the asset to other party, other side, but still maintaining possession on it by not being owner officially. This strategy may sound like the doctrine of “piercing the corporate veil” from corporate law field.

[29] Ibid.

A common strategy involves the responding party transferring ownership of assets to a seemingly unrelated third party. This third party could potentially be a reliable collaborator, a subordinate entity, or even a fictitious firm established specifically for this objective.[30] The transfer establishes a legal obstacle, giving the impression, that the assets are no longer under the control of the person being responded to, thereby impeding the implementation of temporary remedies.

To reduce the need associated with these tactics, parties who are seeking interim measures might consider taking proactive measures, such as: Performing comprehensive asset detection at the beginning of the arbitration process to identify prospective targets, that may attempt to avoid scrutiny.

Requesting international freezing orders to prohibit the transfer or hiding the respondent's assets. Seeking provisional measures, that specifically target assets owned by third parties in cases, where there is suspicion of adopting such strategies. Drafting detailed injunctions that include specific prohibitions against transferring, encumbering, or concealing assets.[31]

To sum up, the tactic of shifting assets in order to avoid interim measures poses a substantial obstacle in arbitration. Although it may appear to meet the necessary legal requirements, it weakens the fundamental principles of fairness and efficient resolution of conflicts. Developing and foreseeing such strategies is crucial for parties aiming to safeguard their interests and effectively implement temporary remedies. Legal professionals and arbitral tribunals should

[30] Nelson Edward Timken, "Veil-Piercing in International Arbitration," 2024.
[31] "Strategies for Asset Preservation in Physical Asset Transfer," FasterCapital, accessed June 3, 2024, https://fastercapital.com/topics/strategies-for-asset-preservation-in-physical-asset-transfer.html.

be alert and employ innovative approaches to address these issues, guaranteeing that interim measures accomplish the intended goal.

4.2 Regulatory flaw in Georgian law on arbitration

While comparing the interim measures outlined in the Georgian Law on Arbitration and the UNCITRAL Model Law, it becomes obvious that the latter possesses a more comprehensive and organized framework, with some significant distinctions. According to the Article 17 of the Georgian Law on Arbitration, the arbitral tribunal has the power to issue interim measures at any point, before the final decision being rendered. However, it does not specifically identify the categories of interim measures or their precise requirements. Article 17 of the UNCITRAL Model Law indicates the various forms that interim measures may adopt, including preserving the current state of matters, mitigating harm, safeguarding assets, and preserving evidence.

This enhances the clarity of expectations for both parties and tribunals.

According to Georgian Law, to get interim measures granted, the party making the request must prove the existence of irreparable injury, a balance of harm, and an equal likelihood of success on the merits. The instructions for evaluating these characteristics are not sufficiently comprehensive. Article 17A of the UNCITRAL Model Law sets forth explicit criteria, such as irreparable harm that cannot be satisfactorily compensated by monetary damages and harm, that significantly outweighs the loss suffered by the other party. This legislation offers greater flexibility for petitions to preserve evidence, thereby establishing more specific requirements and improved direction for arbitral tribunals.

The Georgian Law does not specifically include preliminary orders, although the UNCITRAL Model Law addresses this matter in Articles 17B and 17C. The system permits ex parte preliminary orders to avoid hindering the temporary measure, requires timely communication to all parties following the issuance of a preliminary order, and offers options for the opposing party to immediately make objections. Preliminary orders last to 20 days, but they can be changed or transformed into an interim measure. This allows for a balance between the need for rapid relief and the principles of fairness and due process.

Both rules provide for the alteration, suspension, or removal of temporary measures upon request or at the tribunal's discretion with advance notification. Article 17D of the UNCITRAL Model Law contains comprehensive procedural safeguards, that guarantee transparency and prohibit arbitrary decisions. The Georgian Law acknowledges the potential need for security measures but does not provide specific instructions or criteria. According to the Article 17E of the UNCITRAL Model Law, the tribunal has the authority to request security for interim measures and is obliged to request it for preliminary orders, unless it is considered unnecessary. This ensures that the measures are supported by sufficient assurances.

According to Georgian Law, parties are obliged to reveal significant changes in circumstances. However, the law does not provide further information on the penalties for failing to comply with this requirement. Article 17F of the UNCITRAL Model Law requires the ongoing disclosure of significant developments and pertinent information about preliminary orders, thereby improving transparency and responsibility. The Georgian Law does not explicitly define the responsibility for expenses and losses arising from provisional measures. According to Article 17G of the UNCITRAL Model Law, parties can be held responsible for paying fees and damages, if their actions are later found to be inappropriate.

This provision aims to discourage unnecessary or unfair requests.

The Georgian Law stipulates that, courts have the authority to implement and enforce interim measures, although it does not fully cover the issue of international enforcement. Articles 17H and 17I of the UNCITRAL Model Law provide that, interim measures will be recognised and enforced, independently of their origin. However, there are certain reasons for refusing recognition or enforcement, such as a failure to comply with security provisions or termination of the measure. By adopting this harmonized method, disputes between different jurisdictions are minimized and the reliability for all parties involved is addressed. [32]

The Georgian Law does not specify the involvement of courts in granting interim measures about arbitration. Under Article 17J of the UNCITRAL Model Law, courts have the authority to grant interim measures for arbitration proceedings, just as they would for judicial processes. This is done while considering the unique characteristics of international arbitration. This law guarantees that courts can efficiently facilitate arbitration,
providing further safeguards and solutions to the parties involved.[33]

[32] Georgian law "On Arbitration", Articles 17-23, 2009. https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://matsne.gov.ge/ru/document/download/89284/5/en/pdf&ved=2ahUKEwj4zYb0juGGAxWY9LsIHQdgDfwQFnoECB4QAQ&usg=AOvVaw0mtbmYRxHVNl6oOIwBPbe- accessed 3rd of June 2024.

[33] UNCITRAL Model Law on International Commercial Arbitration, Articles 17-17(J), (1985, with amendments in 2006). https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf accessed 3rd of June 2024.

Overall, The UNCITRAL Model Law provides a comprehensive and standardized framework for interim measures in arbitration that promotes predictability, fairness, and international enforceability. This framework strengthens the reliability and strength of the arbitration process, beyond the provisions of the Georgian Law.

5 Case law regarding International Standards and Practice on Interim measures

Since hearings about interim measure is mostly private and not accessible to the public, case law might not be rich in this area. But it is important to analyse different approaches to common and civil law systems in general about granting and enforcing interim measures. In the case of *Geido Van der Garde BV v. Sauber Motorsport AG*[34], The Victorian Supreme Court received an urgent application to enforce a Swiss final arbitral ruling ordering Sauber Motorsports to replace Geido van der Garde in the week before the 2015 Australian Formula 1 Grand Prix. The Dutch racing driver applied for emergency proceedings under Article 43(1) of the Swiss Rules of International Arbitration within days of being informed in November 2014, that Sauber Motorsports AG would no longer employ him. To prevent Sauber from acting, he requested temporary injunction. An emergency arbitrator approved his request waiting for February 2015 arbitration hearing. The Swiss Rules accelerated the final injunction in London. Van der Garde received a final injunction two weeks before the 2015 season from the solely arbitrator.

[34] Giedo Van Der Garde BV & Giedo Gijsbertus Gerrit Van Der Garde v. Sauber Motorsport AG, SCAI Case No. 300315ER-2014.

Van der Garde filed an application to Enforce Foreign Award with the Supreme Court of Victoria on 5 March 2015. Four days after the application was made, Justice Croft heard it and ordered the award enforced on 11 March 2015. Sauber filed an appeal immediately, which the Court of Appeal heard swiftly on 12 March 2015 and dismissed in the afternoon. This treatment of an application for urgent enforcement of a foreign award shows the court's commitment to the New York Convention and effective urgent interim relief.

Common law system also focuses and recognizes urgent nature of preserving the assets via injunctory relief. In the case of *Cetelem S.A. v. Roust Holdings Limited,* case illustrates the court's jurisdiction to grant urgent interim measures under section 44 of the Arbitration Act 1996.[35] Section 44(3) of the 1996 Act, which empowers the court to preserve evidence or assets in urgent circumstances, was permissive in this case. This view allowed the court to award provisional remedies beyond evidence and asset preservation. Section 44 subsections (4) and (5) have different legislative text than subsection (3). In non-urgent instances, the court can only act with tribunal approval or a party consent, and subsection (5) limits court action to situations, where the tribunal or designated authority cannot act effectively.

Due to asset preservation, claimant contended that section 44(3) gave the court authority over the order. He also argued that, if section 44(3) was restricted, section 37 of the Senior Courts Act 1981 could justify the order under its greater injunctive relief powers. On a true reading of section 44(3), the court found that urgent orders are limited to safeguarding evidence or assets. However, subsections (4) and (5) use different terminology, making this restrictive reading

[35] Cetelem S.A. v. Roust Holdings Limited, Judgment of the Court of Appeal of England and Wales 2005 EWCA Civ 618.

controversial. The ruling shows that, the courts prefer a broader definition to ensure justice, especially in urgent cases, where delay could cause severe injury.

Original judge's order was broader than subsection (3) allows, exceeding jurisdiction. Had the narrower foundation been articulated, the judge would likely have found the injunction necessary for asset preservation, making it within jurisdiction. The court supports interim measures to prevent irreparable harm, even if the legal basis requires revision.

Intermediate relief methods in arbitration are crucial to the court's role in filling gaps in arbitral tribunals' power and efficiency, as shown by the Hiscox Underwriting case. Practitioners seeking court assistance in arbitration disputes should carefully analyse both legislative provisions and broader judicial interpretations.

The case shows the court's discretion in urgent cases, when strict statutory interpretation could compromise parties' rights and assets. Maintaining the balance between efficient arbitration proceedings and rapid judicial involvement to prevent serious harm requires this discretion.

5.1 U.S case law

In the U.S. system, the current arbitration law, is the Federal Arbitration Act (FAA), which was established in 1925 and has remained largely unaltered. Although it is old, it has only been revised once to incorporate the New York and Panama Conventions into law. Articles 17A-17J have been incorporated into the statutes of just Florida and Georgia. The remaining five states have not done so, primarily because they passed their statutes before the 2006 amendments were made. Both the 1985 Model Law and FAA explicitly grant tribunals the power to issue

interim measures, albeit in a very broad manner. In California, parties have the right to ask for the enforcement of an interim measure in arbitration, based on the law that applies to the specific form of interim measure relief being requested.[36]

In the case of *TOYO TIRE HOLDINGS OF AMERICAS INC v. CONTINENTAL TIRE NORTH AMERICA INC,*[37] The case involves a dispute between Toyo Tire Holdings, Continental Tire North America, and Yokohama, all tire manufacturers and distributors, who were partners in GTY Tyre Co. ("GTY"). The dispute arose when Continental and Yokohama decided to terminate their collaboration with Toyo, citing Toyo's partnership with Bridgestone, a competitor. Toyo sought interim measures, specifically a preliminary injunction, to prevent the termination of their partnership and other related actions by Continental and Yokohama.

The core issue revolves around the district court's authority to grant interim measures, such as a preliminary injunction, in the presence of an arbitration agreement, that delegates the power to issue such measures to the arbitral tribunal. The Partnership Agreement included an arbitration clause stipulating that, disputes should be resolved through arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC). These rules allow for the imposition of interim relief by a court.

On January 25, 2010, the district court denied Toyo's request for a preliminary injunction. The court referred to the precedent set by the Simula case, which generally prohibits district courts from granting preliminary injunctions, when the parties have agreed on arbitration and the arbitrator had the authority to provide such relief. The court applied the principles of Simula,

[36] G. A. Bermann, "The UNCITRAL Model Law at the US State Level" (Columbia, 2023), 177.
[37] Toyo Tire Holdings of Americas Inc v. Continental Tire North America Inc GTY 100 (2010), United States Court of Appeals, Ninth Circuit.

concluding that it lacked jurisdiction to grant interim relief, because the arbitration agreement included provisions for the arbitrator to issue interim measures.

For Toyo to secure a preliminary injunction, it needed to demonstrate a strong likelihood of succeeding on the merits of its case. Additionally, Toyo needed to prove that it would suffer irreparable harm, if the injunction was not granted. The balance of harms must favor Toyo over the defendants, and granting the injunction should serve the public interest.

The appellate court recognized the potential for Toyo to suffer permanent harm but decided to remand the case rather than provide temporary injunctive relief itself. This indicates a nuanced approach, balancing the need for immediate protection of Toyo's interests with adherence to the arbitration agreement and respecting the arbitral tribunal's role.

The case underscores several important principles regarding interim measures in international arbitration within the U.S. legal framework. The court’s decision aligns with the principle that arbitration agreements, especially those specifying the power of arbitrators to grant interim measures, should be respected. This upholds the integrity and autonomy of the arbitration process. While U.S. courts can grant interim measures to support arbitration, they are cautious not to overstep when the arbitration agreement explicitly allows arbitrators to issue such measures. This balance ensures that courts support rather than, undermine the arbitral process.

The case highlights the strict criteria that must be met for a preliminary injunction to be granted. Even with a potential risk of irreparable harm, the courts will refer to the arbitral tribunal, if it has the authority to issue interim relief. The court’s decision reflects the broader public interest in enforcing arbitration agreements and ensuring that parties adhere to their contractual

commitments to arbitrate disputes. The court's smart move of upholding the case instead of issuing an order is also in line with international rules and norms for temporary measures in arbitration.

5.2 Georgian case law

In relation to arbitration, as stipulated in Article 23 of Georgian law on Arbitration, a party involved in arbitration proceedings has the right to request the court's assistance in implementing judicial enforcement measures, to enforce decisions made by the arbitral tribunal. Arbitration law regulation pertains to Article 17 (J) of the Model Law, which grants comparable judicial rights. As to Article 356[18] of Georgia's Civil Procedure Code, the court has the authority to utilise judicial enforcement means, when evaluating an application for the recognition of a foreign arbitral award. [38]During arbitration proceedings, the competent court ensures the fair application of enforcement measures in accordance with the Civil Procedure Code. While implementing enforcement measures, the compliance is established in accordance with the Civil Procedure Code, and all rights granted by the procedural code, but specific limitations that are not important to the goals of arbitration procedures, are upheld. The court assesses the rule in which enforcement methods are to be used and determines the relevant provisions based on Articles 191-199 of Georgia's Civil Procedure Code,

rather than following the Arbitration Law of Georgia.

[38] Article 356[18] of the Civil procedural Code of Georgia, Date of issuing: 14/11/1997, Source and date of publishing: Parliamentary Gazette, 47-48, 31/12/1997, Registration code: 060.000.000.05.001.000.301, Consolidated publications: 07/06/2024 https://matsne.gov.ge/en/document/view/29962?publication=164 accessed 5th of June 2024.

The modifications implemented in 2015 to Georgia's legislation also had an impact on Article 23, which defines the jurisdiction of the court to enforce the rulings of the arbitration panel. Prior to the modifications, the statute referred to Article 192 of Georgia's Civil Procedure Code, which granted enforcement authority until the formation of jurisdiction for arbitration tribunals. Following the modifications, the previously mentioned clause was abolished, and the court was granted the power to employ judicial enforcement measures solely, after the creation of arbitration tribunal jurisdiction. [39]

In the court ruling on interim measures No. AS-1665-2019 February 10, 2020, Tbilisi, Chamber of Civil Affairs, the application of I.K., who is the Chairman of the State Agency within the Ministry of Regional Development and Infrastructure of Georgia, was partially granted by the Civil Cases Chamber of the Kutaisi Court of Appeals on October 18, 2019.[40]

To protect the Department's arbitration claim, JSC "T.K.Z. Branch Todini S.P.A. F.T"; hereinafter referred to as the JSC, the Second Appellant, the Arbitration Respondent, or the Contractor was forbidden from selling, pledging, or encumbering the 171 vehicles registered under its name. This meant that the vehicles cannot be transferred to or used as collateral for any third parties. Furthermore, a seizure was imposed on the money held in the bank account under the name of the JSC at "S.B.", up to a maximum of GEL 113,105,997.00, EUR 5,415,262.38, and USD 4,621,461.62. However, this measure could not exceed 50% of the total amount accessible or deposited in the account.

[39] O. Machaidze, "Conditions for the Use of Security Measures and Notice-Execution in Arbitration Proceedings" (Tbilisi, 2019), 60.
[40] Case No. AS-1665-2019 February 10, 2020, St. Tbilisi**,** Chamber of Civil Affairs.

The Department's request to impose a seizure on the money amounting to GEL 113,105,997, EUR 5,415,262.38, and USD 4,621,461.62, held in the bank account at "S.B." by the joint venture T.C.G..... S.p.A - T.C.I. E. & C.Co. L., was not fulfilled.

The Applicant's request to place a seizure on the monetary claims of the joint venture T.C.G..... S.p.A - T.C.I. & C.C.L., against the Department, which arose from the contract EWHIP/CW/ICB-03, dated March 11, 2013, for the construction of the new Zestafoni-Kutaisi bypass road on the E-60 highway, in the amounts of GEL 113,105,997, EUR 5,415,262.38, and USD 4,621,461.62, was denied. Furthermore, the Department's demand not to allow the joint venture T.C.G..... S.p.A - T.C.I. & C.C.L. from asserting and obtaining any sum for quality assurance and other payments was not fulfilled.

The Department's request to prohibit payment of any amount, up to a total of GEL 113,105,997, EUR 5,415,262.38, and USD 4,621,461.62, for any claims submitted or to be submitted by the joint venture T.C.G..... S.p.A - T.C.I. & C.C.L. under the contract EWHIP/CW/ICB-03, dated March 11, 2013, for the construction of the new Zestafoni-Kutaisi bypass road on the E-60 highway, was not granted. After the applicant made the first claim, the Department was not adequately managing the partial execution of sought expertise in an unbiased manner, as expected by public disclosure. Therefore, there was a chance that the department's legal interests may be compromised or made impossible to carry out. This is because there was a significant risk that, the responsibility of arbitration may obstruct, change, or weaken the department's ability to fulfil its obligations as required by law.

According to the department’s position, the claimant's private interests in the first claim may be significantly disadvantaged by these institutional settings. Based on the declarant's statement, there was a real possibility that, the judicial response to the arbitrator's address, while the Department was investigating the execution of the requested expertise, could lead to assets being compromised and financial liabilities being incurred. This could then affect the Department's ability to fulfil its requests. Consequently, the state's interests may suffer severe harm, which was seen in the public budget's disregard for substantial financial obligations total GEL 113,105,997, EUR 5,415,262.38, and USD 4,621,461.62.

According to the court’s analysis, an examination of the court's legal and financial records, considering the analysis of lawsuits and business operations, indicates the need to investigate the court's decision on November 11, 2019. This decision upheld the judicial rulings of the Kutaisi Court of Appeals, civil affairs Chamber rendered on October 18, 2019. The Department emphasises its objective of fully implementing the received resolutions, as well as avoiding interference from its reconsideration of these resolutions, as stated in the first clause of Special Law 23, Section 356[18] of the Civil procedure Code of Georgia, Paragraphs 192, 198, and 191. To ensure the effective implementation of the Department's expertise, it is essential to establish legal priorities. This includes clearly stating in the declaration the factual circumstances that could hinder the execution of resolutions or impede the completion of decisions. Additionally, it is important to specify the Department's involvement in these investigations, aligning with the intentions of the declarant and ensuring that all information has been disclosed in a legitimate manner.

The Department's expertise relies on the assumption that, the respondent to the judiciary's claims can take actions to fulfil the author's ownership interests in judicial decisions, which ultimately hinders the implementation of received resolutions. When the court relies on the Department's competence, it does not assess the legal validity and appropriateness of the judiciary itself. Instead, it examines it with judicial scrutiny to guarantee, that judicial requests may be met (CFC 16-354-09, 05.02.09).

The court reviewed the assessment made by the arbitration chamber, which fully determines the Department's implementation of expertise for the purposes of the arbitration court and guarantees the future enforcement of the arbitration court's decisions, ensuring the legal conclusion of the respondent's responsibilities. Therefore, there are no further preferences for the utilisation of more knowledge and no established preferences for the termination of existing ones; the initial claimant cannot ignore the Department's competence in relation to the utilisation of already employed knowledge and the extent of additional knowledge. The court disapproves of the use of the arbitration court's expertise, because it is considered irrevocable. The court does not anticipate the distinctiveness of international arbitration proceedings and their compliance with the New York Convention. Similarly, it was unclear why the validity of the arbitration decision was being questioned, as it was not limited by the provided notification.

In another court ruling- Court Order, Case No. 020298820700113291, Case No. 2/3-353-20. May 28, 2020, Kutaisi Court of Appeals, Civil Chamber. On May 27, 2020, a representative of the State Sub-Agency under the Ministry of Regional Development and Infrastructure of Georgia – the Roads Department of Georgia, I. K., filed a motion to the Kutaisi Court of Appeals. The motion sought an injunction to secure an arbitration claim and requested that "R. B. A." be prohibited from selling, mortgaging, or otherwise encumbering, to the benefit of third

parties, the vehicles registered in the name of the branch of the foreign enterprise "R. B. A. LLC" registered in Georgia to the extent of 23,513,351.72 euros and 46,686,945.29 GEL in favour of the Roads Department of Georgia.[41]

According to the applicant, on December 12, 2013, a contract was signed between the State Sub-Agency under the Ministry of Regional Development and Infrastructure of Georgia - the Roads Department of Georgia and "R. B. A. LLC" for the construction of a section of the Samtredia-Grigoleti highway (km 0+000 - km 11+500) (Lot) on the E-60 expressway. The contract was based on the Pink Book of FIDIC (International Federation of Consulting Engineers).

The value of the contract was 153,498,019.53 GEL (one hundred fifty-three million four hundred ninety-eight thousand nineteen GEL and fifty-three tetri). When the contract was signed, the contractor presented the Department with a performance guarantee issued by "Joint Stock Commercial Industrial & Investment Bank" (PSC PROMINVESTBANK) on December 11, 2013 (No.: GA/13/2103/SS) amounting to 6,785,342.57 euros, which covered 3,392,671.29 euros and 7,674,900.98 GEL.

The contractor continually violated the obligations stipulated in the contract. The engineer issued two correction notices to the contractor, urging them to fulfil their contractual obligations, but these efforts were unsuccessful. Nearly three years after the commencement of work, the contractor had completed only 23.3% of the total work. On July 18, 2017, the Department sent the contractor a termination letter. On October 2, 2017, in accordance with

[41] Court Order, Case No. 020298820700113291, Case No. 2/3-353-20. May 28, 2020, Kutaisi Court of Appeals, Civil Chamber.

clause 15.2 of the General Conditions of the Contract, the Department confirmed the termination of the contract, which then became effective.

It is noteworthy that, according to the contract, the final body for dispute resolution is international arbitration, which would be conducted under the rules established by the International Chamber of Commerce (ICC). The arbitration was to take place in Paris, France, and the applicable law for the contract was the legislation of Georgia.

Considering that the amount claimed from the contractor in arbitration is substantial (23,513,351.72 euros and 46,686,945.29 GEL, including the portion of the advance payment from the state budget which the contractor has not returned, amounting to 18,388,910.51 euros). According to the claimant, there was a real risk that the respondent may dispose of their assets, transfer them to third parties, or encumber them with any rights in favor of third parties to avoid civil liability. Therefore, to safeguard the legitimate interests of the Department, it was advisable for the Georgian court to apply measures to secure the arbitration claim.

The applicant explained that, not applying measures to secure the arbitration claim, would make it difficult to enforce any future decision by the international arbitration tribunal, as the contractor had effectively refused to compensate for the damages, including the repayment of the unreturned advance, which was explicitly required by the contract and thus was not a disputed matter.

The Chamber noted that, a securing measure is applied when the court has a well-founded suspicion that not applying it would jeopardize the enforcement of the decision. Moreover, the burden of proving the need for securing the claim is upon the applicant, meaning the applicant

must justify the necessity for securing the claim, and the court can accept the validity of this justification. Therefore, the applicant's argument that securing the arbitration claim is necessary in this case was legally justified.

The Chamber explained that, according to Article 191.1 of the Civil Procedure Code, a securing measure serves as a guarantee for protecting the property rights of natural and legal persons and aims at the full and actual restoration of their violated rights. In essence, the importance of a securing measure is that it protects the claimant's legitimate interests in case of bad faith or malpractice from the respondent.

The Chamber considers that, the request for applying measures to secure the arbitration claim (specifically the part about freezing bank accounts) was partially justified. Furthermore, when deliberating on the specific measure to be applied, the Chamber notes that a fair balance must be maintained between the claimant's right (to secure the future realization of a court-affirmed right) and the respondent's interest (to ensure that the securing measure does not unjustifiably infringe the respondent's rights).

Accordingly, the Chamber believed that the request to freeze the bank accounts should be partially granted. Fully freezing the accounts of a business entity might impede the debtor's ability to function as an entrepreneur and fulfill financial obligations to third parties or obligations confirmed by a court's legally binding decision. This would unacceptably infringe upon the interests of not only the respondent but also third parties. Therefore, a freeze should be placed on 50% of the funds present or deposited in the bank account at JSC VTB Bank Georgia, held by the branch of the foreign enterprise "R. B. A. LLC" registered in Georgia, not

exceeding 23,513,351.72 euros and 46,686,945.29 GEL. The Chamber believed that this solution ensures a more balanced protection of the parties' rights, which is reasonable and fair.

The court emphasized that, although the measure to secure the claim represents a form of temporary relief used by the court to avoid potential obstacles to the enforcement of a judgment and to facilitate its enforcement, which implies some restriction on the respondent's rights or interests, it should not be used as an unconditional measure to restrict the respondent's rights. The application of the measure to secure the claim should not violate the principle of fair balance and proportionality between the parties.

The Chamber analysed that, applying the measures to secure the arbitration claim in this manner would protect the rights of both parties: on one hand, ensuring that the arbitration claimant's main concern—that a favourable decision will not remain unenforced—is addressed, and on the other hand, ensuring that the respondent's rights as a business entity are not disproportionately restricted by imposing limitations on property, that exceeds the value of the dispute. Moreover, the branch of the foreign enterprise "R. B. A. LLC" in Georgia is authorized to use these vehicles within the scope of contracts signed with the Department for the purpose of implementing other ongoing projects in Georgia.

Both cases illustrate the balance between the need of granting the interim measure, versus the need to protect investors' interests as a weaker party compared to the state and not to "punish" them excessively, than it is needed to. Highlighting, the size and weigh of the imposed measure is important in the sense not to "scare" or predate the potential investors from the market, especially, in the post-soviet, developing countries like, Georgia.

Conclusion: General remarks and Recommendations for Georgian law on Arbitration

In this thesis, I tried to show the importance and link between the instrument of interim measures and successful recognition/enforcement of Arbitral awards. Furthermore, international commercial arbitration has become an attractive tool for business individuals, but it still faces certain challenges as compared to litigation. However, most individuals discover that it lacks reliability due to various factors. Despite these circumstances, there is currently a heightened awareness regarding arbitration, as well as a deeper comprehension of its futility. However, the parties are still given recognition and enforcement powers, which enhanced the reliability of the arbitration process.

Furthermore, the effectiveness of the recognition and enforcement tool has been further illustrated through the implementation of interim measures to safeguard assets and possessions. Moreover, the utilisation of interim remedies is essential for ensuring the recognition and enforcement of an arbitral ruling. Alternatively, one could consider this as an unjust action carried out by the victorious party to regain a previously restricted entitlement. Using this technology, we have observed that arbitration is becoming more reliable, approaching the level of dependability seen in litigation. This tool ensures that the procedural rights of the parties involved in the dispute are protected.

This thesis highlights the crucial significance of interim measures in the arbitration process, emphasising their value in effectively enforcing arbitral rulings. Interim measures are crucial for safeguarding assets and evidence during arbitration, guaranteeing that the proceedings result in decisions, that can be enforced. The lack of strong interim measures can greatly weaken the effectiveness of arbitration as a method for resolving disputes. This is because it

creates the possibility of assets being disposed or evidence being tampered with, which in turn reduces the reliability and efficiency of arbitral rulings.

The thesis's comparative study reveals significant discrepancies between the Georgian Law on Arbitration and international norms, including the UNCITRAL Model Law. The Georgian system is lacking in providing specific laws and precise criteria for granting interim measures, resulting in gaps and uncertainty throughout arbitral processes. Moreover, the current legal structure in Georgia lacks sufficient provisions for acknowledging and implementing temporary measures in international contexts, which results difficulties for arbitration disputes involving many jurisdictions.

To address these problems and improve the Georgian arbitration system, several crucial suggestions are put forward. First and foremost, it is necessary to review the Georgian arbitration law to incorporate thorough provisions for interim measures, like those found in the UNCITRAL Model Law. This modification should clearly outline the various categories of temporary actions that can be taken, the specific requirements for granting them, and the steps involved in ensuring the implementation. Offering comprehensive instructions would enhance clarity and foreseeability for arbitral tribunals and engaged parties in arbitration, so enhancing the credibility of the procedure.

Furthermore, it is crucial to improve the influence of Georgian courts in strengthening the arbitration process. Courts should be given the power and duty to strongly uphold arbitration, particularly when it comes to awarding and enforcing interim measures. Implementing explicit procedural safeguards and objective criteria for courts can effectively mitigate the risk of arbitrary rulings, so guaranteeing equity and openness in the judicial endorsement of

arbitration. The support from the judiciary is crucial in upholding the integrity and effectiveness of the arbitration system. On the other hand, courts must not be allowed to "shake" the privacy and confidentiality of Arbitration proceedings.

Furthermore, it is imperative for Georgia to harmonise its arbitration legislation with global benchmarks, specifically the New York Convention and the UNCITRAL Model Law. Conforming to these criteria will improve the ability to enforce arbitral rulings and interim remedies internationally, offering increased security and assurance to foreign investors and participants in international commercial arbitration. Furthermore, this harmonisation will enhance Georgia's appeal as a venue for international arbitration.

Moreover, it is crucial to make concerted endeavours to enhance knowledge and comprehension of arbitration among business executives and legal practitioners in Georgia. Education activities, such as programs, workshops, and seminars, can spread knowledge about the advantages and methods of arbitration, including the strategic use of interim measures. Increased awareness will incentivize firms to choose arbitration, confident in its reliability and efficiency as a method of resolving disputes.

Furthermore, adding written regulation of interim measures in the New York Convention would establish a more organised and foreseeable framework for parties involved in arbitration proceedings. Providing more explicit instructions on the various temporary actions that can be taken, the requirements for granting them, and the steps for requesting and enforcing these actions will enhance uniformity and equity in the field of arbitration. Implementing a stronger regulatory framework for interim measures in the New York Convention would enhance the

overall goals of advancing international arbitration as a Reliable and successful method of resolving international conflicts.

Moreover, the thesis examines how the U.S. legal system and case law, which are based on a common law tradition, offer valuable perspectives on the successful granting and execution of interim measures. The U.S. legal system provides practical illustrations of how courts can assist in arbitration processes through its comprehensive body of case law on interim relief and enforcement. Upon analysing U.S. case law, it becomes obvious there is a strong system in place for issuing and enforcing temporary measures. This system can be used as a model for improving Georgian arbitration law.

The thesis also examines the dispute settlement approach of the civil law system, which, although distinct from the common law system, provides important procedural protections and comprehensive legal regulations for granting and enforcing interim measures. The incorporation of these components from civil law systems, into Georgian arbitration legislation can establish a harmonious and comprehensive structure, that facilitates domestic as well as international arbitration proceedings.

To summarise, the Georgian arbitration framework can be greatly improved by incorporating specific provisions for interim measures, strengthening judicial assistance, aligning with global norms, raising awareness and education, and enacting specific legislative changes. These measures will boost the trust of local and international businesses in arbitration, promoting a stronger and more equitable system for resolving disputes in Georgia. Implementing these ideas successfully will establish Georgia as an approachable and appealing location for arbitration, so contributing to its legal and economic progress on the way to European Union.

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