

Enforcement of Foreign Judgments

Interim and Precautionary Measures [Ukraine]

2020



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I. APPLYING FOR INTERIM AND PRECAUTIONARY MEASURES

1. Is it possible to apply for an interim measure in order to ensure the effective enforcement of a court decision?

Answer: Yes. The court may apply interim measures to ensure the effective enforcement of a future court decision.

2. Is it mandatory to pay court fees for this type of application?

Answer: Yes – fees vary depending on the type of litigation proceedings (civil, administrative or commercial). As of 2020, the court fees for submitting the interim application are as follows:

- In civil cases - UAH 1051 (approx. EUR 37) for legal entities and UAH 420 (approx. EUR 14) for private individuals;
- In administrative cases – UAH 630.60 (EUR 21) for both legal entities and private individuals; and
- In commercial cases – UAH 1051 (approx. EUR 37) for both legal entities and private individuals.

3. What is the ordinary/average length of time for this kind of procedure?

Answer: The application for an interim measure shall be considered by the court within two days following its submission. The actual duration may be longer depending on court's caseload.

II. TYPES OF INTERIM AND PRECAUTIONARY MEASURES

1. For which types of interim measures are the parties allowed to apply? (e.g., injunction, freezing orders, caveat, restraining order, etc)

Answer: In commercial cases, the court may apply the following interim measures:

- a. Seizure of funds or other property of the respondent;
- b. Prohibiting the respondent or third parties to take specific actions;
- c. Suspending the enforcement proceedings;
- d. Suspending sale of assets;
- e. Suspending customs clearance of goods;
- f. Arrest of a ship to secure a maritime claim.

The above list is non-exclusive; the court may also apply other interim measures envisaged by Ukrainian laws or international agreements.

The court may also apply several interim measures simultaneously.

In civil cases, in addition to the interim measures listed above, the following interim measures are also available:

- in family disputes - obliging the respondent to perform certain actions; and
- in unjust enrichment disputes - seizure of the respondent's assets.

In administrative cases, the following interim measures are available:

- suspending the laws and regulations, as well as and individual administrative acts adopted by public authorities and local governments;
- prohibiting the respondent or third parties to take specific actions; and
- suspending the enforcement proceedings.

III. PROCEDURE

1. Competent Court

a) Which court has jurisdiction to grant these interim and precautionary measures?

Answer: The court considering a particular case or the court, where the case should be considered (if the interim application is filed prior to submitting the underlying lawsuit), shall have the jurisdiction to grant interim measures. This will usually be a local court (the first instance court). However, appeal and cassation (second appeal) courts are also entitled to grant interim measures.

2. When can the application for interim and precautionary measures be submitted?

Is it possible to apply for it at the time the underlying lawsuit is filed? If YES: Are there any special requirements when so doing?

Answer: Yes, an application for interim or precautionary measures may be submitted together with a lawsuit. There are no special requirements when applying for interim and precautionary measures simultaneously with a lawsuit.

The application for interim measures may be submitted to the court prior to or simultaneously with the lawsuit, or in the course of the litigation until the court renders the decision on merits.

With the purpose of ensuring the enforcement of court decision, the court may also apply interim measures at the request of the winning party.

3. Is it possible to apply for interim precautionary measures before filing the underlying lawsuit? If YES: Are there any special requirements when so doing? (e.g., deadline to submit the lawsuit)

Answer: Yes, in which case the applicant (claimant) must submit the lawsuit within 10 days following the court decision ordering the interim measures.

4. Is it possible to apply for interim precautionary measures after filing the main claim? If YES: Are there any special requirements when so doing?

Answer: Yes. There are no special requirements.

5. Criteria used by the court for granting these measures

What requirements must be fulfilled in order to apply for an interim measure? (e.g. *periculum in mora*, *fumus boni iuris*, security, etc)

Answer: As a matter of Ukrainian law and respective court practice, the following basic requirements should be fulfilled in order to apply for an interim measure:

- a. the application must comply with formal legal requirements established by procedural law (e.g. it must contain the offer for cross-undertaking)
- b. the application must be accompanied with supporting evidence, confirmation of payment of court fee, and a document proving the applicant's authority;
- c. the enforcement of the final judgment or the effective protection/renewal of claimant's rights and interests, would be complicated or impossible without interim relief;
- d. the requested interim measures must be proportionate with the sought claims and must ensure the enforcement of the judgment if the lawsuit is granted;
- e. the requested interim measures must be reasonable, justifiable, fair and must not violate the balance of interest between the parties to the dispute;
- f. the requested interim measures must not violate the rights and interests of other persons which are not participants of the case;
- g. the requested interim measures must not duplicate the claims sought in the lawsuit, i.e. by applying the interim measures the court must not decide the dispute on merits.

Certain peculiarities also apply to specific cases, such as corporate disputes, litigations involving insolvent banks, etc. For example, in corporate disputes, the court cannot prohibit summoning the general shareholders' meetings, or attending (not attending) the said meeting. In insolvent bank litigations, the court cannot suspend the decisions or regulations of the National Bank of Ukraine or its officers.

6. Procedure

a) Which are the main steps of the procedure after filing the interim measure application? (e.g. holding a hearing, presenting evidence, etc.)

Answer: The interim application is usually considered by an individual judge on *ex parte* basis. However, the judge may hold a court hearing and summon the applicant in order to:

- obtain new explanations or seek additional evidence; or
- decide issues related to providing security for possible damages (cross-undertaking).

In exceptional cases, the court may summon both parties.

b) Is it possible for the Court to order an interim measure without hearing the other party? (*in audita parte debitoris*). If YES, under what circumstances can the parties apply for it?

Answer: Yes. As a matter of practice, the court will usually decide on the interim measures without hearing the other party, therefore no specific motion is required.

c) What are the main steps of the procedure in this case?

Answer: The main steps of the procedure are as follows:

- submission of the application for interim measures to the court;
- court's preliminary examination of the application with respect to its compliance with formal legal requirements;
- consideration of the application by the court (either *ex parte* or summoning the parties to court);
- having considered the produced evidence and statements, the court shall produce a court ruling on applying or refusing to apply interim measures;
- the court ruling is then immediately sent to the applicant and other parties to the case, or whose interests it may affect.

7. Opposition of the defendant

a) Is it possible for the defendant to oppose interim and precautionary measures?

Answer: The defendant may oppose interim and precautionary measures by:

- filing written objections against the application for interim measures;

- requesting termination of applied interim measures if the grounds for the interim measures have ceased to exist;
- requesting the court to order the claimant to provide cross-undertaking (security for possible damages as a result of interim measures); and
- appealing the court ruling on application of interim measures.

b) Is it possible for the defendant to ask the court for the substitution of the interim measure for a guarantee?

Answer: Yes. The defendant or third party at their own discretion may provide security for costs by depositing funds (for the total amount of claim) to the court's deposit bank account or by providing a bank guarantee. In this case, the court shall refuse to apply interim measures or terminate the interim measures which had already been applied earlier.

8. Appeal

a) Are appeals allowed from the court decision ordering the measures or rejecting the defendant's opposition to them?

Answer: Yes. The parties to the case and other persons whose rights are were affected by the interim measures, are entitled to appeal the court ruling on application of interim measures.

b) Is it possible to enforce the interim measure once an appeal is filed?

Answer: Yes. Appealing the court ruling on interim measures does not suspend the enforcement of these interim measures.

IV. EFFECTS AND VALIDITY OF INTERIM AND PRECAUTIONARY MEASURES.

1. Is it possible to enforce the interim measure when the other party obstructs it?

Answer: Yes. The court rulings on interim measures are subject to immediate enforcement, regardless of appeals against it.

2. Is it possible to modify a previous interim measure?

Answer: Yes, the court may modify the applied interim measures considering the particular circumstances of the case and the evidence produced by the parties.

3. When is it possible to raise an interim measure?

Answer: The court may terminate interim measures on its own initiative or upon a substantiated application of a party to the proceedings. The interim measures may be raised by the court if:

- the applicant fails to submit the lawsuit within 10 days following the court ruling ordering the interim measures, - if the interim measures were applied prior to filing the lawsuit;
- the applicant fails to provide the cross-undertaking ordered by the court;
- if the court has struck out the case or dismissed the lawsuit;
- the claimant has not enforced the interim measures within 90 days following the delivery of the court decision on the merits in their favour; and
- the circumstances underlying the ordering of interim measures have ceased to exist.

4. Are there any rules concerning the costs (e.g., lawyers' fees, etc.) related to the application?

Answer: The court will issue its decision on costs (including those incurred while applying for interim measures) when deciding the case on the merits. This decision shall cover the winning party's legal fees and expenses. However, the sum of awarded costs may differ from those actually spent by the applicant (usually, the court awards much less than actually spent).

V. ARBITRATION

1. Is it possible to apply for an interim measure in order to assure the effective enforcement of an arbitration award in your country? If YES: what is the enforcement procedure?

Answer: Yes. Within the framework of international arbitration, there are four different scenarios on applicability of interim measures to assure enforcement of an arbitration award:

- 1) Application of interim measures by the domestic state court in support of pending arbitration proceeding.

According to Article 149(3) Civil Procedure Code of Ukraine, the court may apply interim measures in the manner and on the grounds set forth by the Civil Procedure Code, if a party to a pending international commercial arbitration proceeding so petitions the court. Such application would be considered by appeal court at the seat of arbitration, place of debtor's residence or location of his property.

- 2) Application of interim measures by the arbitral tribunal within the pending arbitration proceeding.

The extent of the arbitrator's power to order interim measures will depend on the extent of the powers given to the tribunal by the arbitration agreement or the particular rules of arbitration that apply.

The right of the arbitral tribunal to order application of the interim measures is set forth in Article 17 of the Law of Ukraine on International Commercial Arbitration and in the provisions of Section V of the Rules of the the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry.

- 3) Application of interim measures by the domestic state court within the pending proceeding for recognition and enforcement of an arbitral award.

According to Article 477(3) Civil Procedure Code of Ukraine, upon application of an award creditor, the court may apply interim measures within the framework of proceeding for recognition and enforcement of the arbitral award, if non application of such interim measures may complicate or frustrate further enforcement of such award, in a case the enforcement petition is successful.

- 4) Application of interim measures by the domestic state court by way of recognition and enforcement of arbitral award ordering applicability of interim measures *vis-à-vis* debtor

For such applications, the procedure for enforcement of foreign arbitral awards applies. Foreign arbitral awards are enforced under the provisions of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), Chapter VIII of the Law of Ukraine on International Commercial Arbitration. Chapter IX.3 of the Civil Procedure Code also applies.

- An interested party must file an application for enforcement with the competent domestic court.
- The competent court is an appellate instance court of general jurisdiction in the city of Kyiv irrespective of the place of residence or registration of the debtor or the location of its property.
- The application must be filed within three years of entry into force by the award.
- National legislation does not oblige the filing party to notify the debtor of the enforcement proceedings. The court that received the application with annexes will itself notify the debtor of the proceedings within five days.
- The court case may last up to two months. The actual duration may be longer depending on the court's caseload, the actions of the respondents, the complexity of the matter, and so on. In particular, where the debtor is a foreign company, review may take up to a year given the necessity to notify the debtor of the proceedings under the HCCH Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965 (Hague Service Convention).
- The ruling of the court on recognition and enforcement of an arbitral award can be challenged before the Supreme Court.

2. Are the arbitrators, entitled to order an interim measure?

Answer: Yes. The extent of the arbitrator's power to order interim measures will depend on the extent of the powers given to the arbitrator by the arbitration agreement or the particular institutional arbitration rules that apply.

The right of the arbitral tribunal to order application of the interim measures is set forth in Article 17 of the Law of Ukraine on International Commercial Arbitration and in the provisions of Section V of the Rules of the the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry.

VI. FOREIGN PROCEDURE & ARBITRATION

1. Is it possible to apply for an interim measure before your country's courts in order to assure the effective enforcement of a foreign court decision or arbitration award? If YES: how is this procedure executed?

Answer: Yes. Procedure as above.

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