Kraków, January 17th, 2019

SUMMARY OF THE DOCTORAL THESIS

Maria Kierska

Interim measures of protection in commercial arbitration

Doctoral thesis supervisor: Prof. dr hab. Andrzej Szumański

The subject of the thesis is interim measures of protection in commercial arbitration. The dissertation presents a broad, functional approach to the interim measures, and therefore it refers to all types of temporary protective measures aimed not only at securing the feasibility and effectiveness of the final award, including a ruling on the costs of the proceedings, but also safeguards the arbitration proceedings themselves, evidence and the legal and factual situation of the parties throughout the duration of the arbitral proceedings. Such an approach allowed for a full and comprehensive analysis of the role and nature of interim measures of protection in commercial arbitration that differs significantly from the conservatory measures issued in state court proceedings.

The scope of the thesis covers both domestic and international commercial arbitration, since there are no significant differences between them that would justify limiting the subject to only one of the types of arbitration proceedings. The investment arbitration is beyond the scope of the thesis.

The aim of the thesis was to examine the role and function of interim measures of protection in commercial arbitration and to provide answers to the contemporary challenges facing its development. The practice of both arbitral tribunals and state courts has made huge progress against this background. The dynamism and scope of changes, as well as the increased interest in interim measures in the arbitration proceedings were the main reason for choosing this subject.

The dissertation consists of an introduction, eight chapters and a conclusion.

The first chapter of the thesis deals with general issues, *i.e.* the definition of interim measures in commercial arbitration, their main characteristics and nature, the competence of both arbitration tribunal and national courts to provide security for the purposes of arbitration proceedings. This chapter also addresses the question of the jurisdiction of national courts to provide security for domestic and foreign arbitration proceedings.

The second chapter discusses the relevant criteria for granting interim measures of protection in arbitral proceedings. Given the general rule as to the broad powers of arbitral tribunal to grant any interim measure they consider necessary and/or appropriate, it was vital to examine what is understood by notions of necessity and/or appropriateness. The complexity and variety of sources of relevant regulation (national law, model law, arbitration rules, general practice) were analyzed in order to identify and characterize relevant criteria for granting interim measures, such as arguable case on the merits, no pre-judgment of the case, threat of serious or irreparable harm and urgency.

The third chapter examines the types of interim measures of protection. It describes the idea of an open catalog of types of protective measures available to arbitral tribunals and identifies the basic categories of security methods. Further it identifies and describes the specific types of interim measures occurring in the practice of arbitration proceedings, including *i.a.* measures to secure the *status quo*, assets, costs of proceedings, evidence and confidentiality of the proceedings.

The fourth chapter explores the issue of the *ex parte* arbitration proceedings on interim protection. This part of the thesis presents the current approach of legal systems and arbitration rules to *ex parte* proceedings, criticize the discussion on this matter, which grew in 2006, while working on the amendment of the UNCITRAL Model Law, that resulted in significant changes to the Model Law provisions on interim measures of protection in arbitration proceedings and allowed for *ex parte* procedure. An analysis of Polish regulation on that aspect was also presented.

The fifth chapter aims to analyze the issue of concurrent jurisdiction between state courts and arbitral tribunals as to granting the interim protection in aid of arbitral proceedings. The thesis reviews the concept, models and consequences of concurrent jurisdiction from the perspective of both state law and rules of arbitration. Further it develops the possible

coordination mechanisms between the arbitral tribunal's and state courts' competences to grant interim protection measures. Finally the thesis examines whether the national court could refuse to recognize or enforce interim order issued by arbitral tribunal on the grounds that an order of similar effect has already been granted (or refused) by the national court.

The sixth chapter focuses on the enforcement of the order on interim protection issued by arbitral tribunal. Taking into consideration that the arbitral tribunal does not possess coercive powers, such orders, if not obeyed voluntarily, need to be enforced by the national courts. The analysis commences with the detailed examination of the form such an order can take, that often determines its enforcement or recognition. The chapter also focuses on arbitral tribunal power and methods to ensure that parties adhere to ordered protective measures. Finally, it reviews the current discussion on the enforcement of arbitral tribunal's decisions by common courts, especially on the grounds of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958.

The seventh chapter elaborates on one of the most recent innovation in international arbitration, i.e. the introduction of emergency arbitrator. The analysis focuses on the role and nature of the emergency arbitrator in comparison to arbitral tribunal and Pre-Arbitral Referee. This leads to the analysis of possible ways of enforcing the emergency arbitrator decisions on provisional measures before national courts, especially whether the provisions on enforcement of arbitral tribunal's orders *per analogiam* allow for the recognition and enforcement of the orders of emergency arbitrators.

The last chapter considers *anti – suit injunction* issued by arbitral tribunals, as a method of securing their jurisdiction and arbitration agreement. First it discusses the arbitral tribunal's authority to grant an antisuit order. That can arise from the arbitration agreement itself, where *anti – suit injunction* constitutes a remedy for a breach of the arbitration agreement. The legitimacy may also be found in arbitral tribunal's competence to order interim measures, since *anti – suit injunction* is commonly perceived as one of the types of interim measures. The second part focuses on prerequisites for granting *anti – suit injunctions* by arbitral tribunals. While referring to the international practice and standards, including the European law and judgments of the ECJ (*West Tankers*, C-185/07, and *Gazprom*, C□536/13), the thesis also examines these issues under the Polish law.

The thesis formulates eight research questions, that were discussed and analysed within the scope of study, as well as formulates *de lege ferenda* postulates towards Polish arbitration law.

Maria Kienka