

IVANE JAVAKHISHVILI TBILISI STATE UNIVERSITY

NATIONAL CENTER FOR ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution

Yearbook

2018-2019

Competence of Arbitration and National Courts to Apply Arbitral Interim Measures

The paper discusses one of the crucial institutes of arbitration proceedings - interim measures and related thereto aspects. Subject to analysis is the competence of arbitral tribunal and court of law in ordering interim measures in arbitration and the grounds for restriction of their powers.

The paper also offers the review of the evolution of the institute of interim measure and modern international trends. Particular attention is paid to the analysis of the efficiency of interim measures applied by court of law and arbitral tribunal.

Keywords: *interim measure in arbitration, arbitral tribunal, national courts, competence of the arbitral tribunal and national courts, international competence of georgian courts.*

1. Introduction

The institute of interim measure plays an important role in arbitration proceedings, allowing for the maintenance of the existing factual and legal statuses in the course of dispute resolution.¹ The institute of interim measure in arbitration is developing on a day-to-day basis and is acquiring increased importance for arbitral proceedings. When claimant's claim is not secured on the basis of an agreement entered into by and between the parties, upon initiation of a dispute a claimant party always tries to reach the imposition of an interim measure on the assets of the opponent party to ensure the enforcement of a future award.

The institute of interim measure has not very long-standing history, inter alia, in arbitral proceedings, the initial version of UNCITRAL Model Law on International Commercial Arbitration² (UNCITRAL Model Law) limited itself only to general regulation.³ The amendments made to Model Law in 2006 provided for detailed regulation of the matters related to interim measures in arbitration.⁴

When ordering an interim measure it is important to determine whether which authority is empowered to make a decision on ordering an interim measure, whether or not this power is subject to any limitation and the interim measure of which authority is the most efficient and allows for the attainment of the goal.

Consequently, this paper aims at the analysis of the competence of the authority making a decision on ordering an interim measure, the scope of limitation of this power and the matters related to the efficiency of applied interim measures.

The article is based on comparative law analysis of Georgian legislation, Model Law and arbitration law of those countries, that are based on and share the regulation of the Model Law. The review will also cover the analysis of arbitration rules of globally recognized permanent arbitration institutions.

* Ph.D Student and Visiting Lecturer at Iv. Javakhishvili Tbilisi State University, Faculty of Law, Assistant to the Chairman of Tbilisi Arbitration Institute.

¹ *Van Uden BV v. Kommanditgesellschaft in Firma Deco-Line*, C – 391/95 (1998).

² UNCITRAL Model Law on International Commercial Arbitration, 1985.

³ *Born G.B.*, International Commercial Arbitration, Vol. II, 2009, 1949-1951.

⁴ UNCITRAL Model Law on International Commercial Arbitration, 1985 as Amended in 2006. Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006, Section 4 (b).

2. History of Development of Interim Measures in Arbitration

2.1. International Trends of Development

Application of interim measures in arbitration can be regarded as a recent accomplishment despite the fact the international tribunals were empowered to apply interim measures.⁵ However, the domestic legislation of the countries did not provide for the option of ordering interim measures by arbitral tribunal⁶ as it was believed, that ordering interim measures was the sole competence of the court of law,⁷ and, on the other hand, if a party applied to the court for ordering an interim measure, it was believed, that the party concerned would lose the right to apply to the Arbitration for the resolution of the dispute on merits.⁸

It should be mentioned that this approach has essentially changed lately and arbitral tribunals were granted the right to apply interim measures,⁹ however, in some countries the above restriction is still maintained, for example, Article 818 of the Italian Code of Civil Procedure does not entitle the arbitrators to grant interim measures of protection.¹⁰ Similar approach is embodied in the Arbitration Law of the People's Republic of China.¹¹

2.2. Development Trends in Georgia

The first regulation of arbitration in Georgia is associated with the Law of Georgia on Private Arbitration of 1997, which did not provide for an interim in arbitration at legislative level and allowed only for securing evidences through the court of law. According to Article 23 of this Law "The arbitral tribunal shall apply to the court of law on its own initiative or at request of a party to make a decision on securing evidences." As already mentioned, the Law did not empower the arbitral tribunal to apply interim measures, but it did not provide for any prohibition either. The analysis of arbitration and judicial practice makes obvious that there were cases, when arbitration regulations provided for ordering interim measures in arbitration, and provisional measures, granted by an arbitral tribunal were admissible for the court, what is clearly evidenced by one of the Supreme Court rulings.¹² According to this Ruling the court found legal the interim measure, granted by tribunal due to the following circumstances: 1) the interim measure was envisaged by the regulation of dispute reviewing arbitral tribunal; 2) the Law of Georgia on Private Arbitration did not prohibit ordering interim measures. According to the explanations of the Court: "When there is an arbitration agreement for the resolution of commercial disputes, a dispute is resolved via the alternative dispute resolution mean - through arbitral tribunal, when there should be the same guarantees of comprehensive protection of violated rights and interest of the parties, as they are in general courts for the resolution of similar disputes. This very opinion underlies the decision of the parties to decide on Arbitration as the most suitable authority. To this end, the tribunal is entitled and required within the framework of the law and regulations, to order interim measures for the enforcement of the award, made with regard to the dispute."¹³ As explained by the Court this judgment is based on UNCITRAL Model Law, according to Article 17 of which the tribunal may order an interim measure. Respectively, even before the adoption of the new Law ordering interim measures by tribunal was admissible in arbitral proceedings. As

⁵ *Rosenne S.*, Provisional Measures in International Law: the International Court of Justice and the International Tribunal of the Law of Seas, 2005, Article 47 on the ICSID Convention authorizes ICSID tribunals to order provisional measures.

⁶ *Born G.B.*, International Arbitration: Law and Practice, 2012, 203.

⁷ *Moses M.L.*, The Principles and Practice of International Commercial Arbitration, 2nd ed., 2012, 105.

⁸ Ibid.

⁹ *Born G.B.*, International Arbitration: Law and Practice, 2012, 204.

¹⁰ Italian Code of Civil Procedure, Article 818, can be accessed at <www.jus.uio.no/lm/italy.arbitration/818.html>.

¹¹ Arbitration Law of the People's Republic of China, Article 68, can be accessed at <www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm>.

¹² See Ruling of the Supreme Court of Georgia of 27.05.2007 in the Case №AS-827-1190-06.

¹³ See Ruling of the Supreme Court of Georgia of 27.05.2007 in the Case №AS-827-1190-06.

regards the Law on Arbitration, which was adopted in 2009 and is based on UNCITRAL Model Law,¹⁴ it follows the regulation of Model Law and regulates matters, related to interim measures in arbitration by its Articles 17-23.

According to the Law a claimant party is entitled to apply both to the court of law and arbitral tribunal for ordering an interim measure.¹⁵ Both authorities are entitled and have relevant competence to make a decision on ordering interim measures, what is fully compatible with the Model Law regulation, which empowers both authorities to make a decision on ordering interim measures.¹⁶ Hence, a claimant party is entitled, unless it is contrary to arbitration agreements to chose on a case-by-case basis, whether the interim measure, ordered by which authority will be the most expedient, efficient and result-oriented.

3. Powers of Arbitral Tribunal in Ordering Interim Measures

3.1. Powers of Arbitral Tribunal in International Practice

When ordering an interim measure in arbitration by arbitral tribunal the basis of the powers of the tribunal should be established and also, it should be assessed how expedient and efficient mean of attainment of the goal is the interim measure, ordered by arbitral tribunal.

When defining the power of tribunal to order an interim measure, important is the law applicable in the place of arbitral proceedings and an arbitration agreement entered into by and between the parties.

As already mentioned it was believed in international arbitration practice for quite a long period, that arbitral tribunal was not entitled to order an interim measure, or this power was limited and was the sole prerogative of the court of law.¹⁷ This approach served the public law purposes,¹⁸ for private institution (Arbitration) not to restrict the interests of the parties in the dispute without sound grounds. However, according to current regulation the majority of legal systems give preference to the authority to order interim measures. Some authors believe, that Arbitral Tribunal is the best "forum" to define the necessity of ordering interim measures, also whether which measure will be reasonable for the case concerned.¹⁹ This opinion is based on the situation, that dispute reviewing tribunal is aware of case materials, is in the position to assess the prospective of meeting the claim and make a relevant decision.

3.2. Powers of Arbitral Tribunal According to Georgian Law

As regards the Law of Georgia on Arbitration, being influenced by UNCITRAL Model Law, it explicitly admits the authority of arbitral tribunal to order an interim measure²⁰. In 2015 certain amendments were made to the Law of Georgia on Arbitration. These amendments were conditioned by "the incompatibility of certain provisions of the Law of Georgia with UNCITRAL Model Law on International Commercial Arbitration, also a number of deficiencies and translation errors".²¹ The amendments also

¹⁴ *Binder P.M.*, Comments on the Law of Georgia on Arbitration, Georgian Law Review, №10/2007-2/3, 2007, 182-202 (in Georgian); *Tkemaladze S.*, Public Order as Grounds for Cancellation of an Award or Refusal to its Recognition-Enforcement (Short Overview of Georgian Practice), Georgian Business Law Review, №2, Tbilisi, 2013, 14-15 (in Georgian).

¹⁵ Law of Georgia on Arbitration, 02.07.2009, Legislative Herald of Georgia, Article 17, 23.

¹⁶ UNCITRAL Model Law, Articles 17, 17 J.

¹⁷ *Lew J.D.M., Mistelis L.A., Kroll S.M.*, Comparative International Commercial Arbitration, Kluwer Law International, 2003, 588.

¹⁸ *Blackarby N., Partasides C., with Redfern A., and Hunter M.*, Redfern and Hunter on International Arbitration, Oxford edition, 2015, 445.

¹⁹ *Lew J.D.M., Mistelis L.A., Kroll S.M.*, Comparative International Commercial Arbitration, Kluwer Law International, 2003, 588.

²⁰ *Binder P.M.*, Comments on the Law of Georgia on Arbitration, Georgian Law Review, №10/2007-2/3, 2007, 192 (in Georgian).

²¹ Explanatory Note on Amendment of the Law of Georgia on Arbitration.

covered interim measures in arbitration and their recognition and enforcement²². Before the amendments, as per Article 17 "Against an application of a party, the tribunal shall order the party to undertake the action envisaged by an interim measure through its written award, within a reasonable period of time." After the amendment the following stipulation was appeared in the Law: "Based on an application of a party the tribunal is authorized, to oblige a party through its written award, within a reasonable period of time." According to the explanations of the authors of draft amendments, the according to initial version of this article the tribunal was required to order an interim measure. As a result of the amendments, after adding the following wording to the article: "the tribunal is authorized" now the tribunal is not required but rather entitled to order an interim measure.²³ Based on both initial and amended versions of the Law of Georgia on Arbitration it can be explicitly said, that Georgian legislation recognises the authority of tribunal to order interim measures in arbitral proceedings, what is fully compatible with international standards.

As per Article 17.1 of the Law of Georgia on Arbitration " Unless otherwise provided for by an arbitration agreement, before the commencement of arbitral proceedings or at any time during such proceedings but before an arbitration award is made, a party may request the tribunal to grant an interim measure." Based on this stipulation, a motion of a party on ordering an interim measure may contradict the arbitration agreement, meaning that the parties are entitled to exclude interim measures in arbitration proceedings by their arbitration agreement both before and after the commencement of the arbitral proceedings.²⁴ The UNCITRAL Model Law²⁵ also provides for granting this power to the parties and, in general, this approach is commonly acknowledged in international arbitration.²⁶ Granting such right to the parties stems from the fundamental principle of arbitration, under which principle the arbitration proceedings are based on party autonomy. An agreement entered into by and between the parties may not directly preclude tribunal from ordering interim measures; however, if parties agreed upon such arbitration rules, which prohibit the application of interim measures, the authority of tribunal may be excluded in this way as well.

4. Competence of Court in Ordering Interim Measures

4.1. Competence of Court in International Practice

It is explicitly recognised in international practice, that courts of law are duly competent to order interim measures in arbitration proceedings.²⁷ This option is the exemption, when the court of law may intervene in arbitration proceedings.²⁸ This authority of the court of law is recognized and confirmed on the basis of Article 17 (j) of the Model Law. This approach of the Model Law is substantially upheld by domestic legislations worldwide. For example, according to Swiss Law on International Private Law, both tribunal and the court are competent to order interim measures²⁹. The UK Arbitration Act recognises the power of the court to order interim measures only in the case of existence of certain preconditions, when there is an urgency or tribunal is not in the position to duly secure thr claim.³⁰

²² Ibid.

²³ Ibid.

²⁴ *Segesser G., Kurth Ch.*, Interim Measure, International Arbitration in Switzerland, A Handbook for Practitioners, Edited by *Kaufmann-Kohler G., Stucki B.*, 2004, 71.

²⁵ UNCITRAL Model Law, Article 17; *Roth M.*, Commentary on the UNCITRAL Modal Law, Practitioner's Handbook on International Commercial Arbitration, Edited by *Weigand F. B.*, 2nd ed., Oxford University Press, 2010, 1032.

²⁶ *Lew J.D.M., Mistelis L.A., Kroll S.M.*, Comparative International Commercial Arbitration, Kluwer Law International, 2003, 588.

²⁷ *Born G.B.*, International Arbitration: Law and Practice, 2012, 213.

²⁸ Ibid.

²⁹ Swiss Law on Private Law, Articles 183 and 185.

³⁰ See: UK Arbitration Act, 1996, para. 44.

4.2. Competence of Georgian Courts

According to Article 23 of the Law of Georgia on Arbitration a party to arbitral proceedings is entitled to apply to the court for an interim measure. The regulation of the Arbitration Law is based on Article 17 (j) of Model Law, which recognises similar authority of the court. According to Article 356¹⁸ of the Civil Code of Georgia "When there is an arbitration agreement between the parties, the court has the power to order an interim measure with regard to an arbitration action on the basis of claimant's application."

Under Georgian law the competent court for ordering an interim measure in arbitral proceedings is the Court of Appeals.³¹ When granting an interim measure the Court is guided by the Code of Civil Procedure of Georgia and exercises all the powers, delegated thereon by Procedure Code, except for certain exemptions, which cannot be linked with arbitral proceedings.³² Consequently, the court is empowered to grant interim measures prescribed by the Code of Civil Procedure and not the Law of Georgia on Arbitration.

The amendments made to the Law of Georgia on Arbitration in 2015 covered Article 23 as well, which provides for the authority of the court with regard to interim measures in arbitration. Before the amendments the Law excluded the authority of the court to rely on Article 192 of the Code of Civil Procedure of Georgia and order an interim measure before filing an arbitration claim (preliminary order (pre-interim measure)). After the amendments this restriction was revoked and the court was granted with the right to grant interim measures before filing arbitration claim as well, based on application of a party.³³ Preliminary interim measure is an important institute, as the impossibility of granting interim measures before filing an arbitration claim may turn particularly detrimental for a party. If the court grants an interim measure in arbitration court, the claimant is required to file an arbitration claim within a period of 10 days, otherwise the court will revoke the interim measure under Article 192.2 of the Code of Civil procedure on its own initiative or on the basis of a motion of the defendant party.

When granting an interim measure the court verifies the validity of the arbitration agreement based on Article 356¹⁸ of the Code of Civil Procedure of Georgia. In one of its cases the Kutaisi Court of Appeals refused granting an interim measure because there existed no valid arbitration agreement between the parties despite the fact, that arbitral proceedings were already pending at the London Court of International Arbitration with regard to the claim concerned.³⁴

The mention should as well be made of the stipulation of the Georgian Arbitration Law, under which stipulation the court enjoys same powers with regard to interim measures in arbitration proceedings as it has with regard to interim measures in judicial proceedings, regardless of the venue of arbitration. This provision means that Georgian courts apply the provisions of Article 23 of the Law of Georgia on Arbitration with regard to interim measure in arbitration not only when the venue of arbitration is on the territory of Georgia, but also when arbitral proceedings are conducted outside Georgia.³⁵ Such regulation is fully compatible with contemporary international arbitration trends.³⁶ According to this regulation, when the venue of arbitral proceedings is, say, in France, and the assets of the respondent are located in Georgia, the claimant party is entitled to file a motion with the Georgian court and request freezing orders with regard to these assets, which assets will then become subject to foreclosure. This, of course, enhances the efficiency of arbitral proceedings. On 29 July, 2014 the Kutaisi Court of Appeals made a case-law ruling, when an interim measure was granted

³¹ See: Law of Georgia on Arbitration, 02.07.2009, Legislative Herald of Georgia, Article 2.1(a); 23.

³² See: Law of Georgia on Arbitration, 02.07.2009, Legislative Herald of Georgia, Article 23.3; Civil Procedure Code of Georgia, 14.11.1997, Legislative Herald of Georgia, Article 356¹⁸.2, according to which the court is guided by Chapter XXIII of the Code of Civil Procedure of Georgia, excluding Article 198.2 (f) and (i), according to which subparagraphs an interim measure may constitute suspension of a disputed act of central authority, local self-government authority, organization or official or suspension of the enforcement of an enforcement writ in cases initiated on the basis of the Law of Georgia on Relationships Originating from Using Dwelling Area or with regard to which an application is filed on renewal of case proceedings.

³³ Explanatory Note on Draft Law of Georgia on Amendment of the Law of Georgia on Arbitration.

³⁴ See: Ruling of the Kutaisi Court of Appeals in case №2/B-1085-2016, dated 16.11.2016.

³⁵ Ruling of the Supreme Court of Georgia in the Case №AS-538-511-2013, dated 03.07.2013.

³⁶ *Born G.B.*, International Arbitration: Law and Practice, 2012, 213.

and freezing order was laid on the ship, owned by the respondent. The main dispute was reviewed by the London Maritime Arbitrators Association (LMAA).³⁷ The award of arbitral tribunal became subject to recognition-enforcement on the territory of Georgia on the basis of the Ruling of the Supreme Court of Georgia, dated 9 July, 2014.³⁸ After this award the Georgian courts made more than one decision on granting interim measures in disputes, which were tried on merits outside Georgia.³⁹

Furthermore, the account should as well be taken of the fact, that when establishing its right to order an interim measure, the Georgian court refers both to Article 23 of the Law of Georgia on Arbitration and Article 20 of the Law of Georgia on International Private Law, under which Article the Georgian courts are competent to order interim measures when the measures concerned are to be enforced in Georgia or when Georgian courts have international jurisdiction. It should as well be mentioned that insofar as the Arbitration Law is a special law with regard to arbitral proceedings and provides for the competence of the court of law, there is no need for the court to apply the provisions of the Law on International Private law.

Law of Georgia on Arbitration does not stipulate whether the parties are entitled to exclude the power of the court with regard to provisional measures by virtue of an arbitration agreement. According to international sources such power of the parties is recognized,⁴⁰ however such agreement may become unenforceable under certain preconditions.⁴¹ Georgian arbitration practice should develop in this direction as well - if the law empowers parties to exclude ordering interim measures in arbitration by an arbitral tribunal it is reasonable for similar option to exist with regard to the court of law with due consideration of the international practice.

5. Efficiency Analysis of Interim Measures Ordered by Arbitral Tribunal and Court of Law

Whereas the competence of arbitral tribunal to order an interim measure is not exclusive⁴² and an interim measure can be ordered both by tribunal and the court of law, there definitely is some competition between them - the interim measure, ordered by which of these authorities is more expedient and efficient.⁴³ Both authorities have inherent beneficial and negative impacts. A party should make choice between them on an case-by-case basis, however it is possible to pre-define some general characteristics:

5.1. Enforcement of an Interim Measure

According to general principle an arbitral tribunal is not entitled for an interim measure ordered thereby to be directly enforced without its recognition-enforcement by the court.⁴⁴ Enforcement power is the competence of the court.⁴⁵ Similar regulation is provided for by the UNCITRAL Model Law⁴⁶ and Swiss legislation⁴⁷. And when an interim measure in arbitration is ordered by court, the court itself is entitled to issue an enforcement writ.

³⁷ Ruling of the Kutaisi Court of Appeals in the Case №2/B-674-2013, dated 29.07.2013.

³⁸ Ruling of the Supreme Court of Georgia in the Case №A-544-Sh-17-2014, dated 09.07.2014.

³⁹ Ruling of the Kutaisi Court of Appeals in the Case №2B-985, dated 09.10.2017.

⁴⁰ *Born G.B.*, International Commercial Arbitration, Vol. II, 2009, 2051.

⁴¹ *Ibid.*

⁴² *Born G.B.*, International Commercial Arbitration, Vol. II, 2009, 2051.

⁴³ *Moses M.L.*, The Principles and Practice of International Commercial Arbitration, 2nd ed., 2012, 106.

⁴⁴ *Born G.B.*, International Arbitration: Law and Practice, 2012, 206.

⁴⁵ *Born G.B.*, International Commercial Arbitration, Vol. II, 2009, 2066.

⁴⁶ *Roth M.*, Commentary on the UNCITRAL Model Law, Practitioner's Handbook on International Commercial Arbitration, Edited by Weigand F. B., 2nd ed., Oxford University Press, 2010, 1042.

⁴⁷ Swiss Law on International Private Law, Article 183.2.

5.2. Term for Granting an Interim Measure

When ordering an interim measure it is important for the interim measure to be enforced as promptly as practicable, as each day is of paramount importance in this case. According to the Law of Georgia on Arbitration the arbitral tribunal is required to make an award within a ~reasonable period of time~.⁴⁸ Whether which period of time is ~reasonable~ can be determined by an arbitration agreement, rules of procedure of dispute-reviewing tribunal or/and arbitration practice. For example, pursuant to arbitration rules of the Tbilisi Arbitration Chamber (TBAC) an award on ordering an interim measure is made within a period of 3 days,⁴⁹ and as per arbitration rules of the Dispute Resolution Centre (DRC) - "as promptly as practicable"⁵⁰. However, the court is required to make a decision within 24 hours.⁵¹ Furthermore, an award of a tribunal on ordering an interim measure is subject to recognition-enforcement by the Court of Appeals,⁵² which delivers a ruling on recognition-enforcement of tribunal's award within a period of 10 days.⁵³ Furthermore, in cases, when an interim measure, ordered by tribunal is subject to recognition-enforcement in other country, it may take the party longer to attain the desired goal. Hence, when a claimant directly applies to the court for an interim measure, the desired goal may be attained quicker.

5.3. Costs for Granting an Interim Measure

Arbitral proceedings are associated with considerable expenses, like fee for filing an arbitration claim, arbitrator's fee, expenses for legal services and arbitration fee for ordering an interim measure in arbitration. The Law of Georgia on Arbitration says nothing about the expenses of ordering an interim measure, this issue is regulated by arbitration rules of the Arbitration Institute.⁵⁴ Along with these expenses a party has to pay the state duty as well when requesting the recognition-enforcement of the interim measure.⁵⁵ Based on the foregoing, it is reasonable for the party to take account of this matter as well.

5.4. Ordering an Interim Measure against Third Persons

Generally, a tribunal award is binding only for the parties to arbitration agreement.⁵⁶ Consequently, the tribunal is entitled to order interim measures only against the parties to arbitral proceedings.⁵⁷ For instance, if an interim measure is ordered against bank accounts, the bank is not liable to enforce tribunal award until the court recognises/enforces it⁵⁸ whilst the court ruling is binding for everybody;⁵⁹ furthermore, the court is entitled to order interim measures against third persons as well and oblige or prohibit them to perform a certain action.⁶⁰

5.5. Ordering a Preliminary Order

⁴⁸ Law of Georgia on Arbitration, 02.07.2009, Legislative Herald of Georgia, Article 17.2.

⁴⁹ See: The Arbitration Rules of the Tbilisi Arbitration Chamber, Article 6.4.(2).

⁵⁰ See: Arbitration Rules of Dispute Resolution Centre, Article 32.2.

⁵¹ See: Civil Procedure Code of Georgia, 14.11.1997, Legislative Herald of Georgia, Article 193.

⁵² See: Law of Georgia on Arbitration, Article 21; Civil Procedure Code of Georgia, 14.11.1997, Legislative Herald of Georgia, Article 356¹⁸.

⁵³ See: Civil Procedure Code of Georgia, 14.11.1997, Legislative Herald of Georgia, Article, Article 356¹⁸.

⁵⁴ See: Rules of Procedure of the Tbilisi Arbitration Institute, Appendix №1, Article 2.3.

⁵⁵ Civil Procedure Code of Georgia, 14.11.1997, Legislative Herald of Georgia, Article 39.1(e¹).

⁵⁶ *Born G.B.*, International Arbitration: Law and Practice, 2012, 206.

⁵⁷ *Born G.B.*, International Commercial Arbitration, Vol. II, 2009, 1965.

⁵⁸ *Abascal J.M.*, The Art of Interim Measure, ICCA Congress Series N 13, General editor *Berg A. J.*, 2006, 758.

⁵⁹ Civil Procedure Code of Georgia, 14.11.1997, Legislative Herald of Georgia, Article, Article 10.

⁶⁰ Civil Procedure Code of Georgia, 14.11.1997, Legislative Herald of Georgia, Article, Article 198.2(d).

According to judgments, offered in international literature, it is acknowledged that arbitral tribunal is devoid of possibility to order an interim measure until it is fully staffed.⁶¹ This opinion particularly concerns *ad hoc* tribunals, that are set up for trial of specific cases and are not institutional bodies. However, the international arbitration institutes have developed special regulations to remove this gap, known as 'Emergency Arbitration'.⁶² The number of applications to this institution is increasing year-on-year basis. For instance, in 2017 the parties applied to arbitral tribunal of International Chamber of Commerce 21 times, requesting 'Emergency Arbitration'⁶³ and thrice to Swedish Chamber of Commerce.⁶⁴

In this regard, the Georgian law, Article 17 of the Law on Arbitration allows for a tribunal to order an interim measure before the commencement of arbitral proceedings or at any stage thereof.⁶⁵ E.g. according to Arbitration Rules of the Tbilisi Arbitration Institute, review of applications for interim measures and making awards is the exclusive competence of the TAI chairperson; consequently there is no need for the existence of specific dispute reviewing tribunal. As regards the court, as already mentioned after the amendments of 2015 it is entitled to rely on Article 192 of the Code of Civil Procedure of Georgia and order a preliminary order. Hence, it can be said with this regard that both authorities are rather efficient and flexible.

In Georgian reality when a party applies to the Arbitration for an interim measure, it has to spend double time and resources. Consequently, application to the court is more beneficial. It was voiced in Georgian literature, that an interim measure, ordered by tribunal is not efficient.⁶⁶ It is admitted in international literature as well, that in arbitral proceedings, an interim measure ordered by court is more efficient and expedient mean of attainment of desired goal, that that of a tribunal.⁶⁷ However, there is also a dissenting opinion.⁶⁸ Domestic laws of various countries also give preference to the court of law. E.g. in Belgium, enforcement of an interim measure, ordered by court is considered to be easier,⁶⁹ in China - more expedient,⁷⁰ while it is believed to be more efficient in France,⁷¹ like in Germany⁷². However, the situation is quite contrary in Austria and an interim measure, ordered by a tribunal is believed to be more ~convenient~.⁷³

Based on the foregoing the party is supposed to assess risks, associated with an interim measure in arbitration on a case-by-case basis and make a decision, whether to which authority to apply with for an interim measure.

⁶¹ *Born G.B.*, International Commercial Arbitration, Vol. II, 2009, 1970; *Liebscher C.*, Commentary on Austrian Arbitration Law, Practitioner's Handbook on International Commercial Arbitration Edited by *Weigand F. B.*, 2nd ed., Oxford University Press, 2010, 146.

⁶² *Born G.B.*, International Arbitration: Law and Practice, 2012, 207; ICC Rules of Arbitration (enforced on 1st of January, 2012), Article 29.

⁶³ <www.iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes/>.

⁶⁴ <<http://www.sccinstitute.com/statistics/>>.

⁶⁵ Law of Georgia on Arbitration, 02.07.2009, Legislative Herald of Georgia, Article 17.

⁶⁶ *Tserstvadze G.*, Brief Commentary to the Georgian Arbitration Law 2009, Tbilisi, 2011, 142.

⁶⁷ *Born G.B.*, International Commercial Arbitration, Vol. II, 2009, 2049.

⁶⁸ *Abascal J.M.*, The Art of Interim Measure, ICCA Congress Series N 13, General Editor Berg A. J., 2006, 585-575.

⁶⁹ *Houtte H.V.*, Commentary on Belgium Arbitration Law, Practitioner's Handbook on International Commercial Arbitration, Edited by Frank-Bernd Weigand, 2nd ed., Oxford University Press, 2010, 208.

⁷⁰ *Ibid*, *Moser M.J.*, *Choong J.*, Commentary on China and Hong-Kong Arbitration Law, 208.

⁷¹ *Ibid*, *Gaillard E.*, Commentary on France Arbitration Law, 449.

⁷² *Houtte H.V.*, Commentary on Belgium Arbitration Law, Practitioner's Handbook on International Commercial Arbitration Edited by Weigand F. B., 2nd ed., Oxford University Press, 2010, 510.

⁷³ *Ibid*, *Liebscher C.*, Commentary on Austrian Arbitration Law, 145.

6. Conclusion

Contemporary arbitration law recognises the competence of both the arbitral tribunal and court of law in ordering interim measures. However, as already mentioned, there are certain exemptions. Furthermore, the parties are fully entitled to exclude the power of either the tribunal or the court of law to order an interim measure during the resolution of a dispute. It should be mentioned, that in this regard the Georgian law is fully compatible with international approaches and Georgian judicial practice has taken up the correct route of developing.

The fact, that there is a certain competition between tribunal and court of law in ordering interim measures in arbitration, gives parties wider option to apply to the institute, whose interim measure will be more efficient and ensure the attainment of set goal.

Bibliography:

1. Law of Georgia on Arbitration, 02.07.2009.
2. Civil Procedure Code of Georgia, 14.11.1997.
3. Arbitration Rules of Tbilisi Arbitration Institute, 2017.
4. Arbitration Rules of Tbilisi Arbitration Chamber, 2010.
5. Arbitration Rules of Dispute Resolution Center (DRC).
6. Explanatory note of draft law on the Law of Georgia on Arbitration.
7. UNCITRAL Model Law on International Commercial Arbitration, 1985.
8. UNCITRAL Model Law on International Commercial Arbitration, 1985 with amendments as adopted in 2006.
9. Civil Procedure Code of Italy.
10. China Law on Arbitration.
11. Swiss International Privat Law.
12. English Arbitration Act, 1996.
13. ICC International Arbitration Rules.
14. *Abascal J.M.*, The Art of Interim Measure, ICCA Congress Series N 13, General editor Berg *Berg A. J.*, 2006, 558-575.
15. *Binder P.M.*, Comments on the Law of Georgia on Arbitration, *Georgian Law Review*, №10/2007-2/3, 2007, 182-202.
16. *Blackaby N., Partasides C., Redfern A., Hunter M.*, Redfern and Hunter on International Arbitration, Oxford ed., 2015, 445.
17. *Born G.B.*, International Arbitration: Law and Practice, 2012, 203-213.
18. *Born G.B.*, International Commercial Arbitration, Vol. II, 2009, 1949-1951, 1965, 1970, 2049, 2051, 2066.
19. *Gaillard E.*, Commentary on France Arbitration Law, Practitioner's Handbook on International Commercial Arbitration, Edited by *Weigand F. B.*, 2nd edition, Oxford University Press, 2010, 449.
20. *Houtte H.V.*, Commentary on Belgium Arbitration Law, Practitioner's Handbook on International Commercial Arbitration, Edited by *Weigand F. B.*, 2nd edition, Oxford University Press, 2010, 208.
21. *Lew J.D.M., Mistelis L.A., Kroll S.M.*, Comparative International Commercial Arbitration, Kluwer Law International, 2003, 588.
22. *Liebscher C.*, Commentary on Austrian Arbitration Law, Practitioner's Handbook on International Commercial Arbitration Edited by *Weigand F. B.*, 2nd edition, Oxford University Press, 2010, 145-146.
23. *Moser M.J., Choong J.*, Commentary on China and Hong-Kong Arbitration Law, Practitioner's Handbook on International Commercial Arbitration Edited by *Weigand F. B.*, 2nd edition, Oxford University Press, 2010, 208.
24. *Moses M.L.*, The Principle and Practice of International Commercial Arbitration, 2nd ed., 2012, 105-106.
25. *Rosenne S.*, Provisional Measures in International Law: The international Court of Justice and The International Tribunal of the Law of Seas, 2005.

26. *Roth M.*, Commentary on the UNCITRAL Modal Law, Practitioner's Handbook on International Commercial Arbitration, Edited by *Weigand F. B.*, 2nd edition, Oxford University Press, 2010, 1032-142.
27. *Segesser G., Kurth Ch.*, *Interim Measure*, International Arbitration in Switzerland, A Handbook for Practitioners, Edited by *Kaufmann-Kohler G., Stucki B.*, 2004, 71.
28. *Tkemaladze S.*, Public Order as Grounds for Cancellation of an Award or Refusal to its Recognition-Enforcement (Short Overview of Georgian Practice), *Georgian Business Law Review*, №2, Tbilisi, 2013, 14-15.
29. *Tserstvadze G.*, Brief Commentary to the Georgian Arbitration Law 2009, Tbilisi, 2011, 142.
30. Order of Kutaisi Court of Appeals dated 09.10.2017, Case №2b-985.
31. Order of Kutaisi Court of Appeals dated 16.11.2016, Case №2/b-1085-2016.
32. Order of Supreme Court of Georgia dated 09.07.2014, Case №A-544-ა-17-2014
33. Order of Kutaisi Court of Appeals dated 29.07.2013, Case №2/b-674-2013.
34. Order of Supreme Court of Georgia 03.07.2013, Case №AS-538-511-2013.
35. Order of Supreme Court of Georgia dated 27.05.2007, Case №AS-827-1190-06.
36. *Van Uden BV v. Kommanditgesellschaft in Firma Deco-Line*, C – 391/95 (1998).
37. <www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htmz>.
38. <www.iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes/>.
39. <<http://www.sccinstitute.com/statistics/>>.
40. <www.jus.uio.no/lm/italy.arbitration/818.html>.