Provisional Measures in Serbian Arbitration
Part Two: Interim measures granted by the Arbitral Tribunals

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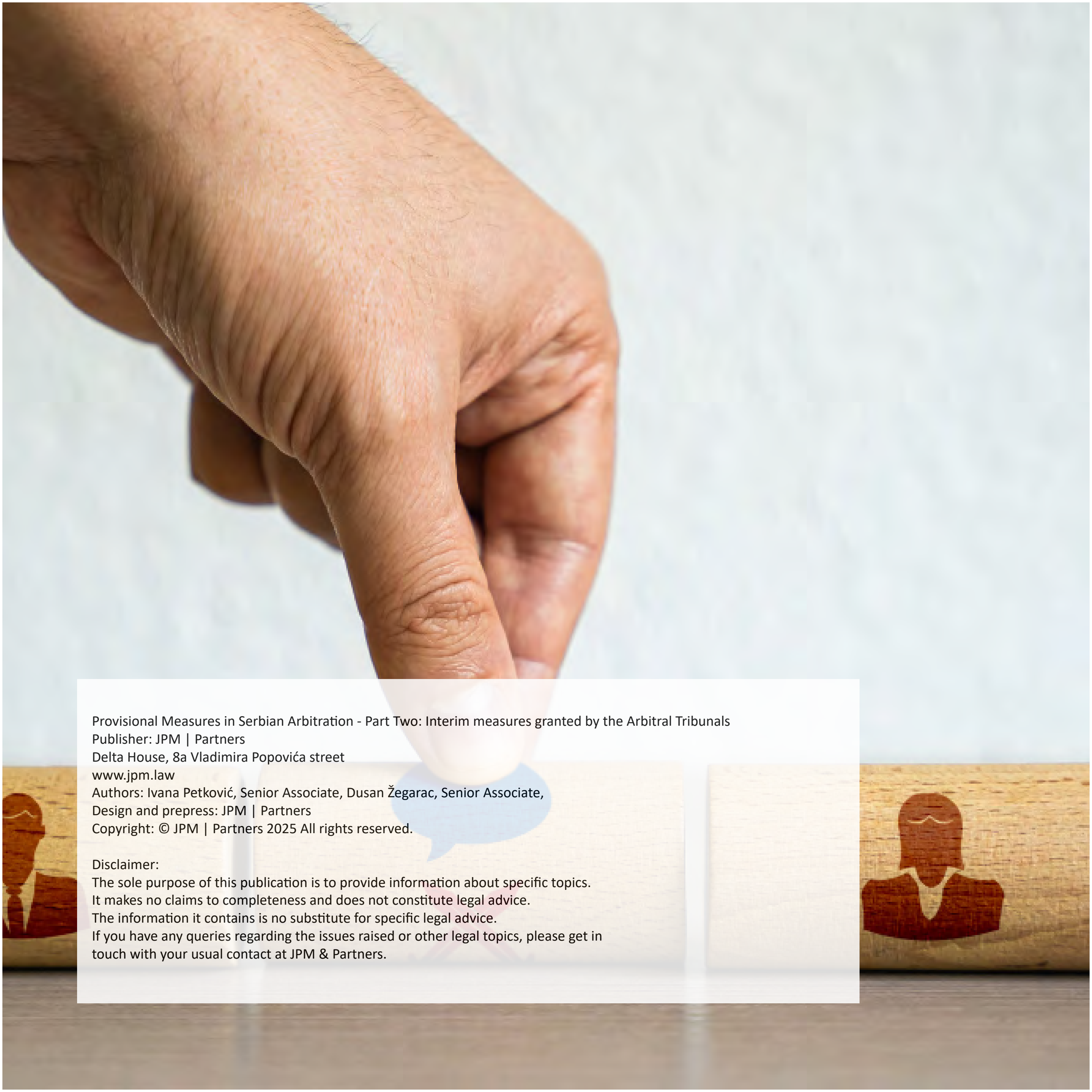

Provisional Measures in Serbian Arbitration - Part Two: Interim measures granted by the Arbitral Tribunals
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Interim measures, whether imposed by state court or arbitral tribunal, play a critical role in arbitration, serving as a mechanism to preserve the rights of the parties and prevent irreparable harm before a final award is rendered. This series of articles seeks to provide a comprehensive analysis of the legal framework governing provisional measures in arbitration under the laws of the Republic of Serbia. It aims to examine the statutory basis, procedural conditions, jurisdictional aspects, and practical implications of granting such measures.

The first article in these series focused on provisional measures issued by Serbian national courts in relation to arbitration proceedings. It addressed the legal conditions under which national courts may grant such measures. This text is available **here**.

This article focuses on the interim measures granted by arbitral tribunals. It will explore the legal mechanisms through which such measures are made effective, the interplay between arbitral and judicial authorities, and the extent to which national legislation aligns with international standards in this regard.

Providing of the urgent legal reliefs that are aimed at the prevention of irreparable harm or preserving the status quo traditionally fall within the competence of the state courts. This is because the implementation of such reliefs more often than not requires coercion. On the other hand, powers of an arbitral tribunal are soft. Hence, the fact that the parties to arbitration turn to state courts for emergency measures is not surprising.

A major development came with the adoption of the 1985 UNCITRAL Model Law on International Commercial Arbitration, which formally recognized the authority of arbitral tribunals to grant interim measures (Article 17) . The 2006 amendments to the Model Law further expanded and clarified this power, including provisions on enforceability and types of interim relief available . Not long after, major arbitral institutions such as the ICC, LCIA, and ICSID revised their rules to include provisions for interim measures, allowing parties to seek emergency relief even before a tribunal was fully constituted.

In response to the increasing complexity of international disputes, the concept of “emergency arbitration” emerged in the late 2000s and early 2010s. Institutions such as the ICC (2012), SIAC (2010), and Hong Kong International Arbitration Center (2013) introduced emergency arbitrator provisions, allowing parties to request urgent relief before the appointment of the main tribunal.

Local institutions in Serbia followed this trend. What is more, former Yugoslavia was even more progressive in this respect, considering that the Rules of Arbitration before the Foreign Trade Court of Arbitration at the Chamber of Commerce and Industry of Yugoslavia contained provisions on interim measures. The provision related to the arbitral tribunal's power to order interim measures also existed in the Rules of the Foreign Trade Court of Arbitration at the Chamber of Commerce and Industry of Serbia. The other domestic arbitration institution, Belgrade Arbitration Centre, also followed this approach after its establishment in. Belgrade Rules are in force since 2014 and they also contain the provision empowering tribunal to order interim measures.

Other institutions in the region also followed developments regarding the interim measures. Moreover, Rules of the Permanent court of Arbitration attached to the Economic Chamber of North Macedonia envisages Emergency Arbitrator Proceedings same as ICC. So do the Rules of the Arbitration Court of the Montenegrin Chamber of Commerce.

Considering that the arbitral tribunals can issue interim measures, several important issues arise: what are conditions for issuing interim measures, what is their scope and how are they enforced. This article will deal with the former two issues, leaving the question of enforcement to be analyzed in the upcoming article

II Conditions for Granting an Interim Measure

When it comes to the conditions for granting the request for interim measure, some would instinctively refer to the conditions set forth in the Enforcement and Security Act. However, this approach is not entirely correct. In this respect, one should start from the point that Enforcement and Security Act regulates interim measures before state courts, cannot be applied in arbitration for several key reasons. State courts operate under public authority, meaning they have the power to enforce decisions directly using state mechanisms, such as freezing assets or ordering payments. Arbitral tribunals, on the other hand, derive their authority from party agreement and lack coercive powers. Serbian Arbitration Act and institutional rules do not reference the Enforcement Act as applicable law for interim measures Applying the Enforcement Act in arbitration would require an explicit legal foundation, which does not exist in Serbian arbitration law. If an arbitral tribunal applies the Enforcement Act, it might exercise powers reserved for state courts, such as issuing direct orders to banks or government authorities. This would violate arbitration's contractual nature, as tribunals cannot impose obligations beyond what parties agreed to in the arbitration clause.

Article 17 of the UNCITRAL Model Law prescribes conditions under which an interim measure may be granted. The first condition is that the that harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, as well as that 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. The second condition is that 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. However, the problem is that Serbia did not implement these conditions in its legislation.

Then, what should an arbitral tribunal do when there are no clear rules in respect to what are the conditions under which an interim measure may be granted? Since the matter is not regulated the decision is within the arbitral tribunal's discretion. However, a practitioner that aspires to be a good arbitrator must justify their decision to grant or not to grant the request. One approach is that in this situation, an arbitral tribunal can take into account conditions for ordering interim measures from Enforcement Act, or from the UNCITRAL Model Law, as guidelines. This is especially because both acts take fairly similar approach when determining the applicable conditions. In other words, an arbitral tribunal may use the Enforcement Act's criteria for determining the application is justified as a reference to the extent they align with arbitration principles, but it cannot treat them as binding law. Further, it could rely primarily on arbitration-specific rules and standards such as UNCITRAL Model Law, institutional rules, party agreement while still not violating the nature of arbitration.

III Scope of Interim Measures

The second issue is the scope of the interim measures that can be granted by an arbitral tribunal. Despite the Law on Arbitration not providing more detailed regulations regarding this issue, it is undisputable that the starting point for the consideration of the arbitral tribunal's powers is the arbitration agreement. This means that any decisions made in the arbitral proceedings can have effect only towards the parties to the agreement. Further, if any such measure is rendered it must be done so within the limits of such agreement.

In an arbitration agreement, the parties can exclude the possibility of rendering the interim measures The tribunal must respect such agreement even if there is a real necessity for it. In such case, the party seeking temporary injunction must turn to the state court.

An arbitral tribunal also must keep in mind other limitations that may be set forth in agreement to arbitrate. For example, the agreement to arbitrate stipulates envisages that the dispute shall be resolved by multiple arbitrators and that they must reach all decisions unilaterally, this extends to the decisions on the requests for interim measures as well.

Finally, coming to the situation where there is no exclusion of any kind with respect to the interim measures, what must be kept in mind is that such measure must be within the limitations of the tribunal's powers granted by the law. Arbitrators are, after all, private individuals without public authority; they do not perform their function on behalf of the state, but in their own name, on the basis of powers granted by the contracting parties – who are also private persons and entites.

They lack the coercive power and cannot issue orders to the collection and other authorities. The use of coercion, on the other hand, is a monopoly of the state and may be exercised only through the enforcement court, which is vested with the authority to order enforced collection, seizure of property and other measures of similar nature. To explain this issue through a practical example: a claimant in arbitral proceedings provides evidence that there is a reasonable possibility that they will succeed on the merits of the claim, but also that it is likely that they will not be prevented from collecting it by the time that the proceedings are done. Hence, it requests the provision of a security. An arbitral tribunal can order the opposing party to provide such security, but it cannot compel it to provide it. That leads to the third issue, and that is the enforcement of interim measures ordered by arbitral tribunals.

IV Conclusion

Interim measures granted by arbitral tribunals in Serbian arbitration represent a crucial, yet limited, tool for protecting parties' rights, especially given the absence of coercive power and the lack of precisely defined statutory conditions in Serbian legislation. While tribunals may rely on international standards and comparative legal frameworks, such as the UNCITRAL Model Law, their decisions must remain within the boundaries of party autonomy and the contractual nature of arbitration.

For the next instalment, we'll examine the enforcement of arbitral interim measures under Serbian law.

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