

# Kluwer Arbitration Blog

## The Still (Somewhat) Muddied Waters of Court-Ordered Interim Measures in Support of Commercial Arbitration in Ukraine

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In recent years, arbitration has been gaining traction in Ukraine as a fast and efficient method for dispute resolution. It was against this background that in December 2017 a [long-awaited reform of procedural legislation](#) was carried out (hereafter referred to as the 'Reform'). The Reform introduced several pro-arbitration measures. Among these, the Reform sought to better facilitate the capacity of parties to obtain interim measures in support of international arbitration from the state courts before an award on the merits is delivered. However, as will be seen below, there are still several hurdles that need to be tackled before one can speak of an effective regime for interim measures in Ukraine.

### Before and After the Reform: Overview

Before the Reform,<sup>1)</sup> [the Code of Civil Procedure of Ukraine](#) (CCPU) contained no provisions on granting interim measures in support of arbitration. In spite of that, Ukrainian courts received three requests for the enforcement of awards on interim measures. The courts stated that those requests were duly submitted and initiated proceedings under the CCPU provisions designated for enforcement of final awards. However, all three applications were dismissed for different substantive reasons.<sup>2)</sup>

As a result of the Reform, Chapter 10 of Section I of the CCPU (regulating the application of interim measures in civil proceedings) was complemented with a provision providing that a court can grant interim measures at a request of a party in either domestic or international arbitration.

This innovation was warmly welcomed by arbitration practitioners. However, we are yet to see a significant increase in the number of interim measures requests granted. The International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry decides 300-600 cases annually, yet fewer than 30 applications for interim measures have been successful in more than three years.

## Current Challenges

What is it that (still) prevents parties to arbitration from obtaining court-ordered interim measures in Ukraine?

### *(i) Request Submission: Finding the Appropriate Document(s)*

Article 151 of the CCPU requires a party seeking an interim measure to provide a copy of:

- a document initiating arbitration proceedings (Initiation document), which can either be a request for arbitration or statement of claim, depending on the Rules chosen, and
- a document confirming the submission of the Initiation document to an arbitration institution (Confirmation document).

While the arbitration rules will generally define what document will serve to initiate arbitration, the same cannot be said for the Confirmation document. Unfortunately, the CCPU gives no clarification as to what can be used as the Confirmation document, leaving this matter to the courts. In practice, this has caused some confusion as many parties would, as a matter of convenience, submit a document that for them was the easiest to procure, but the court would reject it as inadequate.

So, what would a Ukrainian court accept as a valid Confirmation document? Looking at the case law, the following non-exhaustive list emerges:

- a postal delivery confirmation document with a list of enclosures (not a postal confirmation related to sending the Initiation document),
- a copy of the Initiation document stamped by the arbitration institution with an incoming number and date,
- a copy of a ruling on commencement of proceedings duly certified by the arbitration institution, or
- a confirmation letter from the registrar of the arbitration institution.

An interesting question arises as to whether an e-mail can be used as a Confirmation document. Similar to the documents listed above, an electronic Confirmation document must be an answer from an arbitration institution confirming receipt of a letter and not the mere fact of sending it. Further, the CCPU requires an electronic document submitted as evidence to contain a qualified electronic signature. Ukraine is currently creating an extensive network of treaties on mutual recognition of electronic trust services allowing parties to international arbitration to present e-mails from non-Ukrainian arbitration institutions as a Confirmation document. However, a major practical hurdle is that no treaty has been signed to this end so far.

### *(ii) Provision of Security: An Off-Putting Requirement*

If the claim is rejected or left without consideration,<sup>3)</sup> the CCPU entitles the respondent to recover compensation for any damage caused by the interim measures. However, if such a recovery may be precluded in the future, the court may require the requesting party to provide security.

Generally speaking, a court has discretion to require provision of security. However, in two cases it is mandatory: (1) the applicant is neither registered in Ukraine nor has property on its territory

sufficient to cover possible damages, and (2) the court is satisfied that the applicant's actions or property status may complicate recovery of the respondent's damages.

Under the CCPU, a request for interim measures shall *inter alia* contain the applicant's suggestions on security. Para. 4 of Article 154 of the CCPU provides three options for security: (1) placing funds into the court's deposit account, (2) providing financial assurance or (3) taking any other relevant actions. The first option is the most frequently used one. That being said, under the current legislation, the Ukrainian courts have deposit accounts only in the national currency – Ukrainian hryvnia (UAH).

Failure to comply with the requirement to suggest a method for security ranks among the most common reasons for leaving the request without consideration. In a number of cases<sup>4)</sup> the requesting parties claimed that there was no need for security as no damages would be inflicted to the responding party. In turn, the courts left the requests without consideration, noting that the suggestion for security was still necessary. Nevertheless, in the proceedings No. 61-15925/20, the Supreme Court stated that a statement that the requesting party agrees to any security a court deems necessary is acceptable.

Ultimately, the requesting party bears all the risks and expenses connected to security. The CCPU provides neither protection of the deposited sums from inflation nor reimbursement of expenses connected to obtaining financial assurance. Deciding cases No.785/1018/18 and No.194533, the courts put forward a rather controversial opinion as regards the assessment of security: it was required to be equal to the amount of requested preservation.

#### **New Case Law: Paving the Way in the Right Direction**

##### *(i) Criteria clarified*

Despite Ukraine being a civil law jurisdiction, statutory regulation of the criteria for interim measures is rather limited, thus requiring courts to develop the applicable standards through case law. Interim measures in aid of commercial arbitration fall within the jurisdiction of the Ukrainian civil courts. Compared to commercial courts, the civil courts have a less established case law on the criteria applicable to interim measures requested in commercial disputes. And when it comes to granting interim measures in support of commercial arbitration, the civil courts tend to simply adapt the commercial courts' approach. However, they do so in an inconsistent manner.

Existing case law indicates that an applicant seeking provisional measures will be required to show:

- a *prima facie* case on the merits and reasonable possibility of success on the merits,
- that the requested measures correspond with the type of claim and will not hinder respondent's business activity or breach the rights of third parties,
- that the balance of hardships weighs in the applicant's favor, and
- a reasonable assumption that in case of refusal, enforcement of the award on the merits would be unlikely or impossible.

The fourth point is emphasized as the key condition for granting interim measures. However, what

precisely constitutes a reasonable assumption is still unclear. For example, in the proceedings [No.06.08/824/311/2019](#) and [No.22-?/824/620/2020](#), the applicants showed identical circumstances: claimant makes an advance payment under a supply agreement; respondent neither delivered the goods nor returned the payment. While in the first case the request for provisional measures was successful, in the second it was rejected. The court in the second case adopted a higher probability requirement by resorting to the degree standard set in [the resolution of the Plenum of the Supreme Commercial Court No.16 dated 26.12.2011](#), requiring demonstration of the respondent's exact actions aimed at making a future award unenforceable.

In the proceedings [No. 61-16635??20](#), the Supreme Court ruled that the requesting party shall show that the respondent failed to act in good faith and took certain actions to make enforcement of the award on the merits unlikely or impossible e.g. sells or prepares for sale property in possession. Although Ukraine is a civil law jurisdiction, the legal position of the Supreme Court must be heeded by lower courts, thus bringing us a much needed clarification as to what shall constitute a reasonable assumption.

#### *(ii) Enforcement of Awards on Interim Measures*

The Reform left enforcement of orders and awards on interim measures in a vacuum. No explicit provisions on these topics were introduced into the CCPU and no amendments were made to [the Ukrainian Arbitration Law](#), which is still based on the UNCITRAL Model Law as of 1985.

Recently, a case reached the Supreme Court in which the applicant had petitioned for enforcement of an emergency decision on interim measures delivered by the Emergency Arbitrator of the Arbitration Institute of the Stockholm Chamber of Commerce. Deciding the case [No. 824/178/19](#), the Supreme Court applied the provisions of Chapter 3 of Section IX of the CCPU on enforcement of arbitral awards and made no reservations as to the non-final character of the emergency decision.

This gives us an explicit answer as to whether awards on interim measures can be enforced in Ukraine.

#### **Conclusion**

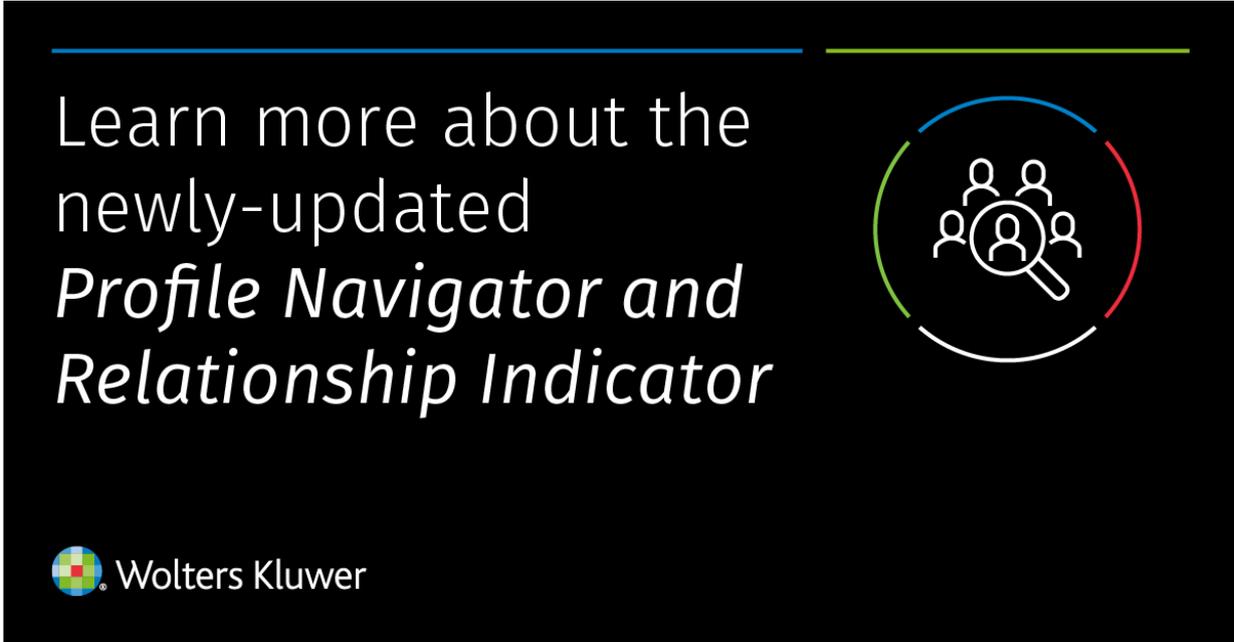
Currently, a party to arbitration aiming to obtain interim measures from a court in Ukraine is sure to face certain difficulties. However, case law developed by the Ukrainian courts has produced much needed clarity. Furthermore, it can be said that the Reform of the Ukrainian legislation regarding interim measures was overall a successful endeavor. In other words, although there is still work left to be done, great strides have been made. Given the fact that the regime of interim measures in Ukraine is still a work in progress, I would advise arbitration practitioners to be both aware of possible intricacies that remain and to become engaged in constructive discussions and contribute to legislative initiatives to help Ukraine become a solid pro-arbitration jurisdiction.

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### References

?1 To find out more about the Reform, please see two posts published by Kluwer Arbitration Blog, available [here](#) and [here](#).

?2 [Case No. 2?-13/2011](#), [Case No. 519/459/16-?](#), and [No. 757/5777/15-?](#)

According to the CCPU, if a requesting party fails to provide required documents or information, a ?3 court leaves the request without consideration instead of rejecting it. This means the requesting party can address the court again by submitting the documents and information needed.

?4 e.g. cases [No.812/223/19](#), [812/816/19](#), [812/808/19](#)

This entry was posted on Monday, August 2nd, 2021 at 8:00 am and is filed under [Arbitration](#), [Interim measures](#), [Reform](#), [Ukraine](#)

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