

*Dominik Horodyski, Maria Kierska**

ENFORCEMENT OF EMERGENCY ARBITRATORS' DECISIONS UNDER POLISH LAW

Abstract:

One of the most significant changes in modern arbitration rules is the adoption of emergency arbitrator proceedings. These proceedings were introduced in order to provide a party in need of urgent interim measures before the constitution of an arbitral tribunal with an additional option besides going to state courts. In emergency arbitrator procedures such a party may seize an emergency arbitrator to grant the requested urgent relief. This article provides the Polish perspective on the effectiveness of emergency arbitrator proceedings, given that the Polish law is silent on the institution of emergency arbitrator and the possible recognition and enforcement of the decisions of an emergency arbitrator. The article analyses the Polish regulations on interim measures, together with their enforcement, by comparing the relationship, similarities and divergences between an arbitral tribunal, a state court, and an emergency arbitrator. This brings us to the conclusion that the existing legal framework as to the enforcement of interim measures issued by an arbitral tribunal provides a solid foundation for drawing an analogy to the recognition and enforcement of such orders granted by an emergency arbitrator. Thus, the provisions on enforcement of arbitral tribunal's orders per analogiam allow for the recognition and enforcement of emergency arbitrators' decisions on interim measures in Poland.

Keywords: civil procedure, commercial arbitration, emergency arbitrator, arbitral tribunal,

INTRODUCTION

The recent proliferation of emergency arbitrator's (EA) provisions in different arbitration rules has opened up to parties an additional mechanism for securing their claims at the pre-arbitral stage in cases submitted to arbitral proceedings.¹ Despite the

* Ph.D. candidate, Jagiellonian University of Kraków (Poland), attorney admitted to the Polish Bar; Ph.D. candidate, Jagiellonian University of Kraków (Poland), attorney – trainee admitted to the Polish Bar.

¹ See generally C. Caher, J. McMillan, *Emergency Arbitration: The Default Option for Pre-Arbitral Relief?*, in: *The International Comparative Legal Guide to: International Arbitration 2015* (12th ed.), Global Legal Group, London: 2015, p. 2; R. Bose, I. Meredith, *Emergency Arbitration Procedure: A Comparative Analysis*, 15(5) *International Arbitration Law Review* 186 (2012), p. 186; I. Welser, *Fast Track Proceedings*,

fact, that the new provisions on EA have been approved worldwide by the arbitral community and practitioners,² it is still difficult to predict their effectiveness, in part owing to the fact that emergency procedures were created as an initiative coming directly from arbitral institutions, with the goal of improving the functioning of their rules and assisting parties in need of urgent interim relief prior to the constitution of an arbitral tribunal. Given the contractual nature of institutional arbitration rules, they cannot provide for any coercive tools or enforcement mechanisms of EA decisions. Moreover, there is no multilateral enforcement agreement covering court-ordered, arbitral tribunal or EA-granted interim measures. Therefore the key to recognition and enforcement of EA decisions involves examination of the relevant local legislation in order to determine how it responds to, or can be adapted to respond to, the introduction of EA.

Three legal paths to the enforcement of EA decisions can be identified in the global practice: (i) national law clearly provides for the enforcement of EA decisions, which is the case in the Netherlands, Singapore and Hong Kong;³ (ii) enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which is invoked in the USA;⁴ (iii) by applying the existing provisions for recognition and enforcement of interim measures granted by arbitral tribunals to EA decisions by analogy.⁵

The purpose of this article is to analyse the Polish regulations as well as potential Polish court practices with respect to the possibilities of enforcing EA decisions granting interim

Expedited Procedure and Emergency Arbitrator – Pros and Cons, in: B. Gessel-Kalinowska vel Kalisz (ed.), *The Challenges and the Future of Commercial and Investment Arbitration*, Court of Arbitration Lewiatan, Warszawa: 2015, pp. 220-222.

² E.g. the 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, available at: <http://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015.pdf> (accessed 30 May 2017), p. 29, according to which 93% of respondents favor the inclusion of provisions on EA in institutional rules; D. Horodyski, M. Kierska, *Enforcement of emergency arbitrator's decisions – legal problems and global trends*, 1(33) *Kwartalnik ADR Arbitraż i Mediacja* 19 (2016), pp. 37-38. See also Caher & McMillan, *supra* note 1, pp. 1-2, where the authors state that an increasing number of parties have made use of EA. Also a survey is presented that shows the number of emergency arbitrator applications received as of March 2015 by an illustrative list of arbitral institutions. As to the growing popularity of EA proceedings, see generally F.G. Santacroce, *The emergency arbitrator: a full-fledged arbitrator rendering an enforceable decision?*, 31(2) *Arbitration International* 213 (2015), p. 284; Bose & Meredith, *supra* note 1, p. 193.

³ The Dutch Code of Civil Procedure, Article 1043b(2); Singapore's International Arbitration Act (as amended in 2012) Sec. 2(1), Sec. 19; Hong Kong's Arbitration Ordinance (as amended in 2013) Sec. 22B(1) and 22B(2).

⁴ However, this path is especially troublesome, since the New York Convention applies primarily to final arbitral awards, hence extending it to interim measures is based on the precondition of finality of such orders. Without an express definition of a final arbitral award in the New York Convention, the US case law contends that the finality requirement should be understood broadly to allow the enforcement of arbitral tribunal's and EA's interim orders. See Santacroce, *supra* note 2, pp. 304-305.

⁵ For a more thorough analysis of the different national legal systems' approaches towards the enforcement of EA decisions, see Horodyski & Kierska, *supra* note 2, pp. 33-35; Caher & McMillan, *supra* note 1, pp. 2-3.

measures of protection. Given the fact that the Polish Code of Civil Procedure (CCP)⁶ has not been changed to adjust to these new regulations, it lacks provisions explicitly enabling the court to recognize or enforce EA decisions. Therefore, we argue that the third path leading towards enforcement might be followed in Poland.

In abovementioned context, it is vital to review the Polish regulations in order to establish the legal status of EA decisions and subsequently determine whether it will be possible to enforce such decisions before a Polish court by using the existing legal framework on recognition and enforcement of interim measures granted by arbitral tribunals *per analogiam*. This question is particularly pertinent since the efficiency of arbitral proceedings, and in particularly the enforcement of arbitral tribunals' awards or orders, still tends to be the most important factor influencing the popularity and attractiveness of arbitration as an alternative to state judicial systems.⁷

This article is composed of two parts. The first part provides an analysis of the Polish regulations on interim measures by comparing the relationship, similarities and divergences between an arbitral tribunal and state courts, and between an EA proceeding and an arbitral tribunal. The second part examines the enforcement of interim awards by an arbitral tribunal and a state court, as well as by an EA and a state court. As a result, it holistically illuminates the problem of interim measures in arbitration, making it possible to detect possible legal problems under Polish law when parties choose to seek interim relief in arbitration. This is vital from the perspective of examining the effectiveness of EA proceedings, since it is up to the parties to decide upon the forum in which to seek interim protection.⁸

1. POLISH REGULATIONS ON INTERIM MEASURES IN ARBITRATION

1.1. Arbitral tribunals and state courts

Polish regulations follow the path established by the UNICTRAL Model Law of 1985⁹

⁶ *Kodeks postępowania cywilnego* [The Code of Civil Procedure: CCP], Official Journal (Dz. U.) 2016, No. 1822 as amended; accessible in Polish at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19640430296> (accessed 30 May 2017). The Polish regulation on domestic and international arbitration is contained in part 5 of the CCP.

⁷ See the 2015 International Arbitration Survey, *supra* note 2, p. 29, according to which an important factor influencing the choice of forum between state court and arbitral tribunal in the context of an emergency award is the enforceability of any decision rendered. See also Ch. Brown, *The Enforcement of Interim Measures Ordered by Tribunals and Emergency Arbitrators in International Arbitration*, in: A. J. van den Berg (ed.), *International Arbitration: The Coming of a New Age?*, ICCA Congress Series No. 17, Singapore: 2013, pp. 289-290, where the author stresses the importance of enforceability of arbitral tribunals' and EA decisions on interim measures for the efficiency of international arbitration as an legitimate method of settling international commercial disputes. Moreover, this is consistent and fulfills the purpose of an arbitration agreement.

⁸ Polish law, under the Article 1166 and Article 1181 § 1 of CCP, leaves it open for the parties to decide upon the forum in which to seek interim protection. This concept is developed further in the article.

⁹ The UNCITRAL Model Law on International Commercial Arbitration of 1985 (original version), available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf (accessed

and provide for two ways to seek interim measures in arbitration. On one hand, the competence to decide on this matter is bestowed on state courts. Article 1166 of the CCP provides that the fact that a dispute has been brought before an arbitral tribunal does not impair the possibility to have the claim(s) secured by a state court. It affirms the general competence of a state court to decide upon interim relief even though the case is submitted to arbitration and an arbitral tribunal has been constituted. It should also be noted that according to Article 1166 § 2 of the CCP Polish courts have jurisdiction over interim measures in arbitration even if the place of arbitration is outside of the territory of Poland, or the place of arbitration is not stipulated. In such a case the general rule stating that the jurisdiction of Polish courts over interim measures is dependent upon their jurisdiction on the merits of the case is suppressed.¹⁰

On the other hand, Article 1181 of CCP authorizes an arbitral tribunal to decide on interim measures. It states:

§ 1. Unless the parties have agreed otherwise, the arbitral tribunal, at the request of the party who substantiated his claim, may decide to apply such security as the arbitral tribunal deems reasonable considering the matter at issue. When issuing a relevant decision, the arbitral tribunal may condition its enforcement on the provision of relevant security.

§ 2. At the request of a party, the arbitral tribunal may change or set aside a decision issued pursuant to § 1.

§ 3. An order of the arbitral tribunal to apply an interim security measure shall be enforced after the court has issued a writ of execution for that decision. The provisions of Article 1214 § 2 and 3 and Article 1215 apply accordingly.

It should be pointed out that the solution adopted by the Polish legislator reflects the development of arbitration practice and provides parties with wider autonomy in deciding their cases, and also strengthens the efficiency of legal protection rendered by arbitral tribunals.¹¹ The parties therefore have a choice between a state court or an arbitral tribunal with respect to seeking interim relief.¹² At the same time, giving each party a free and unrestricted choice between either forum might create the problem of concurrent jurisdiction and a possible conflict between an arbitral tribunal's and state court's prerogatives, which has led some authors to postulate the introduction of coordination mechanisms, impeding parties from using both methods of securing claims

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¹⁰ W. Głodowski, *Zabezpieczenie roszczeń dochodzonych przed sądem polubownym* [Securing claims lodged before the arbitral tribunal], 1(5) *Kwartalnik ADR Arbitraż i Mediacja* 97 (2009), p. 102.

¹¹ *Ibidem*, p. 99.

¹² See T. Ereciński, *Postępowania o stwierdzenie wykonalności zagranicznego wyroku arbitrażowego (zagadnienia wybrane)* [Proceedings towards the declaration of enforceability of a foreign arbitration award (selected issues)], 5(1) *Kwartalnik ADR Arbitraż i Mediacja* 66 (2009), pp. 68-73; Głodowski, *supra* note 10, pp. 98-99; A. W. Wiśniewski, M. Hauser-Morel, *Postępowanie zabezpieczające* [Securing procedures], in: A. Szumański (ed.), *System Prawa Handlowego, Arbitraż Handlowy Tom 8*, CH Beck, Warszawa: 2010, pp. 484.

simultaneously, or one method after another.¹³ The introduction of EA and its growing popularity exacerbates the problem by providing a third forum when it comes to seeking interim protection.¹⁴

Moreover, Polish law, in Articles 730 – 757 of CCP, sets forth a detailed procedure as to court-ordered interim measures. In certain circumstances it might turn out to be burdensome, especially for foreign parties. This is due to the fact that there is no separate procedure for court-ordered interim measures in aid of arbitral proceedings; the court simply follows the same procedure as for interim measures in aid of state court proceedings.¹⁵

The first problem that arises is choosing which court is authorized to review the motion. According to Article 1158 § 1 of CCP, each reference to “a court” means a court which would be competent to hear the case if the parties had not implemented an arbitration clause. Hence, the requesting party needs to establish which court has jurisdiction (as to the subject matter of the case) to hear the case under Polish law, and apply to that court to seek interim protection.¹⁶

Secondly, Article 730¹ § 1 of CCP requires the requesting party to substantiate not only a claim, which is also required pursuant to Article 1181 of CPP in the procedure for seeking interim relief before an arbitral tribunal, but also its legal interest in obtaining the security for a claim. A legal interest in securing a claim exists if the lack of such a measure impedes or significantly hinders the enforcement of a ruling issued in a given case, or otherwise impedes or seriously hinders satisfaction of the purpose of the proceedings in the case.¹⁷ In order to substantiate a claim or a legal interest the party does not need to prove them in a legal manner – it is sufficient to establish *prima facie* grounds justifying their existence.¹⁸ Whereas, the majority of arbitration rules do not establish any explicit requirements or guidelines for the arbitral tribunal's discretion to grant interim measures. The rules merely state that the arbitral tribunal/EA may grant such measures as it considers appropriate.¹⁹ Nevertheless, Article 1181 § 1 of CCP pro-

¹³ See A. Zieliński, *Komentarz do art. 1181 Kodeksu postępowania cywilnego* [Commentary to article 1181 of the Code of Civil procedure], in: A. Zieliński (ed.), *Kodeks Postępowania Cywilnego Komentarz*, CH Beck, Warszawa: 2016, p. 1819.

¹⁴ For a more thorough analysis of the concept of concurrent jurisdiction and its consequences, see D. Horodyski, M. Kierska, *Concurrent jurisdiction and its consequences in context of enforcement of interim measures of protection in arbitral proceedings*, 3(35) *Kwartalnik ADR Arbitraż i Mediacja* 19 (2016).

¹⁵ Excluding Articles 753, 754 and 755 § 1 of CCP in terms of the arbitrability requirement.

¹⁶ Głodowski, *supra* note 10, p. 100.

¹⁷ A. Jakubecki, *Komentarz aktualizowany do Art. 730(1) Kodeksu postępowania cywilnego* [Updated Commentary to article 730(1) of the Code of Civil procedure], in: A. Jakubecki (ed.), *Komentarz aktualizowany do ustawy z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego* (LEX/el.: 2016).

¹⁸ Zieliński, *supra* note 13, p. 488.

¹⁹ E.g. para. 36.1. of Lewiatan Court of Arbitration Rules; Article 28.1. of ICC Arbitration Rules; Article 25.1. of LCIA Arbitration Rules; and Rule 26.1. of SIAC Arbitration Rules. For a more thorough analysis of the grounds to order interim measures of protection in arbitral proceedings, see D. Horodyski, M. Kierska, *Przesłanki orzekania o środkach zabezpieczających w arbitrażu handlowym* [Prerequisites conditioning the security measures in commercial arbitration], 3(283) *Przegląd Prawa Handlowego* 51 (2016),

vides that the arbitral tribunal may grant interim measure if a requesting party substantiated the grounds for the claim. Therefore, if the recognition or enforcement of interim measures in Polish courts is anticipated, it is advisable for the arbitral tribunal/EA to refer to that prerequisite.

Thirdly, when it comes to the protection of monetary claims, the requesting party is obliged to choose the interim relief from the list provided in Article 747 of CCP.²⁰ Thus the parties are limited to seeking a specific type of interim measures, and the state court can only issue interim relief that is both listed in the relevant provision and is sought by the party,²¹ while the arbitration rules generally allow for an open catalogue when it comes to the types of interim measures sought in arbitral proceedings.²²

Fourth, according to the Polish procedure, the court may order an interim measure *ex parte*,²³ i.e. without notifying the enjoined party, which might be beneficial for the requesting party.²⁴ In addition the court, unlike the arbitral tribunal, might decide on interim measures not only *inter partes* but also as to third parties' obligations.²⁵

1.2. Emergency arbitrator and an arbitral tribunal

Prior to the introduction of EA proceedings, in cases where an arbitral tribunal had not yet been established parties could only wait for the constitution of the arbitral tribunal or seek interim relief before the state courts. Under Polish law, interim relief ordered by a state court at the pre-arbitral stage is subject to the same CCP provisions

pp. 51-59.

²⁰ Article 747. Monetary claims shall be secured by means of:

- 1) attachment of movable property, remuneration for work, money in a bank account or other amounts due or property rights;
- 2) mortgaging the obligor's immovable property;
- 3) prohibiting the selling and/or encumbering of immovable property which does not have a land and mortgage register or whose land and mortgage register has been lost or destroyed;
- 4) mortgaging a ship or a ship under construction;
- 5) prohibiting the sale of a cooperative title to premises;
- 6) compulsory administration over the obligor's enterprise or agricultural farm, or a plant comprising part of the enterprise, or a part of the enterprise or the agricultural farm.

²¹ Jakubecki, *supra* note 17.

²² E.g. Para. 36.1. of Lewiatan Court of Arbitration Rules and Article 28.1. of ICC Arbitration Rules. But see Article 26.2. of UNCIRAL Arbitration Rules.

²³ While, the arbitral tribunal must decide *inter partes* on interim measures, due to the clear meaning of Article 1183 of CCP, which sets forth the obligation to treat parties equally and to provide parties with the right to be heard and to present their allegations; see A. Sidor, K. Dąbrowska, *Zabezpieczenie wykonalności wyroku sądu polubownego w kontekście nowego regulaminu Sądu Arbitrażowego Lewiatan* [Securing the enforceability of an arbitration award in the context of the new rules of the Lewiatan Court of Arbitration], 3-4(10-11) e-Przegląd Arbitrażowy 36(2012), p. 46.

²⁴ Although pursuant to Article 733 of CCP, when granting interim measures prior to the commencement of proceedings the court shall determine a time limit, not exceeding two weeks, within which an initial pleading (request for arbitration) should be filed. If the requesting party fails to file the request for arbitration within this period, the interim measure shall be cancelled.

²⁵ Głodowski, *supra* note 10, p. 103.

as interim relief issued by a state court after constitution of the arbitral tribunal. This means that the parties need to follow the procedure set out in Articles 730–757 of CCP, which is subject to the same challenges as described above.

The Polish legislator has not yet introduced provisions that would directly regulate the institution of an EA procedure and its competences to issue interim measures of protection in arbitral proceedings, which puts into question the effectiveness of EA decisions on interim relief. Article 1181 of CCP directly refers to an arbitral tribunal only as a body authorized to deal with interim measures.

Thus a legal problem arises whether, in light of the lack of a direct regulation as to the EA itself, and consequently as to the enforcement of EA orders, this lacuna may be filled by the analogous regulation on the competence of arbitral tribunals to order interim measures, and subsequently on the provisions allowing the enforcement of such orders granted by arbitral tribunals. To answer this question, it appears necessary to compare these two institutions and verify if the similarities between them justify such a thesis.

It should be noted that an EA cannot be viewed simply as an arbitral tribunal because its position, method of appointment and competences are different.²⁶ The first difference regards the composition of both bodies. In contrast to an arbitral tribunal, which might act as a collegial body, the function of EA is always fulfilled by a sole arbitrator.²⁷

When it comes to its duties, the EA appears in arbitration proceedings only incidentally, to deal with a specific claim – a request for interim protection. The obligation of an EA is thus to provide a decision on interim measures in a quick and effective manner, without pre-judging the substance of the case in dispute. As to his or her appointment, the EA is in different position than an arbitral tribunal. While the arbitral tribunal is composed of arbitrators nominated by the parties, the EA is appointed by the arbitration institution.²⁸ On one hand, such a method of appointment might be considered as a limitation on the parties' autonomy and therefore may put into question the legitimacy of an EA procedure. On the other hand, the institution of EA is designed to act in urgent circumstances, prior to the constitution of an arbitral tribunal, thus awaiting the parties' joint appointment could make the role of EA largely ineffective.

In addition, an EA independence is strengthened by the fact that he or she cannot be subsequently appointed as an arbitrator. In fact the relationship between the parties and the EA is much weaker than the relationship between the parties and the arbitrators, which are nominated by them. Unlike arbitrators nominated by parties, an EA is

²⁶ See also M. Asłanowicz, *Arbiter doraźny* [Emergency arbitrator], 8(782) *Przegląd Ustawodawstwa Gospodarczego* 18 (2013), pp. 18–22, where the author clearly states that an interim order granted in EA is enforceable under Article 1181 § 3 of CCP. However, such a thesis fails to take into account the differences between an EA and arbitral tribunal.

²⁷ Of course, more similarities exist when the case is determined by a sole arbitrator.

²⁸ For instance, under ICC Arbitration Rules, Appendix V – Emergency Arbitrator Rules, Article 2 the President of the ICC Arbitration Court should appoint an emergency arbitrator; according to Article 9.6. of LCIA Arbitration Rules, an emergency arbitrator shall be appointed by the LCIA Court; pursuant to § 4(1) of Appendix II to the Lewiatan Court of Arbitration Rules, the President of the Arbitration Court appoints an emergency arbitrator.

not inclined to satisfy “his/her party” in order to get another appointment. In this context the position of an EA might paradoxically be considered as more independent than the position of an arbitral tribunal. The arbitral tribunal, which conducts the entire proceedings until final determination of the case, might be reluctant to decide upon interim measures for fear of revealing its point of view on the substance of the case.²⁹

As to the competences of an EA compared to an arbitral tribunal, it might be observed that an EA is given broad powers to conduct the proceedings in the manner she/he considers appropriate, taking into account the principles of urgency and due process.³⁰ Interestingly, such provisions give EA greater leeway than an arbitral tribunal, since the latter is generally required to consult with the parties and follow any agreement the parties may reach.³¹ The EA also enjoys the discretion as to the requirements for granting provisional measures, and is empowered to order any measure he or she considers appropriate, similarly to the powers of arbitral tribunal.³²

In practice, the existence and acceptance of EA by the arbitration community is associated with the core feature of arbitration, which is trust in the arbitrators and arbitration institutions in terms of their professionalism and independence. This tends to be universally shared in the arbitration community, since the results of recent surveys show that the overwhelming majority of respondents (93%) favour the introduction of EA provisions into arbitration rules.³³

Taking into account above-mentioned characteristics and qualities of EA and its proceedings, it seems that despite the apparent differences in the appointment of an EA in comparison to an arbitral tribunal, these should not hinder the state courts from recognizing the judicial nature of EA proceedings and consequently – the enforceability of its decisions.³⁴

²⁹ Of course, this does not impair the general obligation of impartiality and independence that is common both for EA and an arbitral tribunal. See R. Schütze, *Institutional Arbitration: Article-by-Article Commentary*, Beck, München: 2013, pp. 144-145.

³⁰ E.g. Lewiatan Court of Arbitration Rules, Appendix II, para. 5.1.; ICC Arbitration Rules, Appendix V, Article 5.2.

³¹ J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration*, ICC Publication 729, Paris: 2012, p. 298.

³² E.g. SIAC Arbitration Rules Schedule 1 – Sec. 5, 6, 11; para. 5 and para. 6 of Appendix II to the Lewiatan Court of Arbitration Rules.

³³ The 2015 International Arbitration Survey, *supra* note 2, p. 29. See also: M. Grando, *The Coming of Age of Interim Relief in International Arbitration: A Report from the 28th Annual ITA Workshop*, Kluwer Arbitration Blog, 20/07/2016, available at <http://kluwerarbitrationblog.com/2016/07/20/the-coming-of-age-of-interim-relief-in-international-arbitration-a-report-from-the-28th-annual-ita-workshop/> (accessed 30 May 2017), where the author concludes that the system of interim measures in arbitration is mature and has become routine, which is a significant development that has undoubtedly strengthened the arbitral system and allowed it to evolve into a more sophisticated and self-standing system of dispute resolution. This is a welcome development for the users of international arbitration, who are getting closer to the ideal of being able to resolve disputes entirely at the international level.

³⁴ See generally R. Werdnik, *The enforceability of emergency arbitrator's decisions*, Austrian Yearbook on International Arbitration (2014), p. 274. For a detailed definition and analysis of EA's role, see also

In addition, the right to seek interim measures granted by EA is consistent with the intent of parties and results from the direct provisions of applicable arbitration rules. If the arbitration rules have been agreed on before the adoption of EA provisions, the parties should give explicit consent to the application of EA provisions to make them binding.³⁵ Thus the intent of parties should prevail. Moreover, both the arbitral tribunals and EA decisions share the same goal, which is securing the interests of a party seeking urgent and effective interim relief, even if at different arbitral stages. Therefore, even though the decision of an EA cannot be treated simply as an interim measure rendered by an arbitral tribunal, they might be treated analogously because the conditions under which they are issued and the aim they serve are parallel to orders issued by arbitral tribunals.³⁶

2. POLISH REGULATIONS ON THE ENFORCEMENT OF INTERIM MEASURES IN ARBITRATION

2.1. Arbitral tribunals and state courts

Enforcement of interim measures issued by arbitral tribunals and state courts differ significantly. When it comes to the procedure before state courts, enforcement is granted automatically pursuant to Article 743 § 1 of CCP, which states that if an order on interim relief is enforceable by execution, provisions on execution proceedings apply accordingly to the enforcement of that order, provided that the court issues a writ of execution *ex officio* to the decision to grant security. An order on interim relief issued by a state court is hence enforceable from the date of its issuance, which constitutes a meaningful advantage for the requesting party and is probably the most important benefit of seeking interim relief before a state court. Additionally, the possibility of obtaining an enforceable interim relief order before filing a request for arbitration, as well

Santacroce, *supra* note 2, pp. 292-302.

³⁵ E.g. Article 29 (5) ICC Arbitration Rules; Article 9.14. LCIA Arbitration Rules. However, see also Y. Burova, *Interim Relief Against the Host State: Analysis of Emergency Awards against Moldova*, CIS Arbitration Forum, 28/07/2016, available at: <http://www.cisarbitration.com/2016/07/28/interim-relief-against-the-host-state-analysis-of-emergency-awards-against-moldova/> (accessed 30 May 2017), where the author refers to the two most recent SCC emergency arbitration awards (*Evrobalt* and *Kompozit v. Moldova*), wherein both emergency arbitrators agreed upon the applicability of the 2010 SCC Arbitration Rules, while the Treaty containing the offer to arbitrate was signed in 1998. Neither did the 1998 SCC Arbitration Rules, in force at that time, provide for emergency interim measures, nor did the subsequent 1999 and 2007 versions. Therefore, the question arose whether Article 10 of the Treaty could encompass the 2010 version, including emergency arbitration rules. Both emergency arbitrators found the 2010 version *prima facie* applicable; firstly, because under the Preamble to the 2010 version, any reference to the SCC arbitration in the arbitration agreement “shall mean the rules in force on the date of the filing of an application for emergency arbitration”; and secondly, had the contracting parties wished to freeze any applicable version of the SCC Rules, they would have provided for it in the Treaty. In the absence of such a specific declaration, it was concluded that the 2010 Rules were within the reasonable contemplation of the parties.

³⁶ See Asłanowicz, *supra* note 26, pp. 18-22; Horodyski & Kierska, *supra* note 2, pp. 35-37.

as without notifying the enjoined party, should be considered as another incentive to use Polish state jurisdiction rather than an arbitral tribunal.³⁷

The enforcement of an arbitral tribunal's decision (both in the form of an order and an award) under Polish law is subject to the recognition or enforcement procedure prescribed in Articles 1212 – 1217 of CCP. Article 1212 § 1 of CCP states that a judgment of an arbitral tribunal has the same legal effect as a court judgment upon its recognition or enforcement by the court. This requirement is repeated in Article 1181 § 3 of CCP, which may be treated as *lex specialis* from the general norm of Article 1212 § 1 of CCP with respect to orders for interim protection. Article 1181 § 3 of CCP states that an order of an arbitral tribunal granting an interim measure of protection shall be enforced after the court has issued a writ of execution for that decision. The second sentence of Article 1181 § 3 of CCP provides that Article 1214 § 2 and § 3 of CCP, as well as Article 1215 of CCP, shall apply accordingly, with respect to the enforcement of interim measures if the seat of arbitral proceedings is located in Poland, and to foreign interim measures respectively.

The requirements for confirmation or enforcement are the same for both interim measures and final awards issued by arbitral tribunals.³⁸ According to Article 1214 § 2 of CCP the court issues a writ of execution to enforce an order on interim measures that is enforceable by execution. Article 1214 § 3 of CCP sets forth the premises upon which the court is prohibited from granting enforcement.³⁹ The first criterion is the arbitrability of the case, which means that the case could not be submitted to arbitration (pursuant to Article 1157 of CCP, unless otherwise provided for by specific regulations the parties may bring disputes involving property rights or disputes involving non-property rights which can be resolved by a court settlement, except maintenance cases, before an arbitration court).⁴⁰ Second, enforcement cannot be granted if it would be contrary to the basic principles of the legal order of the Republic of Poland (the public order clause).⁴¹

Article 1215 of CCP sets forth additional exceptions which apply only to the enforcement of interim measures issued abroad. These exceptions are as follows: (i) there was no arbitration agreement, the agreement is invalid, ineffective or has expired; (ii) the party was not given proper notice of the appointment of an arbitrator, of the arbitral proceedings, or was otherwise unable to present its case before the arbitral tribunal; (iii) the award deals with a dispute not contemplated by or beyond the scope of the arbitration agreement; (iv) the composition of the arbitral tribunal or the arbitral procedure was inconsistent with the parties' agreement, or where no agreement had been con-

³⁷ E.g. Głodowski, *supra* note 10, p. 105; Sidor & Dąbrowska, *supra* note 23, pp. 36-37.

³⁸ See Sidor & Dąbrowska, *supra* note 23, pp. 43-44.

³⁹ In that context, it is worth mentioning that Article 1214 § 3 of CCP differs from Article V(2) of the New York Convention, which defines two grounds (arbitrability and public policy) upon which a state court may, on its own motion, refuse recognition and enforcement of an award. Hence the New York Convention provides a state court with discretion, instead of obliging the court to refuse recognition or enforcement of the arbitral award in the above two instances.

⁴⁰ See M. Łaszczyk, J. Szpara, *Postępowanie postarbitrażowe* [Post arbitrary proceedings], in: Szumański (ed.), *supra* note 12, pp. 669-670.

⁴¹ *Ibidem*, pp. 670-671; Zieliński, *supra* note 13, pp. 1850-1851.

cluded – inconsistent with the law of the country in which the arbitration proceedings took place; (v) the order has not yet become binding on the parties or has been set aside or suspended by a court of the country in which that award was rendered. The party opposing the enforcement or recognition of an interim measure must raise and formulate these exceptions in order for the court to consider them. This means that, contrary to the grounds for refusal of recognition and enforcement formulated in Article 1214 § 3 of CCP, which are taken into account by the court *ex officio*, the party against whom the decision is invoked needs to raise them and prove them before the court.

In this respect, it should be stressed that the Polish framework for recognition and enforcement of an arbitral tribunal's interim measures, as provided for in Article 1181 § 3, Article 1214 § 2 and § 3 and Article 1215 of CCP, concerns both domestic and foreign decisions. In other words, parties are allowed to seek recognition or enforcement of such measures in Polish courts, even if the seat of arbitration is not in Poland. This is favourable to claimants, since most jurisdictions merely deal with enforcement at the seat of arbitration.⁴² Since the seat of arbitration is usually chosen by the parties due to its neutrality or geographical convenience, often neither party has any assets in that country. Thus the fact that Polish law in this respect does not differentiate between foreign and domestic interim measures is noteworthy, since it fosters the circulation of such orders and provides a comprehensive environment for the protection of legal claims. This is particularly true if the practice of Polish courts allows for the recognition and enforcement of interim measures ordered in EA, by applying Article 1181, Article 1214 and Article 1215 of CCP, *per analogiam*.

2.2. Emergency arbitrators and state courts

When it comes to the enforcement of interim measures issued by a state court at the pre-arbitral stage, the Polish regulations apply the same provisions as for the protection of claims procedures (stipulated in Articles 730–757 of CCP). State courts are authorized, pursuant to Article 743 § 1 of CCP, to issue a writ of execution *ex officio*, which seems to be the fastest way of obtaining the enforceability of an interim measure, in particular if the place of arbitration is in Poland. In fact, the interim measures issued by a Polish court at the pre-arbitral stage share the same pros and cons as those issued in judicial proceedings or as the interim measures ordered after the constitution of an arbitral tribunal. The Polish CCP requires fulfilment of the same prerequisites in order

⁴² A. Yesilirmak, *Provisional Measures*, in: J.D.M. Lew, L.A. Mistelis (eds.), *Pervasive Problems in International Arbitration*, Kluwer Law International, New York: 2006, p. 199. See also e.g. Article 176(1) of the Swiss Federal Act on Private International Law, under which the provisions of this chapter apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was entered into at least one of the parties had neither its domicile nor its habitual residence in Switzerland. Similarly by virtue of Sec. 2(1) of the English Arbitration Act of 1996, the provisions of Sec. 42(1) allowing for enforcement of arbitral tribunal orders, apply only when the seat of arbitration is in England, Wales or Northern Ireland. The German Code of Civil Procedure, under the Sec. 1025(1) also allows for enforcement of arbitral tribunal's interim measures only if the venue of the arbitration proceedings is located in Germany.

to grant an enforceable interim measure before and after constitution of an arbitral tribunal, which makes the procedure universal in these two scenarios.

As to the enforcement of interim measures issued in an EA proceeding, it has already been pointed out that the Polish CCP does not contain provisions that refer expressly to EA decisions. It appears unquestionable that the decisions issued by an EA can be confirmed by the court and become legally enforceable, however in the current legal framework this can be the case only if the courts would treat EA as an arbitral tribunal and apply *per analogiam* the relevant regulations pertaining to the enforcement of arbitral tribunals' orders, as postulated above. In such a case the EA decisions will be subject to the same procedure and treated accordingly by the Polish courts. As has already been mentioned, this will also allow for recognition and enforcement of foreign EA decisions on interim measures, which is vital for parties engaged in an international dispute.

An additional problem that might arise at the recognition or enforcement stage concerns the form of an interim measure issued by an EA. In different arbitration rules the interim measure decisions have different labels (e.g. an "order" in the ICC (International Chamber of Commerce) Arbitration Rules and Polish Court of Arbitration at the Confederation of Lewiatan; an "order or award" in HKIAC (Hong Kong International Arbitration Center) and LCIA (London Court of International Arbitration) Arbitration Rules; and a 'decision' in SCC (Stockholm Chamber of Commerce) Rules).⁴³ The form of decision might be important because Article 1181 § 3 of CCP refers to "an order" (in Polish: "postanowienie" – DHMK), and not a decision or an award. Therefore, it could turn out that the court will deem a decision coming from EA to be incompatible with the formal requirements contained in CCP, and set aside an application for recognition or enforcement of such a decision.⁴⁴

With reference to this problem it might be pointed out that the court should recognize the principle of 'substance over form', which means that the merits of the ruling at issue should be taken into consideration rather than its label.⁴⁵ This argument is strengthened by the UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006. Article 17 (2) clearly states that: "[a]n interim measure is any temporary measure, whether in the form of an award or in another form (...)." This suggests that according to the UNCITRAL Model Law interim measures do not require any particular form to be enforceable and effective. What's more, this issue might be of less importance in practice, since in many arbitration rules the form of interim measures is universal both for arbitral tribunals and EA.⁴⁶ Hence

⁴³ But cf. M. Scherer, *The New Emergency Arbitrator Provisions and Other Options for Urgent Relief Under the 2014 LCIA Rules*, 1(4) European International Arbitration Review 81 (2015), pp. 99-100, where the author states that even though under LCIA Arbitration Rules the EA can decide freely whether the decision should take the form of an order or award, given the temporary nature of an award on interim measures, it is unlikely that such an award could fall under the enforcement regime of the New York Convention.

⁴⁴ See Łaszczuk & Szpara, *supra* note 40, p. 669.

⁴⁵ Werdnik, *supra* note 34, p. 275; Horodyski & Kierska, *supra* note 2, p. 31.

⁴⁶ E.g. Article 28(1) and Article 29(2) of ICC Arbitration Rules; Article 25.2. and Article 9.8. of

when it comes to the form, the EA decision should not be divergent from the same decisions issued by an arbitral tribunal, and thus should not prevent a Polish court from enforcing them.

At the same time, it should be pointed out that, as was already mentioned above, monetary claims shall be secured by a state court through one of the types of interim measures provided in Article 747 of CCP, which is of a mandatory character. Hence it would be advisable for an EA to adhere to this catalogue if the enforcement of such measure is to be sought in Poland. Nevertheless, given that the EA is authorized to secure a claim as he/she deems fit, in our view the enforcement of such orders should not be hindered by the fact that they provide for a method of securing a claim which is not listed in Article 747 of CCP, so long as the chosen type of interim relief is not contrary to the Polish public order clause. The mere fact that the type of interim relief is incompatible with state law does not constitute grounds for a public policy rule.⁴⁷ As a result, an order on interim measures providing for a method of securing a claim that is not contained in Article 747 of CCP should be enforced by Polish courts.

CONCLUSIONS

Due to the recent, significant development of arbitration practice worldwide, the Polish law on interim measures in the sphere of arbitration is becoming outdated. Nevertheless, the fact that provisions regarding the institution of EA and the legal grounds for recognition and enforcement of EA interim measures have not yet been incorporated into the Polish CCP might be justified by the novelty of EA proceedings in the international domain. In this context it should be stressed that the Polish legal framework is a bridge between the UNCITRAL Model Laws of 1985 and 2006. Despite the fact that it is generally based on the UNCITRAL Model Law of 1985, Polish law directly provides not only for recognition and enforcement of arbitral tribunal's orders on protective measures, but also allows for recognition and enforcement of interim measures irrespective of the country in which they were issued. That was not the case in the original text of the UNCITRAL Model Law, since Article 17 merely granted the arbitral tribunal the power to order interim measures, without referring to the possibilities of recognition and enforcement. Hence it may be said that the Polish law established a more advantageous framework for the enforcement of interim measures of protection

LCIA Arbitration Rules; § 36(3) of Lewiatan Court of Arbitration Rules; and § 6.1. Appendix II to Lewiatan Court of Arbitration Rules.

⁴⁷ According to the Polish Supreme Court, the meaning of public policy is narrow since it encompasses the constitutional norms and those of fundamental importance for the legal system. Hence, not all norms of a mandatory character fall within the scope of the public policy domain. See wyrok Sądu Najwyższego [judgment of the Supreme Court], dated 9 September 2010, I CSK 535/09, published in *Rzeczpospolita*, PCD 2010/214/2 and wyrok Sądu Najwyższego [judgment of the Supreme Court], dated 30 September 2010, I CSK 342/10, unpublished. See also T. Ereciński, K. Weitz, *Sąd arbitrażowy* [Court of Arbitration], LexisNexis, Warszawa: 2008, chapter VI, point 3.3.1.

than the UNCITRAL Model Law, until its amendment in 2006. The recognition and enforcement of arbitral tribunal's measures is now provided for in Arts. 17H and 17I of the UNCITRAL Model Law of 2006.

Nevertheless, the absence of both a multilateral enforcement agreement covering arbitral tribunals – and interim relief granted in an EA proceeding – as well as direct statutory regulation, does create a lacuna with respect to the recognition and enforcement of EA orders on interim protection, which could possibly lead to undesired and divergent court practices. The growing popularity of EA proceedings worldwide exacerbates any potential problems.⁴⁸

In our view, analysis of the existing Polish legal framework as to the enforcement of arbitral tribunal orders on interim measures of protection provides a solid foundation for drawing an analogy between such orders and those granted in an EA proceeding. We thus argue that Article 1181, together with Article 1214 § 2 and § 3 and Article 1215 of CCP, can be viewed as establishing *per analogiam* grounds for the recognition and enforcement by Polish courts of EA decisions on interim measures. Moreover, the views and legal reasoning supporting the possibility of enforcing EA decisions as arbitral decisions under Polish law proposed in this article may be applicable to other states' legislation which does not expressly provide for enforcement of EA interim measures, but allows for the recognition and enforcement of arbitral tribunal's orders. This is the case, for example, in England, Switzerland and Germany, as well as in other countries that based their law on the UNCITRAL Model Law on International Commercial Arbitration, with amendments, as adopted in 2006, such as Belgium, Ireland, Australia and New Zealand.⁴⁹

Nevertheless, given the legal uncertainty as to the enforcement of EA decisions, it should be stressed that since the existence of EA proceedings have no effect on the availability of judicial interim measures, from the Polish perspective it might be still advisable to seek interim protection at the pre-arbitral stage from the state courts.

⁴⁸ See J. Lundstedt, *SCC Practice: Emergency Arbitrator Decisions*, Arbitration Institution of the Stockholm Chamber of Commerce, Stockholm: 2013, pp. 25-26, where the author states that given that the most prominent arbitral institutions have already introduced EA proceedings into their rules, the trend is clear that these types of provisions are here to stay.

⁴⁹ Swiss Federal Act on Private International Law, Article 183(2), under which if the party so ordered does not comply with interim relief and conservatory measure voluntarily, the arbitral tribunal may request the assistance of the competent court. The English Arbitration Act of 1996 in Sec. 42(1) provides that the court may make an order requiring a party to comply with a peremptory order made by the tribunal, however under Sec. 42(3) the court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process with respect to failure to comply with the tribunal's order. The German Code of Civil Procedure states, in Sec. 1041(2), that the court may permit the enforcement of an arbitral tribunal's provisional measures or measures serving to provide security. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985, with amendments, as adopted in 2006, Article 17H(1) provides that an interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued; see also Horodyski & Kierska, *supra* note 2, pp. 55-56.