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INTERIM MEASURES IN ARBITRATION: THE SERBIAN PERSPECTIVE

This paper discusses interim measures that can be ordered by Serbian arbitral tribunals and the possibility of their domestic enforcement. The introduction examines the legal framework for interim measures under Serbian law and the arbitration rules that govern the majority of arbitrations in Serbia. Subsequent chapters discuss the interpretation of the domestic legislation available to the courts and arbitrators in Serbia when facing legal gaps concerning interim measures. The best practices are identified by using comparative legal models, paving the way for optimal judicial and arbitral decisions and better legislative solutions in the future. In the second chapter, the limits of the arbitral tribunal's jurisdiction to order interim measures are determined based on a hypothetical example. The third chapter focuses on the decision-making process, types, conditions, and judicial enforcement of interim measures by domestic arbitral tribunals. The conclusion highlights the limited interpretative possibilities, which supports the need for legislative amendment.

Key words: *Arbitration in Serbia. – Interim measures. – Enforcement.*

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1. INTRODUCTION

Arbitration has evolved into the predominant method of resolving commercial disputes with a foreign element on a global scale. Consequently, its framework must be adapted to meet all the requirements of efficient dispute resolution, including the need to impose an interim measure or another form of security before or during the arbitral proceedings. The necessity for interim measures is dictated by the time factor (Ortolani 2020, 327). Every arbitration lasts for a certain period, during which external or party-induced changes may occur, potentially jeopardizing the outcome of the arbitration. To effectively address these needs, in addition to arbitrators having the power to impose interim measures, there must also be a mechanism for the compulsory enforcement of such measures through the courts if voluntary compliance is lacking (Kojović 2001, 512).

The subjects of this paper are the interim measures that can be ordered by an arbitral tribunal seated in Serbia and the possibility of their enforcement within the country. The introductory chapter examines the legal framework for interim measures under Serbian law and the arbitration rules that govern the majority of arbitrations in Serbia. The subsequent chapters address the interpretation of legislation that domestic courts and arbitrators in Serbia should apply when faced with legal gaps related to interim measures in arbitration. The best practices in applying the sparse provisions of Serbian legislation are identified using comparative legal models, thereby paving the way for the adoption of optimal judicial and arbitral decisions and better legislative solutions in the future. The limits of the arbitral tribunal's power to order interim measures are determined in the second chapter, using a hypothetical example. The third chapter focuses on the decision-making process of arbitrators regarding interim measures, the types of interim measures, the conditions for their issuance, and the judicial enforcement of interim measures ordered by arbitral tribunals in Serbia. Finally, the article concludes by highlighting the limited interpretative possibilities that support the need for legislative intervention.

Before delving into the subject matter, an important note should be made. Serbian arbitration law is rooted in international and comparative arbitration law. The concept of "interim measures" in international and comparative arbitration law does not fully align with the concept of "interim measures" in domestic enforcement law, despite the identical terminology. For instance, international arbitration law treats the preservation of evidence as an

interim measure,[1] whereas domestic procedural law regulates the procedure for preserving evidence separately in the Civil Procedure Act, specifically in Articles 284–288. In comparative law, arbitrators lack the power to apply coercion and therefore cannot rule on the compulsory enforcement of interim measures, among other things. Consequently, when interpreting terms used in domestic arbitration law, one should always strive for a characterization that is tailored to the specific nature of arbitration and is not strictly tied to concepts from the domestic civil enforcement procedure.

1.1. Interim Measures Before and During Arbitration under Domestic Legislation

In arbitration proceedings, interim measures can be granted only at a party's request.[2] The power to grant interim measures in arbitration disputes rests with both the courts and the arbitrators.[3] Their power is concurrent, allowing the party to choose whom to approach. If the party opts for the court, the existence of an arbitration agreement in the dispute does not prevent the court from ruling on the interim measure.[4] A party that applies to the court for the determination of an interim measure does not thereby violate the arbitration agreement or waive it.[5] The domestic court may order interim measures regardless of the agreed place of arbitration or the fact that the arbitral tribunal has already been constituted.[6] When

1 UNCITRAL Model Law on International Commercial Arbitration 2006 (2006 UML), Article 17(2); UNCITRAL Arbitration Rules, Art. 26(2).

2 Art. 26(1) UNCITRAL Arbitration Rules.

3 Zakon o arbitraži (Serbian Arbitration Act, SAA), *Official Journal of the Republic of Serbia* 46/2006, Arts. 15 and 31.

4 The legislative trend in the arbitration law of developed countries is to limit the parties' right to seek interim measures from the courts only to situations where urgency requires it and the arbitral tribunal has not yet been constituted, or when the arbitral tribunal lacks jurisdiction to grant the requested interim measure. Born (Born 2020, 2601–2758) cites as examples Section 44 of the English Arbitration Act, Art. 1449(1) of the French Code of Civil Procedure, Schedule 1, Art. 17J of the South African International Arbitration Act, Section 8(b)(2) of the United States Uniform Arbitration Act, Section 9 of the Arbitration and Conciliation Act of India, Section 12A(6) of the Singapore International Arbitration Act, etc.

5 Art. VI(4) European Convention on International Commercial Arbitration; Art. 26(9) UNCITRAL Arbitration Rules; Art. 28(2) ICC Arbitration Rules; Art. 28(5) Swiss Arbitration Rules.

6 Art. 15(2) SAA. The Appellate Court in Kragujevac, Serbia, Gž 2307/2010, 4 November 2010: "the court of first instance has the power to rule on the claimant's proposal for the determination of an interim measure, regardless of whether, by

deciding on an interim measure, the court determines its jurisdiction and proceeds according to the rules of the Serbian Enforcement and Security Act (ESA).[7] The local court with jurisdiction is the one that has territorial jurisdiction for enforcement in accordance with the provisions of that law (Stanivuković 2013, 191).[8] The power to order interim measures is also granted to the arbitral tribunal under Article 31 of the Serbian Arbitration Act, but it is not elaborated in detail. For instance, it is not specified what nature the arbitral tribunal's decision on an interim measure has, in what procedure it is issued, or in what form. It is not stated whether the request for an interim measure must first be served on the other party. Additionally, the conditions for ordering an interim measure are not defined. The only provision is the possibility for the arbitrators to request that a party provide appropriate security. The provision of security may be requested from the opposing party, although it would be reasonable to interpret that the provision of security may also be requested from the party proposing the interim measure, as the interim measure is imposed on the assets of the opposing party, which may suffer loss as a result.[9] That loss should be compensated from the security provided by the applicant if it is determined that the interim measure was not justified (Stanivuković 2013, 192; Krvavac, Belović 2017, 459). The purpose of the opposing party providing security may be to serve as a substitute for an interim measure aimed at securing a claim (Schäfer 2015, 233; Bodiroga 2024, 354).

A more detailed elaboration of the power under Article 31 of the Arbitration Act is necessary because arbitrators are not obligated to follow the ETA when deciding on interim measures. The Arbitration Act does not prescribe such an obligation, nor does comparative law require arbitrators to adhere to national enforcement laws. The Arbitration Act applies to arbitral proceedings, including the arbitrators' decisions on interim measures, but it does not regulate all outstanding issues.[10]

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applying the relevant substantive law, it will establish that the arbitration clause, being valid, applies to the specific dispute between the parties" (translated by author).

7 Zakon o izvršenju i obezbeđenju (Enforcement and Security Act, ESA), *Official Journal of the Republic of Serbia*, 106/2015 as amended, Art. 414 *et seq*.

8 Art. 258(4) ESA.

9 For instance, Arts. 451 and 452 ESA provide for a guarantee as an alternative to or a prerequisite for ordering an interim measure.

10 Art. 2(1) SAA.

Another important issue that is insufficiently regulated by the Arbitration Act is the enforcement of interim measures issued by an arbitral tribunal. Since the arbitral tribunal lacks coercive powers, it cannot ensure the compulsory enforcement of such measures without the cooperation of a state court (Stanivuković 2013, 192). The Arbitration Act and the Enforcement and Security Act do not stipulate that an interim measure ordered by an arbitral tribunal constitutes an enforceable instrument. Additionally, the relationship between the court and the arbitral tribunal is not defined in cases where parties seek interim measures from both bodies.[11]

Furthermore, the Arbitration Act does not provide for the possibility of appointing an emergency arbitrator before the constitution of the arbitral tribunal, which is something that exists in many arbitration rules. The power of such an arbitrator is limited to deciding on a request for an interim measure, and their decision is subject to review by the arbitral tribunal, once it has been constituted.

The concurrent jurisdiction of courts and arbitrators in ordering interim measures can be resolved through party autonomy. It is undisputed that the contracting parties may exclude the power of arbitrators to order interim measures,[12] although they do this rarely (Ortolani 2020, 324). On the other hand, it is controversial whether the parties have the power to mutually exclude or limit the power of courts to order interim measures after the initiation of arbitration proceedings and the constitution of the arbitral tribunal. Some arbitration rules aim to restrict the possibility of approaching the court after that point.[13] Nevertheless, the possibility of excluding recourse

[11] German and Austrian law deny court assistance for the enforcement of an interim measure issued by an arbitral tribunal if a party had previously requested an interim measure from the court. The purpose of this provision is to prevent the issuance of contradictory decisions. In other countries, the right of a party to approach the court is restricted once the arbitral tribunal has been constituted. See below for more details.

[12] Art. 31(1) SAA; Art. 17(1) 2006 UML.

[13] For instance, the 2020 London Court of International Arbitration Rules, provide in Art. 25(3) that "[a] party may apply to a competent state court or other legal authority for interim or conservatory measures that the Arbitral Tribunal would have power to order under Article 25.1: (i) before the formation of the Arbitral Tribunal; and (ii) after the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal's authorisation, until the final award."

to court by agreement ultimately depends on the domestic enforcement law, i.e., whether it allows parties to waive their right to request the court to order an interim measure.[14]

1.2. Interim Measures Before and During Arbitration under Arbitration Rules Applicable in Serbia

Among experts in Serbian arbitration law, there was significant skepticism regarding the possibility of arbitrators ordering interim measures prior to the adoption of the Arbitration Act. However, it should be noted that provisions on interim measures had existed almost from the outset in the Chamber of Commerce of Yugoslavia Rules of Foreign Trade Arbitration, although they were not applied.[15]

The opportunity to introduce more detailed provisions on interim measures into the domestic system arose following the adoption of the Arbitration Act, when the rules of arbitration institutions based in Serbia were enacted. However, this opportunity was not fully utilized.

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[14] Bodiroga considers that waiving the right to initiate enforcement proceedings would be inadmissible, just as waiving the right to legal protection is inadmissible (Bodiroga 2024, 250).

[15] Poznić (1973, 121) comments on Art. 37 of the Rules of Foreign Trade Arbitration at the Federal Chamber of Commerce, adopted on 26 June 1958, and amended on 9 October 1967, read as follows:

> "Some arbitration rules provide for the arbitral tribunal itself to order a security measure. [The Rules of Foreign Trade Arbitration] contain a provision reflecting this idea, although in a wording that does not align with common terminology. Specifically, during the proceedings, the rules state that arbitral tribunals may order the parties (but not third parties) to undertake certain actions or refrain from certain actions related to the subject matter of the dispute (Art. 37) [...]
>
> Regarding the provisions on the possibility of ordering such measures, it should be noted that the arbitral tribunal may authorize such a measure, at the request of a party. However, when necessary, the enforcement of the measure through coercive actions is exclusively within the competence of the state court. The arbitral tribunal is not authorized to enforce coercion.
>
> This raises the legitimate question whether the provision allowing the arbitral tribunal to authorize a security measure is necessary at all. There is no doubt that such measures can be ordered and enforced by the state court. In practice, the provisions on ordering security measures [in Foreign Trade Arbitration] have not been applied" (translated by author).

The 2007 Rules of Foreign Trade Arbitration vested the competence to order an "interim measure deemed necessary in view of the subject matter of the dispute" in the arbitration institution itself (rather than the arbitrators) at the request of a party. At the same time, the institution could also require the opposing party to provide appropriate security.[16] This solution was something of a curiosity, as it deviated from common practice. In the rules of this institution adopted in 2013, the competence to order interim measures was assigned to the arbitral tribunal or a sole arbitrator. The provision regarding the opposing party was also corrected, allowing the arbitral tribunal to require the party requesting the interim measure to provide appropriate security. Additionally, a second paragraph was introduced, stipulating that the measure may be issued in the form of an order or an arbitral award.[17]

The 2013 Rules of the Belgrade Arbitration Centre (Belgrade Rules) regulate interim measures and security measures in Article 31. The first paragraph adopts part of Article 31 of the Arbitration Act, which establishes the power of the arbitral tribunal to order interim measures. Paragraph 4 incorporates another part of Article 31 of the Arbitration Act, which allows the arbitral tribunal to require the party requesting an interim measure to provide security. The provision explicitly states that the arbitral tribunal may condition the granting of an interim measure on the provision of security. Additionally, Article 31 of the Belgrade Rules introduces a limitation on a party's right to be heard regarding the opposing party's requests, which is an important procedural principle under the Arbitration Act.[18] According to Article 31(2), an interim measure is generally ordered only after the opposing party has been given the opportunity to comment on the request for its issuance. However, an exception is allowed if notifying the other party would render the interim measure meaningless or significantly reduce its effectiveness. These are interim measures where urgency is particularly pertinent. If an interim measure is granted without informing the other party and giving it an opportunity to respond, the opposing party must be allowed to present its position immediately after the measure has been issued.[19] In the

[16] Rules of the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, *Official Journal of the Republic of Serbia* 52/2007, Art. 43, translated by author.

[17] This provision was inspired by Art. 28(1) of the contemporary ICC Rules (Pavić, Đorđević 2016, 331).

[18] Art. 33(2) SAA.

[19] One might question whether it is legally permissible for the rules of an arbitration institution to regulate this issue (i.e., deciding on interim measures ex parte, without giving the opposing party prior opportunity to respond) differently

Belgrade Rules, the manner of termination of interim measures is regulated in Article 31(3). The Arbitral Tribunal may revoke, suspend, or modify an interim measure at any time, on its own initiative, if the circumstances of the case no longer justify its existence. The Belgrade Rules do not contain provisions regarding the form, in which a decision on an interim measure is made, nor the conditions and procedure for its ordering.

The first Rules of the Permanent Arbitration at the Chamber of Commerce of Serbia were adopted on 15 June 2016.[20] Shortly thereafter, on 8 December 2016, they were replaced by a new set of rules, which came into force on December 24.[21] One of the amended provisions was contained in Article 40, concerning interim and security measures. Article 40(1), which later became Article 37 in the subsequent version, replicates the text of Article 31 of the Arbitration Act, addressing the power of the arbitral tribunal to order interim and security measures at the request of a party. The difference, however, was that the arbitral tribunal could require the requesting party (rather than the opposing party) to provide appropriate security. Articles 40(2) and 40(3) contained provisions allowing for the ordering interim measures even before the opposing party had been given the opportunity to respond to the request. Article 40(4) included a provision stipulating that an interim measure "shall be ordered in the form of an arbitral award." The apparent purpose of this provision was to facilitate the enforcement of interim measures ordered by the arbitral tribunal (Pavić, Đorđević 2016, 331). However, this provision was deemed at odds with legal doctrine and criticized, with its intent considered unattainable, as the authors argued that domestic law does not allow for the enforcement of interim measures issued in the form of an arbitral award (Pavić, Đorđević 2016, 332). Whether for this reason or others, this provision was revoked after only six months, so Article 37 of the current Rules of the Permanent Arbitration no longer

from Art. 424 ESA. After all, are the provisions of the ESA not mandatory, meaning they must also be applied in arbitration?

The answer is that the ESA does not apply as a binding regulation in arbitration proceedings. Arbitrators do not have the power to conduct enforcement proceedings. The wording that they may "order" interim measures should not be understood in that sense, as their competence to "order" such measures is significantly limited. Although these limitations are not explicitly stated in the Arbitration Act, they stem from the nature of their jurisdiction, which is based on the arbitration agreement. These limitations will be discussed in the following chapter.

[20] Pravilnik o stalnoj arbitraži pri Privrednoj komori Srbije, *Official Journal of the Republic of Serbia* 58/16.

[21] Pravilnik o stalnoj arbitraži pri Privrednoj komori Srbije, *Official Journal of the Republic of Serbia* 101/16. The date of entry force available in the *Paragraf Lex* database.

regulates the form in which interim measures are issued. Instead, the new Article 37(4) provides that during the proceedings the arbitral tribunal may revoke, modify, or temporarily suspend an interim measure if it concludes that the circumstances of the case no longer justify its existence.

Provisions regarding interim measures are also included in Article 26 of the 2021 UNCITRAL Arbitration Rules, which are in some cases agreed upon in arbitrations in Serbia (Stanivuković 2018, 137–166). The UNCITRAL Rules first define the concept of an interim measure. In short, it is any temporary measure by which the arbitral tribunal, prior to issuing a final arbitral award, orders a party to maintain or restore the status quo pending the final resolution of the dispute, to take action or refrain from taking action that could cause harm to the arbitral proceedings, to secure funds for the enforcement of the final arbitral award, or to preserve evidence.[22] The UNCITRAL Rules also include conditions for ordering interim measures, which the requesting party must prove have been met. However, these conditions are optional when it comes to interim measures aimed at preserving evidence.[23] The termination or modification of an interim measure is possible at the request of a party, while the arbitral tribunal may initiate such actions on its own only in exceptional circumstances, provided that the parties are notified in advance.[24] The parties also have certain obligations regarding interim measures. First, they are required to inform the arbitral tribunal of any material changes in the circumstances that formed the basis for the issuance of the interim measure.[25] Second, they are obligated to compensate for any damage caused to the opposing party by an unjustified interim measure.[26]

It is also necessary to mention the provisions of the 2021 Arbitration Rules of the International Chamber of Commerce (ICC), as in practice parties often agree to resolve disputes under the rules of the ICC International Court of Arbitration with the place of arbitration in Serbia, thereby opting for domestic arbitration conducted in accordance with these rules. The

22 Art. 26(2) UNCITRAL Arbitration Rules.

23 Arts. 26(3) and 26(4) UNCITRAL Arbitration Rules.

24 Art. 26(5) UNCITRAL Arbitration Rules.

25 Art. 26(7) UNCITRAL Arbitration Rules.

26 Art. 26(8) UNCITRAL Arbitration Rules. This provision can be compared to Art. 458 ESA, which also provides for the right to compensation for the loss resulting from an unfounded or unjustified interim measure, but within a separate civil proceeding. In the absence of a specific provision on this matter, in arbitration proceedings it may be debatable whether compensation for the loss can be sought within the same arbitration proceeding in which the unjustified interim measure was ordered. Some arbitration statutes explicitly regulate the right of a party to claim compensation for the loss in such cases.

ICC Rules contain two articles dedicated to interim measures: Article 28 – Conservatory and Interim Measures, and Article 29 – Emergency Arbitrator. Additionally, Appendix V of the ICC Rules sets out the rules governing the procedure of the emergency arbitrator.

Article 28(1) regulates common issues: the power of the arbitral tribunal to order an interim measure as soon as the case is submitted for decision, the right of the parties to agree on excluding such power, and the right of the arbitral tribunal to require the applicant to provide security as a condition for granting an interim measure. However, in the last sentence, unlike other arbitration rules, the ICC Rules also address the form of the decision. An interim measure may be issued in the form of a reasoned order or an arbitral award, at the discretion of the arbitral tribunal.[27]

Article 28(2) of the ICC Rules regulates the effects of turning to the courts. It informs the parties that they may seek recourse to a court to request the issuance of interim or security measures or the enforcement of such measures ordered by the arbitral tribunal, even after the case has been submitted to the arbitral tribunal. However, if the arbitral tribunal has been constituted and the case has been submitted for decision, recourse to the court is only allowed "in appropriate circumstances".

According to one interpretation, after the constitution of the arbitral tribunal, parties in ICC arbitration may turn to the courts only to request interim measures that the arbitral tribunal itself would not be able to grant or when court-ordered interim measures are necessary to protect the purpose of the arbitration proceedings (Ortolani 2020, 325).[28]

Recourse to the court is not considered a violation or waiver of the arbitration agreement, nor does it affect the power of the arbitral tribunal to order an interim measure.[29] The parties are required to inform the Secretariat of the ICC Court of Arbitration of any recourse to judicial authorities and any measures taken by the courts at their request, and the Secretariat, in turn, notifies the arbitrators. The ICC Arbitration Rules also explicitly provide the right for a party to seek court enforcement of an interim measure ordered by the arbitral tribunal.[30]

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[27] Art. 28(1) ICC Arbitration Rules.

[28] *Toyo Tire Holdings of Americas, Inc. v. Continental Tire North America, Inc.*, 609 F.3d 975, 980 (9th Cir. 2010); Supreme Court of British Columbia, CLOUT Case 1654, *African Mixing Technologies Ltd v. Canamix Processing Systems Ltd* [2014] BSCS 2130.

[29] Art. 28(2) ICC Arbitration Rules.

[30] Art. 28(2) ICC Arbitration Rules.

A particular problem arises when a request is submitted prior to the constitution of the arbitral tribunal, or even before the request for arbitration is filed, and the measure must be urgently enforced to prevent irreparable harm. The solution provided by the ICC Arbitration Rules is the appointment of an emergency arbitrator.[31] The emergency arbitrator's power is limited exclusively to ruling on emergency measures and ceases once the case is submitted to the arbitral tribunal.[32] The party requesting the institution to appoint an emergency arbitrator is required to initiate arbitration proceedings within ten days.[33] Arbitrators are not bound by the decisions of the emergency arbitrator and may modify or revoke them.[34]

Neither the Belgrade Rules nor the Rules of the Permanent Arbitration at the Chamber of Commerce of Serbia provide for the institution of an emergency arbitrator. Thus, in Serbia, prior to the initiation of arbitration, interim measures can only be requested from the courts, with the exception of arbitrations conducted under the ICC Rules.[35] Despite the fact that by agreeing to any of the aforementioned rules the parties mutually entrust the arbitral tribunal with the power to order interim measures, the aforementioned ambiguities in the regulations[36] discourage parties from proposing interim measures and hinder domestic arbitrators who would

[31] Art. 29 ICC Arbitration Rules. Emergency arbitrators are also provided for in the Swiss Arbitration Rules (Art. 43), as well as in the rules of the London, Hong Kong, Singapore, and Chinese arbitration centers, along with many other modern rules of arbitral institutions.

[32] The Swiss Rules specify that an emergency arbitrator may rule on a previously submitted request for emergency measures even if the case has been referred to the arbitral tribunal in the meantime. The same follows from Art. 29(1) of the ICC Arbitration Rules (Stanivuković 2013, 191).

[33] Emergency Arbitrator Rules (Appendix V: ICC Arbitration Rules, Art. 1(6)).

[34] Art. 29(3) ICC Arbitration Rules.

[35] The essence of the emergency arbitrator mechanism lies in the speed of their appointment and the swiftness of their decision on interim measures. The ICC Rules state that an emergency arbitrator should be appointed within two days of receiving the request and must issue a decision within fifteen days from the time the matter is referred to them. Such short deadlines for appointment are impossible to achieve in the context of the regular procedure for appointing an arbitral tribunal.

[36] These omissions include the failure of the SAA to elaborate on provisions regarding the power of the arbitral tribunal to issue interim measures, the nature of the decision on interim measures (whether it is a substantive or procedural decision), the procedure and form in which it is issued (arbitral award or procedural order), the conditions for determining interim measures, and the types of interim measures that the arbitral tribunal may impose. Additionally, it is unclear whether the request must be delivered to the other party before a decision is made, what is the status of the emergency arbitrator, the priority of decision-making in cases where a party seeks interim measures from both the court and the arbitral tribunal,

otherwise be willing to order them. In the nearly two-decade-long practice of applying the Serbian Arbitration Act, there is a notable absence of court decisions interpreting Article 31, which may indicate that arbitrators are not utilizing these powers.

2. THE POWER OF THE ARBITRAL TRIBUNAL TO ORDER INTERIM MEASURES

2.1. Hypothetical Example

Inadequate regulation of arbitral interim measures in Serbian law carries risks, especially for foreign parties as defendants. We will illustrate this with a hypothetical example that could easily occur in practice. In this fictional scenario, the claimant is a domestic business entity, while the defendant is a branch of a foreign business entity.[37] The dispute is valued at 4 million euros. The parties agreed to the following arbitration clause:

> The contracting parties agree to submit their disputed relationship to arbitration organized in accordance with the Rules of the Permanent Arbitration at the Chamber of Commerce of Serbia. The seat of arbitration shall be in Belgrade. The language of arbitration shall be English. The dispute shall be resolved by an arbitral tribunal composed of three arbitrators, who shall be appointed in accordance with the Rules of the Permanent Arbitration, whereby each party shall appoint one arbitrator, and the appointed arbitrators shall then jointly select the third arbitrator as the president of the tribunal. The applicable substantive law shall be the law of the Republic of Serbia. The arbitral tribunal shall render its arbitral award unanimously, rather than by majority vote.

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and, above all, how interim measures are to be enforced. Neither the ESA nor the SAA stipulate that an interim measure issued by an arbitral tribunal constitutes an enforceable instrument.

[37] According to the interpretation of the Supreme Court of Cassation, although a branch of a foreign legal entity does not have the status of a legal entity in Serbia, it may exceptionally be granted the status of a party in civil proceedings by a court decision, based on Art. 74(4) of the Civil Procedure Act. A branch of a foreign legal entity may also be recognized as having party capacity in arbitration proceedings, even though the Arbitration Act contains no explicit provisions on this matter.

Along with the claim, the claimant submits a motion for the imposition of an interim measure to secure the claim, stating that the defendant is established as a branch of a foreign legal entity without assets in the territory of the Republic of Serbia; that it was engaged by a third party as a contractor for construction work; that it entered into a subcontracting agreement with the claimant from which the dispute arose; that the third party terminated the contract with the defendant in the meantime, due to multiple breaches of contract; that based on the evidence submitted with the claim (primarily expert reports and opinions) there is a likelihood of the existence of the claimant's claim; that there is a risk to the claimant's claim, which would ultimately have to be enforced abroad because the parent company is liable without limitation for the obligations of the branch; and that, consequently, the conditions prescribed by Articles 449 and 450 of the ESA for ordering an interim measure to secure a monetary claim have been met.

Accordingly, the claimant proposes that the arbitral tribunal order an interim measure securing the monetary claim under Article 459(1)(4) of the ESA and proposes the following operative part of the decision – ruling:

> The claimant's motion for the imposition of an interim measure is granted as well-founded, and therefore an interim measure securing the claimant's monetary claim in the amount of EUR 4 million euros, in dinar equivalent, according at the middle exchange rate of the National Bank of Serbia (NBS) on the day of the transfer, is ordered. The NBS – Department for Forced Collection in Kragujevac is ordered to transfer funds in the amount of the secured claim from the defendant's business accounts to the deposit of Public Enforcement Officer Ljiljana Radovanović from Belgrade. This interim measure shall remain in effect pending the conclusion of the arbitration proceedings, and in the event that the proceedings are concluded in favour of the claimant, the measure shall remain in effect until the enforcement of the arbitral award. This ruling has the effect of a final and enforceable decision.

The defendant disputes the claimant's request for the imposition of an interim measure, arguing that the conditions under Articles 449 and 450 of the ESA (the likelihood of the claim's existence and the risk to the

claim) have not been met.[38] The defendant neither files an objection to the jurisdiction of the arbitral tribunal nor requests an oral hearing on the tribunal's jurisdiction to order the interim measure.

Given the formulation of the proposal described, the need arises to decide on the power of the arbitral tribunal to order the specific interim measure. Before explaining the fundamental principles for making such a decision, we will first examine the origin of Article 31 of the Serbian Arbitration Act, whose careful interpretation is essential in this context.

2.2. The Genesis of Article 31 of the Serbian Arbitration Act

The draft of the Arbitration Act was prepared by a working group of the Serbian Ministry of Foreign Economic Relations (Mitrović 2006, 79). The draft was submitted to the Ministry on 31 May 2005, and was published in the Yearbook *Arbitraža* by the Foreign Trade Court of Arbitration in Belgrade (2006, 109).

For many years, Serbian law did not recognize the power of arbitrators to order interim measures (Poznić 1973, 85). A similar situation existed in other continental legal systems. The change occurred under the influence of the 1985 UNCITRAL Model Law on International Commercial Arbitration (1985 UML). Article 17: Power of arbitral tribunal to order interim measures, which was adopted in many countries and influenced legislation even where it was not explicitly incorporated[39] states:

> Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

[38] According to the position expressed in a decision of the Higher Court in Belgrade, the enforcement of a monetary claim based on a contract with a branch of a foreign business entity implies that the claim must be enforced abroad. The fulfillment of the condition regarding the risk to the claim is assessed in light of this fact. Decision of the Higher Court in Belgrade, Gž. No. 611/14 of 5 December 2014, *Bulletin of the Higher Court in Belgrade* 86/2015, 45–46 (Bodiroga 2024, 572).

[39] For example, the influence of this article is discernable in the original text of Art. 183 of the Swiss Act on Private International Law.

The working group took into account Article 17 of the 1985 UML. However, it also considered two other models: Article 16 of the Draft Croatian Arbitration Act, which was prepared by Siniša Triva,[40] and Article 1041 of the German Code of Civil Procedure (*Zivilprozessordnung*, ZPO). Both provisions are based on the 1985 UML but provide additional elements.

The Triva Draft includes an important addition in its Article 15(2) concerning the enforcement of interim measures:

Article 16: Interim measures in arbitral proceedings

> (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure. (2) If a party to which interim measures relate does not agree to undertake them voluntarily, the party that made the motion for such measures may request their enforcement before the competent court.

Section 1041(1) of the German Code is much more detailed on the provision on interim measures and bears less resemblance to Article 17 of the UML because it does not contain the formulation "may [...] order any party":

Section 1041: Measures of temporary relief

> (1) Unless otherwise agreed by the parties, the arbitral tribunal may order, at the request of a party, such interim measures or measures of protection as it considers necessary in respect of the subject matter of the dispute. The arbitral tribunal may require either party to provide reasonable security in connection with such a measure.

[40] This provision was incorporated into the 2001 Croatian Arbitration Act. The provisions of the Croatian Arbitration Act are modeled after the 1985 UML, but with a significant influence from the German adaptation of that model (Dika 2016, 373).

> (2) On request by a party, the court may permit the enforcement of a measure pursuant to subsection (1), unless an application for a corresponding measure of temporary relief has already been filed with a court. It may recast the order if this is necessary for the enforcement of the measure.
>
> (3) On request, the court may set aside or amend the order pursuant to subsection (2).
>
> (4) Where a measure ordered pursuant to subsection (1) proves to have been unjustified from the outset, the party that has obtained its enforcement is under obligation to compensate the opposing party for the damage the latter has suffered as a result of the measure being enforced or as a result of their having provided security in order to avert the enforcement. The claim may be asserted in the pending arbitral proceedings.[41]

It should be noted that both this provision and the Triva Draft envisage the assistance of the court in the enforcement of interim measures by the arbitral tribunal. Based on the aforementioned models, the following text of the provision on interim measures was initially drafted by the working group:

Article 26: Power of the Arbitration[42] to Order Interim Measures

> (1) If the parties have not agreed otherwise, the arbitration may, at the request of a party, order an interim measure of protection that it considers necessary in view of the subject matter of the dispute, and may simultaneously order that the party provide appropriate security in relation to the ordered measure.
>
> (2) If the party against whom the interim measure has been imposed voluntarily fails to comply with that measure, the party who requested the measure may seek the enforcement of the imposed interim measure of protection from the court designated by law.[43]

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[41] Translation to English: *https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.*

[42] During the drafting of the SAA, the members of the working group consistently referred to the dispute-resolving body (the arbitral tribunal) using the term "arbitration".

[43] Translated by author.

A note was included along with this text, stating that Article 26(2) could be included in a separate chapter on the relationship between the arbitral tribunal and the court, or in a separate provision on enforcement issues, if necessary.

In the draft version of the Croatian Arbitration Act published in May 2005, the provision was, for unknown reasons, reduced to just the first paragraph.

After the preparation of that version, the Draft Arbitration Act was translated into English and French, and comments were requested from three French jurists: Bertrand Ancel, Pierre Mayer, and Charles Jarrosson. Ancel had no comments on Article 29, while Mayer and Jarrosson made similar remarks:

- Jarrosson: What is the relationship between Article 29 and Article 15, which grants the power to the state court to issue interim measures?[44]
- Mayer: What if there is a potential conflict between the measure ordered by the arbitrator and the measure ordered by the judge (Article 15)?[45]

The report analysing the comment by the French jurists, regarding the comment on the relationship between Article 29 and Article 15, states the following:

> The same ambiguity exists in Articles 9 and 17 [1985 UML]. The issue is that both the court and the arbitration have power to order interim measures, and the party practically has the option to choose whom to approach. There is an interest in allowing the parties both options; for instance, due to urgency, a party may be interested in approaching the court if the arbitral tribunal has not yet been formed. Additionally, court intervention is necessary when the interim measure concerns third parties (such as a bank where the debtor holds funds). Some foreign laws stipulate that if the arbitral tribunal has already been formed, a party can only approach the court in specifically outlined cases. The sanctions for noncompliance with the decision of the court and the arbitration differ, as arbitration does not have enforcement powers over the parties. If these measures are mutually conflicting, the arbitral tribunal's decision to issue an interim measure will not be

[44] Unpublished. Author's personal records.

[45] Unpublished. Author's personal records.

> recognized or enforced by courts in our country, as this is not a final arbitral award, but a decision of the arbitral tribunal, for which recognition and enforcement are not provided under the law or international treaties. If it concerns a domestic arbitration decision, the question is whether such a decision can acquire the status of enforceability, since under this draft this status is reserved only for final arbitral awards. Thus, the enforcement of an arbitral decision regarding an interim measure is most often left to the goodwill of the parties and their awareness that noncompliance with the arbitration's orders may negatively affect the final outcome of the dispute. I note that in the Austrian draft, which also concurrently allows the jurisdiction of both the court and the arbitration to issue interim measures, the issue of compulsory enforcement of arbitral decisions determining interim measures is specifically regulated, especially if the arbitration seat is abroad, and particularly if the seat is domestic (see Article 593).[46] Perhaps we should also consider this, but it requires another meeting of the working group to find the appropriate formulations.[47]

This meeting never took place. The final formulation, which remained unchanged, was presented to the public by the chairman of the working group, Dobrosav Mitrović (2006, 82), with the following words:

> The new law gives arbitration the right and ability to issue interim measures and protective measures, which, under previous legal regulations, arbitration was unable to do. This was exclusively within the jurisdiction of state courts. Now, in addition to state courts, these measures can also be issued by arbitration. In practice, this will cause problems, as the question arises whether state courts will enforce such measures issued by arbitration. Arbitration itself does not have the ability to enforce its own measures; they can only be effective if the parties comply with them voluntarily. When such measures are issued by arbitration abroad, domestic courts do not have to

[46] The report submitted to the members of the working group shows that during the drafting of the Draft Law, the then-current content of Art. 593 of the Austrian Arbitration Act was also taken into consideration, which will be discussed below.

[47] Unpublished. Author's personal records. Translated by author.

enforce them, and if they are made in the form of an arbitral award, which is rarely the case, recognition and enforcement (exequatur) must be requested in Serbia.[48]

2.3. Limits of Arbitrator Power: The Arbitral Tribunal Has Power Only for Interim Measures Addressed to a Party, not to a Third Party

In the Serbian legal system, only one limitation of the power of arbitrators to order interim measures is mentioned: in the parties' agreement, as under Article 31, the parties may agree to limit or completely exclude such jurisdiction.[49]

Unlike Article 17 of the 1985 UML and the Triva Draft, the Serbian law does not explicitly state that the arbitral tribunal may order only interim measures that impose an obligation to act or refrain from acting on a party to the dispute. Like the German provision, the subjective limits of the arbitrator's power are not expressly defined in the national law, which at first glance may suggest that they are identical to those of state courts.

However, the subjective limits of the arbitrator's power arise from the very nature and effect of the arbitration agreement and are generally assumed in legal literature. The powers of the arbitrator are confined by the arbitration agreement; they extend only to the parties covered by the arbitration agreement and involved in the proceedings (Knežević 2008a, 278; Stanivuković 2013, 191).[50] Accordingly, the arbitral tribunal has the power to order only interim measures directed at a party, but not at a third party that is not bound by the arbitration agreement. This is explicitly stated in both versions of the UML (Holtzmann *et al.* 2015, 193; Lew, Mistelis, Kröll 2003, 593) and is also recognized in Germany, whose legal framework has had the greatest influence on the wording of the Serbian provision.[51]

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48 Translated by author.

49 Art. 31 SAA.

50 For Swiss law, see the analysis in Boog (2018, 161–162).

51 As outlined in the previous chapter, the genesis of Art. 31(1) shows that the greatest influence on its formulation came from Art. 1041(1) ZPO, which does not specify the type of measure that an arbitral tribunal may order.

Commentators on Article 1041 of the German Code of Civil Procedure emphasize that this provision aligns with Article 17 of the 1985 UML and that an arbitral tribunal has no power to order interim measures against third parties (Schäfer 2015, 227–228). Regarding the limits of arbitrators' power, commentators on the German Code note the following:

a) Based on a prima facie assessment, a valid arbitration agreement must exist;

b) The arbitral tribunal has no power to order interim measures against third parties, e.g., banks, that are not parties to the arbitration agreement;

c) When deciding whether to grant an interim measure, the arbitral tribunal exercises discretion and is not obligated to issue the measure even if the legal requirements for its issuance are met (Schäfer 2015, 228).

Arbitrators may order the interim measure of protection they consider necessary.[52]

The members of the working group for the Serbian Draft Arbitration Act did not explicitly state that the power conferred on arbitrators in Article 31(1) of the Draft was limited to measures directed at a party, as this was assumed. This assumption is evident in Article 31(2), which regulates the enforcement of an interim measure: "If the party against whom the interim measure has been issued *does not voluntarily comply with it*" (emphasis added). There was no doubt that an arbitral tribunal's interim measure could only be issued against a party to the arbitration proceedings.

Article 31(2) was later removed from the Draft, likely due to the belief that the enforcement of arbitral interim measures would fall under the then-applicable Enforcement Proceedings Act.[53] As a result, the adopted provision remained ambiguous – not due to the legislator's intent to depart from the 1985 UML or to grant arbitrators broader powers than those recognized in most jurisdictions, but simply due to an oversight in explicitly stating what was already implied.

52 Art. 1041 ZPO.

53 Such expectations also arise from Art. 65(3) of the Arbitration Law. A more detailed discussion of this article can be found in Section 3.3.

For illustration purposes, even though arbitrators are not required to abide by the ESA when ordering interim measures, they could impose types of interim measures such as those listed in ESA Article 459(1), points 1, 2, and 6. However, they would not be able to order the measures specified in points 3–5 of the same article.

Even when ordering interim measures under Article 459(1), points 1, 2, and 6, arbitrators could not mandate actions that are not actions of the party, such as registering a prohibition of alienation with the cadastre. Such measures could only be ordered by a court, either when issuing an interim measure itself or when supporting the arbitral tribunal by enforcing its interim measure.

The Serbian legal doctrine unanimously holds that an arbitral tribunal may order an interim measure only against one of the parties to the proceedings, not against third parties. An arbitration agreement operates inter partes. It creates obligations for the parties to the agreement and establishes the arbitrator's powers, which extend only to the contracting parties, i.e., the parties to the proceedings.[54]

Arbitrators do not have the power to bind third parties who are not parties to the arbitration agreement.[55] For instance, as is the case in Germany, they do not have the power to compel a bank (or the NBS Forced Collection Department) to transfer funds from the debtor's account to the creditor's account through an interim measure.[56]

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[54] "[T]he strength and weakness of arbitration lie in the arbitration agreement: the tribunal derives its jurisdiction from it, but at the same time, it must respect the limitations arising from such a mandate formed *intuitu personae*" (Knežević, Pavić 2009, 130, translated by author).

[55] "A party may also approach the arbitral tribunal to order an interim measure, provided that the arbitral tribunal is only competent to order interim measures in relation to the parties to the proceedings, and not to third parties" (Stanivuković 2013, 191, translated by author).

[56] "The jurisdiction in this case is agreed upon by the parties, so the arbitral tribunal cannot issue an interim measure against third parties (e.g., a bank) [...] instead, only a court can order such an interim measure" (Krvavac, Belović 2017, 452, translated by author).

The power of the arbitral tribunal is regulated in this manner in countries that have adopted the UML.[57] For example, in Austria,[58] Croatia,[59] and Slovenia,[60] as well as in Germany, the arbitral tribunal's power is limited to issuing orders to a party to take a specific action, and does not include making decisions on enforcement, as requested in the hypothetical example. Even without precise wording, Article 31 of the Serbian Arbitration Act should be interpreted in this manner. One should assume that the legislator did not intend to grant domestic arbitrators broader power than what is typically granted to them in comparative law, because if such an intention had existed, more detailed provisions on the operationalization of this unlimited power would have been adopted.

The power of the arbitral tribunal to order interim measures cannot be equated with the general power of the arbitral tribunal to decide on the conduct of the arbitration proceedings, which exists under Article 32(3) of the Arbitration Act. The power to order interim measures is specifically regulated by a separate provision of the Arbitration Act. A decision on an interim measure is not a decision on the conduct of the proceedings, as it often significantly impacts the parties' substantive rights; it temporarily

[57] "A State court can (within the limits of its jurisdiction as determined by the applicable *lex fori*) grant such a measure, authorising e.g. an attachment against the assets out of which satisfaction may be sought once a final judgment on the merits has been issued. By contrast, an arbitral tribunal is generally unable to do so, as its jurisdiction derives from the parties' agreement and thus does not extend to third parties" (Ortolani 2020, 338).

[58] Art. 593 (1) 2013 Austrian Arbitration Act: "Unless otherwise agreed by the parties, the arbitral tribunal may, upon request of a party and after hearing the other party, order against the other party such interim or protective measures it deems necessary in respect of the subject-matter in dispute if the enforcement of the claim were otherwise frustrated or significantly impeded, or there were a risk of irreparable harm. The arbitral tribunal may request any party to provide appropriate security in connection with such measure." (translation published by International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber).

[59] Article 16 (1) Croatian Arbitration Act: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure."

[60] Article 20 (1) Slovenian Arbitration Act: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, at any time before the issuance of the final award, grant against the other party an interim measure it considers appropriate having regard to the subject matter of the dispute, after giving that other party an opportunity to present its case with respect to the request. The arbitral tribunal may require any party to provide appropriate security in connection with the measure." (translation published by Stalna arbitraža pri Gospodarskoj zbornici Slovenije).

regulates the relationship between the parties or requires the parties to perform or refrain from a specific action, which can affect the presentation of evidence or the enforcement of the final arbitral award (Kojović 2001, 522).

In principle, the power of arbitrators to order interim measures cannot be derived from their power to manage proceedings (Poudret, Besson 2007, 521). This is illustrated by the fact that comparative law includes arbitration statutes that limit the arbitral tribunal's power to order interim measures,[61] or exclude certain types of interim measures from its power,[62] even though they generally grant the arbitrator the power to decide on the conduct of proceedings when there is no agreement between the parties.

2.4. Limits of the Arbitrator's Power: The Arbitral Tribunal is not competent to Issue Enforcement Orders

In the hypothetical example, the claimant included in the dispositive of the proposed interim measure the statement that the decision/ruling has the effect of a final enforcement decision. Although a layperson may think that the arbitral tribunal is competent to issue enforcement orders because it is equated with a court in all respects, this is not the case, neither in Serbia nor elsewhere. In countries influenced by the Germanic law system, which includes Serbia's procedural law, arbitral tribunals do not have the authority to issue enforcement decisions. On the contrary, the law provides for the mandatory assistance of the courts in enforcing arbitral decisions that order interim measures.

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[61] For example, prior to the 2022 reform, which came into effect in 2023, the Italian Code of Civil Procedure (Art. 818) excluded the possibility for arbitrators to order interim measures. The reform introduced the power for arbitrators to issue such measures, but only if the parties had provided for this in the arbitration agreement, which may be by agreeing to the application of specific arbitration rules.

[62] The Belgian Judicial Code (Art. 1696(1)) stipulates that the arbitral tribunal cannot order interim measures such as attachment against the debtor's property for the purpose of security (*saisie conservatoire*). The same applies to the Dutch Code of Civil Procedure, Art. 1043b (*conservatoir beslag*).

The Serbian Arbitration Act grants the arbitral tribunal the power to order interim measures, but this does not mean that the arbitral tribunal was automatically granted the power to order the compulsory enforcement of those measures. Based on this wording, the tribunal is not granted the power to issue an enforcement decision, as per the provisions of the ESA.[63]

The authors of the monograph on arbitration law, published during the validity of the previous version Enforcement Procedure Act, state:

> The term "interim measures", used in the Arbitration Act, fully corresponds to the terminology of our Enforcement Procedure Act (EPA). However, it would be incorrect to conclude that the Arbitration Act simply allows arbitrations operating in the territory of Serbia to follow the provisions of the EPA when ordering interim measures. From a purely formal perspective, the provisions of the EPA were designed for judicial, not arbitration proceedings, and therefore they should not even be subsidiarity applied to arbitration (Knežević, Pavić 2009, 131, translated by author).

The law applicable to arbitration proceedings is determined in Article 2 of the Arbitration Act. The provisions of the Arbitration Act apply to arbitration proceedings when the place of arbitration is in Serbia. Just as the provisions of the Civil Procedure Act do not apply to arbitration proceedings, even by analogy – neither do the provisions of the ESA.[64] In other words, arbitrators, when exercising their powers under Article 31 of the Arbitration Act, are not required to apply the ESA, and it cannot be considered that they are issuing enforcement decisions within the meaning of the ESA. Even though the provision of Article 31 of the Arbitration Act is not well articulated, we cannot agree with the view that the determination of interim measures by the arbitral tribunal entails the application of coercion and represents an ad hoc conduct of enforcement proceedings (Knežević 2008b, 877).

[63] Arts. 2(1)(7), 3(5), 23(2), 70(1), 133(1), 418, and 419 ESA.

[64] The Arbitration Act establishes that its provisions apply to arbitration proceedings conducted in Serbia, while the provisions of the Civil Procedure Act only apply to the decision-making process related to the setting aside of an arbitral award (Art. 61). The provisions of the ESA apply to decisions on the enforcement of domestic arbitral awards (Art. 64(1)), to the recognition of foreign arbitral awards as a preliminary issue (Art. 65(2)), and to (court) decisions on interim measures issued during arbitral proceedings and their enforcement (Art. 65(3)).

The formulation in Article 31 of the Arbitration Act that "the arbitral tribunal may order an interim measure" should not be interpreted as meaning that the arbitral tribunal conducts enforcement proceedings within the arbitration process or that it can issue decisions on securing claims, equivalent to a court's enforcement decision. The key distinction between interim measures in court and arbitral proceedings is that the enforcement of an interim measure ordered by an arbitral tribunal cannot occur without an (additional) court decision. This is supported by the provisions of German, Swiss, Austrian, Croatian, and Slovenian law, as well as the lack of legal basis for direct enforcement in Serbian law. Furthermore, a decision on securing claims issued in court proceedings is subject to appeal (Articles 420 and 423 ESA), while no such remedy is provided for decisions made by an arbitral tribunal regarding interim measures.

An arbitral tribunal's interim measure is not equated with a court enforcement decision in its legal effect because this is not provided for in the law (Pavić, Đorđević 2016, 330). If the interim measure ordered by the arbitral tribunal were to be treated as an enforcement decision equivalent to one made by a court, a public enforcement officer could execute it. However, enforcement by a public enforcement officer only begins after an enforcement decision has been made (Bodiroga 2024, 289). Treating an arbitral tribunal's interim measure as an enforcement decision would adversely affect the procedural rights of the parties, which will be discussed below.

Arbitrators do not have coercive powers over the parties – and even less so over third parties – and cannot forcibly enforce the interim measures they impose. When they "order" a party to take a certain interim measure, arbitrators lack the ability to enforce it against the party's will.[65] Undoubtedly, the arbitrators will consider the fact that the party has not complied with the interim measure they have ordered, but they cannot compel the party to comply with that interim measure against their will. The monopoly on the use of force remains with the state.

In the hypothetical example, the plaintiff requested the arbitrators to order the NBS Forced Collection Department to remove foreign currency from the defendant's account and deposit it into an escrow account with a public enforcement officer. The inconsistency of the dispositive part of this interim measure with the legislator's intentions can be verified by comparing it with the potential dispositive of the final arbitral award. If such a proposal

[65] In Swiss doctrine, there is a discussion about whether an arbitral tribunal could combine an interim measure with the threat of a monetary penalty (*astreinte*), but there is no consensus on this matter. However, there is agreement that an arbitral tribunal cannot impose an interim measure under the threat of criminal sanctions.

for an interim measure were lawful, and if the arbitrators had the power to order the NBS Forced Collection Department to apply coercion against a party, then they could (why not?) also directly order the NBS Forced Collection Department to transfer money from the defendant's account to the plaintiff's account, in the final award in favour of the plaintiff. However, in the dispositive part of the arbitral award, the arbitral tribunal can only order the defendant to pay a certain amount to the plaintiff, and every well-informed plaintiff would formulate their claim in such a way. The dispositive of the final arbitral award must be formulated in this manner because the arbitral tribunal is not authorized to order state authorities to forcibly enforce its decision. The execution of its final decision, which includes an order to the defendant rather than to the NBS Forced Collection Department, will be handled by the courts in the enforcement procedure, if necessary, and when the final decision becomes enforceable by law.

Based on the proposal in the hypothetical example, the decision of the arbitrators would have the character of an enforcement decision, for which the courts have exclusive jurisdiction, according to Article 419 of the ESA. According to this law, the NBS Forced Collection Department acts on the order of the court and the public enforcement officer, not on the order of the arbitral tribunal.

If the arbitrators were to adopt a decision or ruling based on the proposal in the hypothetical example, obliging the NBS Forced Collection Department to transfer funds from the defendant's account to an escrow account with the public enforcement officer, such a measure – representing a significant infringement on the defendant's property rights and interests – would escape the control of legality. If this interim measure were to be equated with an enforcement decision made by the court, then there would be no possibility to apply Article 423(1) of the ESA, which provides for the right to appeal against a decision made on a request for securing the claim, as there would be no second-instance authority where the arbitral tribunal's interim measure could be appealed. This would violate the right to appeal or other legal remedies, as provided in Article 36(2) of the Constitution of Serbia, and undermine the parties' right to a fair trial.[66] In such cases the parties would be left at the mercy of the arbitrators, who are a private court entrusted by the state with a mandate of limited scope.

[66] The Constitutional Court holds the position that the right to a legal remedy in enforcement proceedings must be guaranteed even against a decision regarding a request for enforcement, as well as in other procedural situations where a court or a public enforcement officer resolves a party's rights. This is stated in the decision of the Constitutional Court, Už-9179/2012.

Accordingly, the provision of Article 31 of the Arbitration Act should be interpreted in line with the inherent limitations of the arbitrator's power, which stem from the arbitration agreement as its foundation. Courts should interpret provisions modelled after Article 17 of the 1985 UML in a way that does not grant the arbitral tribunal the power to order or permit enforcement (UNCITRAL 2012, 86; similarly, for German law, see Schäfer 2015, 227).

2.5. Is the Respondent's Objection to the Arbitral Tribunal's Jurisdiction Necessary?

One could discuss whether, in the hypothetical case, a respondent, who did not contest the arbitral tribunal's jurisdiction to order the requested interim measure in their response to the claim, has lost the right to invoke the tribunal's lack of power, in arguing against a decision granting the requested interim measure in the form sought by the claimant.

This issue is also linked to the question whether an arbitral tribunal may determine its own jurisdiction, on its own initiative, when requested to issue an order requiring a third party to act or to issue an enforcement decision.

In the case of interim measures, the general rule under Article 29 of the Arbitration Act should apply, which states that objections to jurisdiction and exceeding power must be raised before the arbitral tribunal as soon as the matter alleged to exceed the tribunal's power is introduced in the arbitration proceedings.

However, the Arbitration Act provides that an arbitral tribunal may decide on its jurisdiction on its own initiative, even in the absence of an objection from the respondent.[67] The tribunal should do so when the disputed matter is not arbitrable or when ruling on the matter, as requested by a party, would exceed the boundaries of the arbitration agreement.

[67] "The arbitral tribunal may decide on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement." Art. 28(1) SAA (translated by author in ICCA International Handbook on Commercial Arbitration, ed. Lise Bosman, Kluwer Law International, Supplement No. 80, July 2014, 1–19).

2.6. Conclusion on the Power of the Arbitral Tribunal

Considering the legislator's intention for the Arbitration Act to align with the 1985 UML, thereby harmonizing Serbian arbitration law with other national laws in this field (Mitrović 2006, 80), the concept of interim measures under Article 31 of the Arbitration Act should be interpreted in accordance with the preparatory materials, i.e., Article 17 of the 1985 UML, comparative legal practice in its application, and doctrinal views. The UN General Assembly resolution adopting the 1985 UML emphasizes the desirability of uniformity in laws governing arbitration proceedings.[68]

This interpretation implies that, under Article 31 of the Arbitration Act, an arbitral tribunal has the power only to issue an interim measure requiring one of the parties to take (or refrain from taking or endure) an action deemed necessary. Conversely, the tribunal does not have the power to issue an enforcement order directing a public enforcement officer or the NBS Forced Collection Department to carry out enforcement.

It follows that the arbitral tribunal lacks jurisdiction to grant the interim measure requested in the hypothetical case. If the arbitrators were to grant such a request, the affected party could seek their disqualification and claim damages for exceeding their power, pursuant to Articles 154 and 158 of the Code of Obligations.

3. WHICH INTERIM MEASURES ARE POSSIBLE AND HOW CAN THEY BE ENFORCED?

The introduction of the arbitrator's power to order interim measures into the Serbian legal system has not significantly enhanced the effectiveness of arbitration as a dispute resolution mechanism. It appears that the most crucial interim measures – those needed when the opposing party does not voluntarily comply – remain beyond the arbitrators' reach.

[68] "The General Assembly [...] Recommends that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice," UN Resolution No. 40/72 of 11.12.1985 on Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law.

Nevertheless, the lack of more precise provisions in national legislation should not discourage arbitrators from granting interim measures at the request of parties. Judicial assistance and a favourable interpretation of existing legal provisions are essential for improving the effectiveness of arbitration within the domestic legal system (without waiting for the legislator to awaken from years of inertia and enact the necessary legal reforms[69]).

3.1. The Nature of the Decision on an Interim Measure

Neither the Arbitration Act nor the rules of procedure specify how arbitrators should decide on interim measures. In the hypothetical case, an atypical situation arises where the contracting parties have agreed in the arbitration agreement that arbitral decisions must be made unanimously.[70] This brings to the forefront the nature of the decision on an interim measure.

Is it a decision of a substantive nature, or is it a procedural ruling concerning the management of the arbitration? Unanimity would be required in the former scenario, whereas in the latter a majority vote would suffice, since applying the unanimity rule to procedural decisions could paralyze the arbitration process.

The classification of the interim measure decision is crucial, as it can determine different outcomes and different resolutions of the request. The specific terminology used for the decision is irrelevant – what matters is its legal qualification.[71]

Starting from the systematic approach, we note that the provision on interim measures is systematized in both the 1985 UML and the Serbian Arbitration Act within the section on the jurisdiction of the arbitral tribunal, under the heading Power of the Arbitral Tribunal to Order Interim Measures. In the 2006 UNCITRAL Model Law on International Commercial Arbitration (2006 UML), it is systematized in a separate chapter IVa titled Interim

[69] Legal scholars have pointed out the need for the amendment of the Arbitration Act (Stanivuković, Pavić 2021, 11–22).

[70] Such an agreement is possible under Art. 51(3) of the Arbitration Act, although it may complicate or entirely prevent the issuance of an arbitral award.

[71] The possibility that a decision referred to as a "procedural order" may still be qualified as an arbitral award and set aside by the court, was confirmed long ago by the French Court of Cassation in the case GMRA v. Brasoil, *Arrêt de la Cour de cassation (Première chambre civile) 99–20.925*, dated December 11, 2001.

Measures and Preliminary Orders, positioned between the fourth chapter – Jurisdiction of Arbitral Tribunal, and the fifth chapter – Conduct of Arbitral Proceedings. On the other hand, in arbitration rules, the provision on interim measures is located within the chapters on arbitral proceedings.

Nevertheless, these differences in systematization are not decisive for qualification; it is more important to assess the significance and effect of such a decision on the position and rights of the parties. A decision on an interim measure is not an ordinary procedural decision because, albeit temporarily, it interferes with the substantive rights and interests of the parties. In terms of its significance and effect, it differs from decisions such as scheduling a hearing or determining the manner of examining witnesses, and even from decisions on the admissibility and probative value of certain evidence (Kojović 2001, 522). At times, it comes close to an arbitral award on the merits of the dispute (Bodiroga 2024, 591). Granting such a measure creates an expectation that the arbitrators will award the claimed amount in the final arbitral award. Moreover, it alters the substantive position of the parties during the proceedings (Kojović 2001, 522). Although temporarily, a party may be deprived of the ability to dispose of a significant amount of its own financial resources for a relatively long period. This can negatively impact its business operations and, over time, lead to a loss in the value of assets due to inflation and exchange rate fluctuations. Finally, deciding on an interim measure also involves deciding on the jurisdiction of the arbitrators.

For these reasons, in the absence of explicit provisions, the rules governing the issuance of an arbitral award should apply by analogy to the decision on an interim measure.[72] In ordinary situations, where the arbitration agreement does not require unanimity, such a decision is made by a majority vote of the arbitrators.[73] However, if the parties have explicitly agreed in the arbitration agreement that an arbitral award must be made unanimously, then the interim measure should also be adopted unanimously. Therefore,

[72] The 2013 Austrian Arbitration Act provides for the analogous application of the provisions on issuing an arbitral award in Art. 593(2). Additionally, this provision stipulates that "measures referred to in paragraph 1 shall be in writing; a signed exemplar of the order shall be served upon each party. In arbitral proceedings with more than one arbitrator the signature of the chairman or, if he is prevented from signing, the signature of another arbitrator shall suffice, provided that the chairman or another arbitrator records on the order the reason for any omitted signature." (translation published by International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber).

[73] Art. 51(3) SAA.

in the hypothetical example, the arbitral tribunal would have to adopt the decision on the request for an interim measure unanimously, in accordance with the parties' will, expressed in the specific arbitration agreement.

The decision on an interim measure should be made in writing, signed, and reasoned unless the parties have agreed to exclude the reasoning.[74] The decision must include the date and place of its issuance.[75]

3.2. Types of Interim Measures and Conditions for Ordering an Interim Measure

The types of interim measures that an arbitral tribunal may order are specified in Article 17, with the conditions elaborated in Article 17A of the 2006 UML. In drafting the Arbitration Act, the working group of the Ministry of Foreign Economic Relations considered only the original version of the UML from 1985. However, arbitrators conducting arbitration proceedings in Serbia may use the 2006 UML as a guideline, with the aim of harmonizing the national legislation as well as the arbitral practice.

According to Article 17 of the 2006 UML, an interim measure is "any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to (a) Maintain or restore the *status quo* pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute."

Sometimes a party requests an interim measure requiring the other party to immediately pay the amount claimed in the lawsuit or at least a part of that amount. As stated in the commentary to the 2006 UML, such an interim measure is not provided for in the 2006 UML because it could be perceived as prejudicial to the outcome of the dispute.[76]

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74 Arts. 51(1) and 53(1) SAA.

75 Art. 53(2) SAA.

76 "[T]his type of interim relief leads to more invasive and delicate effects, as it effectively anticipates the payment at a stage when the tribunal has not yet made its final determination" (Ortolani 2020, 340).

Under Article 17A of the 2006 UML, the party requesting an interim measure under Article 17(2)(a), (b) and (c) must establish that "Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination." These requirements apply to a request for interim measure under Article 17(2)(d) (preservation of evidence) only to the extent that the arbitral tribunal considers appropriate.

Serbian doctrine considers that one of the most important conditions for ordering an interim measure in arbitration proceedings is the need to prevent the occurrence of irreparable damage. Furthermore, an interim measure in arbitration proceedings should not prejudge the outcome of the dispute, and, ultimately, it must be proportional, meaning it should not infringe more than necessary on the rights of the party against whom it is directed (Knežević, Pavić 2009, 132). Additionally, an interim measure should not exhaust the claim for relief (Knežević, Pavić 2009, 132; Krvavac, Belović 2017, 456).

When a request for an interim measure is made at the beginning of the proceedings, the arbitral tribunal cannot decide on it until it determines whether it has jurisdiction to resolve the merits of the dispute. It is sufficient for the arbitral tribunal to assess that it is prima facie competent to resolve the merits of the dispute in order to be able to rule on the interim measure (Stanivuković 2013, 191).

The party whose request for an interim measure has been granted may be required to provide security for any potential damages (Stanivuković 2013, 192). While the arbitral tribunal cannot order an interim measure on its own initiative, the decision to require the requesting party to provide security is not conditional upon the proposal of the party against whom the measure was imposed. Additionally, the decision to lift or modify an interim measure in the event of changed circumstances is not conditional on the proposal of the party, unless the parties have otherwise agreed.

3.3. Enforcement of the Arbitral Tribunal's Decision on an Interim Measure

In its explanatory note on the 1985 UML, the UNCITRAL Secretariat states that "[i]t may be noted that the article does not deal with enforcement of such measures; any State adopting the Model Law would be free to provide court assistance in this regard" (UNCITRAL 1994, 20).

The Serbian Arbitration Act fails to provide for court assistance in the enforcement of interim measures, as recommended by the drafters of the 1985 UML in their guidance for its implementation in national legislation. As discussed in the section on the genesis of Article 31 of the Serbian Arbitration Act, unlike many other national laws, the Arbitration Act does not contain provisions on court assistance in enforcing interim measures (Pavić, Đorđević 2016, 330).

National laws that include such a provision can be divided into two groups, depending on whether the enforcement procedure is the same as or somewhat different from the one applied to arbitral awards (Kojović 2001, 513). This distinction leads to another: laws that prescribe the same enforcement procedure treat decisions on interim measures as arbitral awards and apply the provisions on the enforcement of arbitral awards to them, whereas laws that prescribe a different system treat decisions on interim measures as a distinct type of decision requiring court assistance for enforcement.

Systems of court assistance in enforcing an arbitral tribunal's decision on an interim measure have been adopted in countries that have traditionally influenced Serbian civil procedure (Austria, Germany, and Switzerland), as well as in Croatia and Slovenia (Schäfer 2015, 227).

Article 593(3) of the Austrian Arbitration Act provides:

"Upon request of a party the District Court ('Bezirksgericht') in whose district the opponent of the party at risk has its seat, domicile or habitual residence within Austria at the time of the first filing of the request, otherwise the District Court ('Bezirksgericht') in whose district the enforcement of the interim or protective measure shall be carried out, shall enforce such measure. Where the measure provides for a means of protection unknown to Austrian law, the court may, upon request and after hearing the other party, enforce such measure of protection under Austrian law which comes closest

to the measure ordered by the arbitral tribunal. In this case the court may also, upon request, reformulate the measure ordered by the arbitral tribunal in order to safeguard the realization of its purpose."[77]

The content of Article 1041(2) of the German Code of Civil Procedure is provided in Chapter 2.2.

Article 183(2) of the Swiss Private International Law Act (PIL) provides:

"If the party concerned does not comply voluntarily with the measure ordered, the arbitral tribunal or a party may request the assistance of the competent court. The court shall apply its own law."[78]

Article 16(2) of the Croatian Arbitration Act is identical to the Triva Draft, which is discussed in Chapter 2.2.

Article 20(4) of the Slovenian Arbitration Act provides:

> "If the party fails to comply with the interim order issued by the arbitral tribunal, the court shall permit, at the request of the other party, the enforcement of the measure in accordance with article 43 of this Law, unless a request for the issuance of such an interim measure has already been made before the court."[79]

Article 31(2) of the Draft Serbian Arbitration Act originally contained a similar provision, which was later omitted for unknown reasons (see Chapter 2.2). However, Article 65 of the Arbitration Act, which governs the jurisdiction and procedure for the recognition and enforcement of foreign arbitral awards, contains a provision that could be interpreted as granting the court the power to enforce an interim measure, regardless of whether it concerns an interim measure from a domestic or foreign arbitral tribunal. Article 65(3) reads:

"The provisions of this Act shall not exclude the application of provisions of the statute that regulates enforcement procedure concerning jurisdiction to decide on interim measures and *their enforcement*." (emphasis added)

There are two possible interpretations of this provision. According to one, it refers to the court's decision-making regarding interim measures and the enforcement of judicial interim measures. According to the other

[77] Translation published by International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber.

[78] Translation published by Swiss Confereration on Fedlex.

[79] Translation published by Stalna arbitraža pri Gospodarskoj zbornici Slovenije.

interpretation, the provision refers to the decision-making regarding arbitral tribunal's interim measures and their enforcement. It is preferable to adopt the second interpretation for several reasons.

A linguistic interpretation shows that the pronoun "their" refers to interim measures, which, according to Article 31 of the Act, may also be issued by the arbitral tribunal. Chapter IX of the Act, which encompasses Article 65, regulates the recognition and enforcement of arbitral awards, and Article 65 itself addresses the recognition and enforcement of foreign arbitral awards. Therefore, the provision in Article 65(3) could also refer to the enforcement of a special type of arbitral award – the decision on interim measures, the enforcement of which is decided by the court according to the provisions of the ESA.

It would be redundant and inappropriate to include a provision on the enforcement of judicial decisions on interim measures in the chapter on the recognition and enforcement of arbitral awards. The courts' right to independently decide on interim measures is already reserved in Article 15, and this right also includes decisions regarding the enforcement of their own interim measures under the provisions of the ESA. Furthermore, it is unnecessary for the Arbitration Act to address this because it is already regulated in the ESA.

The third reason, perhaps the most important, is the fact that for an efficient national system of arbitral dispute resolution, there must be the possibility of judicial enforcement of interim measures issued by an arbitral tribunal. Hence, if there is no better-formulated provision, perhaps this one is sufficient, for domestic courts to accept, through a lenient interpretation, the power to rule on the enforcement of interim measures issued by the arbitral tribunal. In response to possible criticism that the basis for the decision is found in an article that regulates the recognition and enforcement of foreign arbitral awards, it could be argued that this systematization is not decisive because the provision itself is not limited to foreign interim measures and can therefore be viewed and interpreted separately from the other provisions of the same article.

At the time the Serbian Arbitration Act was adopted and came into force in 2006, the jurisdiction for the enforcement of arbitral awards and interim measures was entrusted to the court.[80] Article 7 of the Arbitration Act clearly defines the role of the court: "A state court [...] may only take those actions

[80] Arts. 64–68 SAA. Translated by author in ICCA International Handbook on Commercial Arbitration, ed. Lise Bosman, Kluwer Law International, Supplement No. 80, July 2014, 1–19.

regarding arbitration that are expressly specified in this Act." One of these actions is the enforcement of a final domestic or foreign arbitral award: "A domestic arbitral award [...] shall be enforced in accordance with provisions of the statute regulating enforcement procedure."[81] "The court determined by the statute shall decide on the recognition and enforcement of a foreign arbitral award."[82]

The second action, which is somewhat less clearly regulated, is the enforcement of interim measures.[83] Analogous to Article 7 of the Arbitration Act, public enforcement officers are not authorized to take actions related to arbitration, nor to directly enforce the arbitral tribunal's decisions on interim measures, as this is not explicitly provided for in the Arbitration Act. In comparative legislation, the compulsory enforcement of interim measures by an arbitral tribunal is placed in the jurisdiction of the courts. Similarly, in the Serbian legal system, the compulsory enforcement of interim measures cannot be legally achieved without the involvement of the courts.

If Article 65(3) of the Arbitration Act is accepted as the basis for the court's decision-making on the enforcement of interim measures ordered by an arbitral tribunal, the question arises as to whether these interim measures must be adopted in a specific form in order to be enforced by the courts. Additionally, under what conditions could the enforcement of interim measures ordered by the arbitral tribunal be permitted?

According to Article 17 of the 2006 UML, an interim measure is any temporary measure issued in the form of an arbitral award or in some other form. Among the group of laws that treat interim measures by an arbitral tribunal as arbitral awards, inter alia, is the law of the Netherlands. According to Article 1043b(4) of the Dutch Arbitration Act (as contained in the Code of Civil Procedure):

> "Unless the arbitral tribunal determines otherwise, a decision by the arbitral tribunal on the request to grant provisional relief shall constitute an arbitral award to which the provisions of Sections Three to Five inclusive of this Title shall be applicable."[84]

[81] Art. 64(1) SAA.

[82] Art. 65(1) SAA.

[83] Art. 65(3) SAA.

[84] Section Three: The Arbitral Award, Section Four: Enforcement of the Arbitral Award, Section Five: Setting Aside and Revocation of the Arbitral Award.

The Serbian Arbitration Act does not specify the form of an interim measure. Additionally, it does not provide that the arbitrator's decision ordering an interim measure constitutes an enforceable document nor that it is final. According to Article 64(1) of the Arbitration Act, only a domestic arbitral award has the effect of a domestic final court decision and is enforced in accordance with the provisions of the law governing enforcement procedure.[85] This fact directs arbitrators to issue an interim measure in the form of an arbitral award. In addition to the final arbitral award on the merits of the dispute, which resolves all party claims, the Arbitration Act allows an arbitral tribunal to issue an interim or partial award that would decide only on one of the claims.[86] It seems that the provisions of the ESA regarding the enforcement of arbitral awards leave sufficient room for the enforcement of interim measures if they are treated as interim awards.

The enforcement procedure is initiated when the creditor submits a proposal for enforcement based on an enforceable document.[87] The status of an enforceable document must be recognized by law (Bodiroga 2024, 217). An enforceable document includes, among other things, an arbitral interim award issued in proceedings before a domestic arbitral tribunal.[88] An arbitral interim award that mandates action or inaction becomes enforceable once it is final and the deadline for voluntary compliance with the obligation has passed. If no deadline for voluntary compliance is specified in the award, the default is eight days from the delivery of the enforceable document to the debtor.[89] An arbitral award requiring nonaction or forbearance becomes enforceable when it becomes final, unless otherwise stipulated.[90] The court in the enforcement procedure decides by ruling on the proposal for enforcement.[91] The court is not authorized to examine the legality or correctness of the enforceable document.[92] The enforcement ruling does not need to be reasoned.[93] The court's ruling on the enforcement of an interim award can be challenged in the enforcement procedure through an

85 "A domestic arbitral award shall have the effect of a final judgment of the domestic court and shall be enforced in accordance with provisions of the statute regulating enforcement procedure." Art. 64(1) SAA.

86 Arts. 48(1) and (2) SAA.

87 Art. 3(1) ESA.

88 Arts. 41(1)(1) and 42(1) ESA.

89 Art. 47(1) ESA.

90 Art. 42(3) and (4) ESA.

91 Arts. 3(2) and 23(2) ESA.

92 Art. 5(2) ESA.

93 Art. 23(3) ESA.

appeal.[94] The appeal against the enforcement ruling ensures the right to legal remedy in the enforcement procedure, which would be lacking if the interim measure of the arbitral tribunal were incorrectly treated as an enforcement ruling.[95] When the court issues a ruling on the enforcement of an arbitral interim award, the enforcement is carried out. The execution of enforcement is solely the responsibility of the public enforcement officer.[96]

While the Arbitration Act explicitly provides that a domestic arbitral award has the effect of a domestic final court decision, the order of an arbitral tribunal is not granted finality. The orders of an arbitral tribunal are not considered enforceable documents in the sense of Article 41 of the Arbitration Act (Bodiroga 2024, 216–217). Commentators of the 2006 UML argue that recognizing measures taken in forms other than an arbitral award may complicate matters and cause problems (Brekoulakis, Ribeiro, Shore 2015, 877).

Arbitrators could possibly issue an interim measure in the form of a procedural order, and the courts could still treat that procedural order as an arbitral award based on its content rather than its title. However, since there is no complete legislative framework in place for enforcement of procedural orders, a safer approach for arbitrators in Serbia would be to decide on the interim measure through an interim award.

Thus, an arbitral tribunal sitting in Serbia can adopt an interim measure in the form of an interim award under Article 48(2), which facilitates its judicial enforcement, or in the form of a procedural order, which is more suitable for situations where there is no interest in its compulsory enforcement.

It is important to note that domestic arbitral awards, including interim awards, are subject to judicial review for legality within the prescribed time limits and in the detailed procedure. Articles 57–63 of the Arbitration Act govern the procedure for the setting aside of an arbitral award, ensuring judicial control over the legality of the arbitrator's work. However, control of legality is not explicitly provided for interim measures issued by the arbitral tribunal. What should be done when the subject of the arbitral interim award is the determination of an interim measure? Should the court allow for the review of the legality of interim measures issued in the form of an arbitral award through a setting aside action?

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94 Art. 73(1) ESA.

95 Art. 24(1) ESA.

96 Arts. 3(5) and 4(3) ESA.

Speaking about the 2016 draft of the new Croatian Arbitration Act, Professor Mihajlo Dika (Dika 2016, 386, translated by author) states that "[t]he decision on an interim measure is made in the form of a final award, i.e., a substantive decision, and should be reasoned. Insisting on a final award is necessary in order to eliminate any doubt that this decision can be challenged like any other substantive award."

In contrast to this view, Swiss case law does not allow for a setting aside action against an "interim arbitral award", which the court qualified as an interim measure, based on its content rather than form,[97] because an interim measure is not a final or interim arbitral award, as it does not definitively resolve any of the substantive claims and is of a temporary nature.[98]

The 2006 UML aims to fill the legal gap left in the 1985 UML regarding the procedure and conditions for the enforcement of interim measures by arbitral tribunals and the control of their legality. Article 17H of the 2006 UML provides that an interim measure issued by an arbitral tribunal is recognized as binding and enforced upon application to the competent court, regardless of the country in which it was issued. Recognition and enforcement may be refused at the request of the party against whom the interim measure is directed or ex officio.

Article 17I of the 2006 UML outlines the reasons for refusing recognition and enforcement, which are similar to those in Article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, with additional reasons tailored to the specifics of interim measures. For instance, a party may argue that the security required by the arbitral tribunal in connection with the interim measure has not been provided, or that in the meantime, the arbitral tribunal has terminated or suspended the interim measure. The court may ex officio refuse recognition and enforcement of an interim measure if it contradicts the court's powers, unless it decides to reformulate it to adapt it to its own powers and procedure for enforcement, without modifying its substance.

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97 The Swiss court, when qualifying an arbitrator's decision as an arbitral award, focuses on the content rather than the title of the decision. Tribunal fédéral, Arrêt 4A_600/2008 of 20 February 2009, consid. 2.3. In this case, the decision requiring one party to immediately transfer ownership of the clothing stocks, which were the subject of the disputed contract, to the other party, with the value of the transferred goods to be ultimately determined in the final arbitral award, was classified as an interim measure within the meaning of Art. 183 of the Swiss Private International Law Act.

98 Tribunal fédéral, Arrêt 4A_582/2009 of 13 April 2010.

The Slovenian legislator has adopted the provisions of the 2006 UML in a specific provision related to the recognition and enforcement of interim measures issued by arbitral tribunals. These measures are recognized and enforced in enforcement proceedings. The court that is competent under the law on enforcement and security rules on whether to accept the proposal for the enforcement of an interim measure, by examining reasons related to the setting aside of an arbitral award and the recognition and enforcement of a foreign arbitral award, depending on whether the interim measure is issued by a domestic or foreign arbitral tribunal.

The court may refuse the proposal if the party opposing the enforcement demonstrates that the other party has not complied with the arbitral tribunal's decision regarding the provision of security or if the arbitral tribunal has modified, postponed, or revoked the interim measure. Finally, the court may refuse the proposal if it determines, ex officio, that it is not possible to enforce the interim measure in the form in which it was issued. Instead, the court may, at the request of a party, reformulate the interim measure in an appropriate manner and to the necessary extent, provided that its substance remains unchanged.

Since there are no explicit provisions in Serbian law that grant the competence of the enforcement court to decide on the legality of a domestic interim award as an enforceable document, it is most appropriate to allow the party to challenge the legality of an interim award containing an interim measure through a setting aside action. This means treating such an interim award as any other arbitral award. It also implies that two parallel proceedings may occur simultaneously – one for the setting aside of the interim award and another for its enforcement.

The doctrine highlights the problem that, according to the provisions of the Arbitration Act and the regulations of domestic arbitration institutions, an arbitral award may be corrected, interpreted, or supplemented, but not terminated, modified, or revoked, as can be the case with an interim measure. An arbitral award is not subject to subsequent changes, except in the case of setting aside by the court. Therefore, the provision of the original Rules of the Permanent Court of Arbitration, which required the arbitral tribunal to issue an interim measure in the form of an arbitral award, while simultaneously allowing the arbitral tribunal to revoke, modify, or terminate the interim measure, was criticized as unsustainable (Pavić, Đorđević 2016, 333). This criticism concerns the lack of finality of the interim measure, despite being issued in the form of an arbitral award.

If the fact that the interim measure can be changed or revoked over time within the same arbitral proceeding, depending on the change in circumstances, is considered decisive, this would lead to the nonrecognition of the finality of the interim award that contains it. As a result, the possibility of it being enforced as an enforceable document would be denied. This justified objection, however, does not prevent many national courts from enforcing interim measures issued by arbitral tribunals based on their binding nature. An interim measure is binding on the parties, even though it can subsequently be modified or revoked. The binding nature of the interim measure, coupled with the inability to challenge it with any legal remedy, supports its recognition as enforceable.

Case law rightly emphasizes that the enforcement of an interim measure should occur when it is ordered, not at some later point in time, as delaying enforcement would undermine the effectiveness of the interim measure. It is a specific form of legal protection that can only achieve its purpose if the security measure is enforced without delay (Bodiroga 2024, 551). For this reason, a decision on an interim measure is sometimes classified as a decision on one of the claims that can be separated from the other claims, and it is argued that it represents a final decision on that particular claim.

Problems that can arise when an interim measure enforced by the arbitral tribunal later turns out to be unjustified are resolved by a new decision by the arbitrators, which revokes the earlier interim measure, or by a court decision that, at the request of a party, sets aside or modifies the court's decision regarding the enforcement of the arbitral interim measure. The decision of the arbitrator to revoke the interim measure is also enforceable (Van den Berg 2001, 143). If the interim measure proved to be unjustified because the claim for which it was ordered was not upheld, it could be revoked in the operative part of the final arbitral award, with a determination that the party against whom the measure was imposed has the right to restitution and possibly, compensation for the loss.

According to Article 17H of the 2006 UML, the competent court that the party approaches will decide on the enforceability of the interim measure issued by the arbitral tribunal. When drafting the 2006 UML, consideration was given to whether the request for the recognition and enforcement of the interim measure should be made by the arbitral tribunal or the party. The members of the working group concluded that this should be left to the party, as the independence and impartiality of the arbitral tribunal could be called into question if it requested the enforcement of an interim measure that was issued in favour of one party and to the detriment of the other (Gómez 2020, 463).

In future amendments to the law, it would be advisable to adopt the rule included in the 2006 UML and German law, according to which the court may, if necessary, reformulate the interim measure issued by the arbitral tribunal in order to enable its enforcement. For instance, if the arbitral tribunal incorrectly required a party to make a payment in foreign currency in Serbia, such a decision could not be enforced, and under the current legislation, the domestic court has no ability to reformulate that part of the dispositive in the enforcement decision of the arbitral tribunal's interim measure and oblige the party to pay the equivalent amount in dinars. In line with the principle of formal legality, the enforcement court cannot change, correct, or supplement the enforcement instrument (Bodiroga 2024, 241–243). The aim of this provision in German arbitration law is to ensure that interim measures issued by the arbitral tribunal can be "translated" into enforcement orders as provided by German civil procedural law. It also shows that arbitrators are not required to follow the provisions of the German Code of Civil Procedure regulating the procedure and conditions for issuing interim measures (Schäfer 2015, 233). Arbitrators in Serbia can also be foreign nationals who may not be sufficiently familiar with domestic enforcement rules, so it could easily happen that they issue an interim measure that is, for some reason, unsuitable for enforcement. Therefore, it would be beneficial to grant the court the power to adapt the arbitral interim measure to the requirements of the ESA.

The territorial jurisdiction of the court for the enforcement of domestic arbitral awards that have ordered interim measures is also not specified in the Serbian Arbitration Act but could be determined based on the provisions of the ESA. Under German law, it is specified that the court for the enforcement of arbitral awards issued by an arbitral tribunal with its seat in Germany is the court designated in the arbitration agreement, or, in the absence of such a designation, the court in the place of arbitration. For the enforcement of awards by foreign arbitral tribunals, the competent regional court is the district court in the area where the party against whom the enforcement is sought has its place of business or habitual residence, or where the property affected by the measure is located. The regional court in Berlin has jurisdiction if no other court has territorial jurisdiction.[99]

From everything presented above, it follows that the claimant from the hypothetical example could obtain an interim measure if they formulated the request differently. If the arbitral tribunal were to grant the interim measure in the form of an interim award, obligating the opposing party to temporarily execute payment to the designated account of a public enforcement officer,

[99] Art. 1062(1) and (2) ZPO. For more details, see Kojović 2001, 518.

that decision would have been enforceable just like any other domestic arbitral award after the expiration of the deadline for voluntary enforcement, and it would also have been subject to judicial review of legality, through a petition for setting aside. The claimant could then turn to the court for its compulsory enforcement, if the opposing party failed to voluntarily comply with it.

Poznić (1973, 85) long ago raised the issue of the utility of interim measures by arbitral tribunals. Why would a party approach arbitrators for an interim measure that is enforced through the court, when they can directly approach the court with a request for the same measure, which the court (now the public enforcement officer) can enforce immediately? Contemporary literature offers several reasons why parties increasingly do so. The first is confidentiality, as approaching the court for an interim measure would often result in the disclosure of details about the dispute that the parties would prefer to keep private (Ortolani 2020, 331). Furthermore, arbitrators are more familiar with the facts of the dispute and can better assess whether there is a risk to the claim, whether it is reasonable to assume that the claim will be granted, and whether the interim measure would be proportional. A court's decision on an interim measure would require the court to become familiar with the details of the dispute and the circumstances of the case, which would not be efficient. Therefore, after initiating the arbitration process and constituting the arbitral tribunal, the tribunal deciding on an interim measure with the possibility of judicial enforcement represents a more economical solution. Additionally, arbitrators are not bound by provisions of national procedural law, except within the scope of public policy, so they can also order interim measures that the national law does not recognize and thus adapt them to the specific needs of the parties. Finally, the arbitral tribunal's decision on an interim measure is typically in accordance with the will of the parties, as by agreeing to the application of institutional rules, the parties generally accept the arbitration rules that grant primary jurisdiction to the arbitrators.

3. CONCLUSION

In this paper, we have examined the provisions of domestic law regarding interim measures that may be ordered by arbitral tribunals in Serbia and observed that there are legal gaps that currently must be filled through purposive interpretation of domestic law in accordance with the need to develop and enhance the efficiency of arbitration, while safeguarding legality and the parties' right to a fair trial. Arbitrators resolving disputes in Serbia

may order interim measures only against parties who have entered into an arbitration agreement and participate as parties in the dispute. A party may request the enforcement of interim measures only before the court, based on the provisions of the ESA concerning the enforcement of arbitral awards. Decisions of the arbitral tribunal on interim measures may be qualified as arbitral awards, and domestic arbitral awards become final and enforceable upon the expiration of the period for voluntary compliance by the parties. Such decisions may also be subject to setting aside actions.

Given that the provisions of the 2006 UML enabling the recognition and enforcement of interim measures per se have not been implemented in Serbia, it is highly likely that the domestic courts will consider an interim measure issued in another form, such as a procedural order, as suitable for recognition and enforcement. Therefore, it is recommended that arbitrators adopt interim measures that are to be enforced in Serbia in the form of an interim award, respecting the decision-making process, form, and content as prescribed by the arbitration agreement and the applicable law.

It is suggested that the legislator, in the upcoming amendments to the legislation, explicitly include provisions that would regulate in more detail the power of arbitrators for determining interim measures and for judicial enforcement and adaptation of those measures. In search for appropriate solutions, the legislator can benefit from the comparative law experiences and the provisions of the 2006 UML, a legal instrument whose main goal is the harmonization of national arbitration laws and arbitration practices.

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