

# INTERIM MEASURES IN CORPORATE DISPUTES IN UKRAINE



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The execution of any court decision is an integral stage of the justice process and, therefore, must meet the requirements of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The ECHR, in its judgment of 19.03.1997 in the case of *Hornsby v. Greece*, stated that the execution of a judgment rendered by any court should be regarded as an integral part of the trial. At the same time, judicial protection, as well as the activities of the court, cannot be considered effective if court decisions are not enforced or are enforced improperly and without the court's control over their execution.

In the judgment of the ECHR of 18.05.2004 in the case of *Prodan v. Moldova*, the Court emphasized that the right to a fair trial guaranteed by the Convention would be an illusion if the legal system of the states that have ratified the Convention allows a final, binding judgment to remain unenforced, causing prejudice to one of the parties.

Thus, the interim measures taken by the court help to guarantee the restoration of the plaintiff's violated rights in case of satisfaction of the claim and enforcement of the court decision, which is fully consistent with the ECHR case law. The economic court should consider the potential risks of non-enforcement of the court decision and guarantee the restoration of the plaintiff's violated rights in case of satisfaction of the claim and enforcement of the court decision.

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The institution of interim measures is one of the mechanisms for ensuring effective legal protection. In other words, interim relief, by its legal nature, is a means of preventing possible violations of property rights or legally protected interests of a legal entity or individual, the purpose of which is to avoid possible future violations of the rights and legally protected interests of the plaintiff, as well as to ensure that the court decision is actually enforced and to avoid any difficulties in enforcement in the event the claim is satisfied.



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The main types of interim measures in corporate disputes are prohibition of registration actions; suspension of a resolution of the general meeting of a legal entity with prohibiting the general meeting of shareholders from making decisions; prohibition of alienation of a share in the authorised capital of a company; seizure of a share in the authorised capital of a company; seizure of immovable property; seizure of funds; suspension of the order of the Ministry of Justice.

✓ A prerequisite for securing a corporate claim is the selection of an appropriate interim measure that is relevant to the subject matter of the dispute, which guarantees compliance with the principle of correlation of the type of interim measure with the requirements stated by the claimant, which ultimately allows for a balance of interests of the parties and other participants in the litigation in resolving the dispute, facilitates the actual execution of the court decision in case of satisfaction of the claim and, as a result, ensures adequate protection or restoration of the violated or disputed rights or interests of the claimant (applicant).

✓ For example, in its rulings in cases No. 902/774/20 and No. 902/775/20, the Supreme Court noted that the interim measures taken by the appellate court (seizure of corporate rights of a third party; prohibition for state registrars to perform registration actions in relation to LLC) have no legal connection with the subject matter of the claim (termination of the share purchase agreement, and obligation of the state registrar to amend the register), during the consideration of which the courts will examine the issue of whether there are grounds for termination of the agreement concluded between the plaintiff and the defendant and whether there are grounds for the registrar's obligation to amend the register. The claims do not relate to the direct return of the share in the company's charter capital to the plaintiff.

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Interim relief must be consistent with the subject matter and grounds of the claim, and the person claiming the need for interim relief must prove the connection between the failure to take such measures and the difficulty or impossibility of enforcing the court act.

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The dispute in case No. 927/481/21 concerned the return to the plaintiff of a share in the company's authorized capital. However, as the commercial court of appeal correctly noted, the local commercial court took measures to secure the claim in respect of land plots that were not in dispute in this case. By partially satisfying the application for interim relief, the commercial court prohibited the LLC and the subjects of state registration of rights from taking actions aimed at alienating real estate and terminating the ownership of agricultural land plots and the right to lease agricultural land plots under land lease agreements concluded with individuals, which indicates that the measures taken are disproportionate to the subject matter of the dispute.

**SUCH A METHOD OF SECURING A CLAIM IS NOT DIRECTLY RELATED TO THE DISPUTE UNDER CONSIDERATION AND LEADS TO AN UNJUSTIFIED RESTRICTION OF THE RIGHTS OF THE COMPANY, COMPANY MEMBERS WHO ARE NOT DEFENDANTS, AND LAND PLOT OWNERS.**

The Supreme Court rejected the complainant's arguments that the appellate court had violated the procedural law, as the evidence, which, in the plaintiff's opinion, confirms the validity of the assumptions set out in the application for interim relief, does not change the fact that the method of interim relief chosen by the plaintiff is inconsistent with the subject matter of the claim. The Supreme Court noted that the measures taken by the court of first instance to secure the claim did not meet the requirements of procedural law regarding reasonableness, validity, adequacy, and balance of interests of the parties, and therefore the conclusion of the commercial court of appeal that there were no grounds for securing the claim in the manner chosen by the plaintiff was justified.

In its ruling in case No. 927/460/21, the Supreme Court also concluded that the method of interim relief chosen by the plaintiff was inconsistent with the requirements for which it was applied. The court noted that a mere reference in the application to the potential for the defendant to evade the court decision without providing appropriate justification is not a sufficient basis for satisfying the application.

The plaintiff did not provide evidence of the defendant's threat and intention to alienate the disputed share in the LLC's charter capital. The complainant's arguments are based only on assumptions and the defendant's potential ability to alienate such rights, which are not a proper justification for taking appropriate interim measures.

As for the arguments of the plaintiff's cassation appeal that he provided the court of appeal with evidence of the alienation of the LLC's assets, namely the termination of the lease of land plots, which are the defendant's main means of production, and also substantiated the impossibility of submitting such evidence to the court of first instance, but the plaintiff's application was left unanswered by the court of appeal, they cannot be a basis for setting aside the appealed decision of the court of appeal, since they do not change the fact that the method of securing the claim chosen by the plaintiff was not agreed upon.

The justification for the need to secure a claim is to prove the circumstances that are relevant to the decision on securing the claim. The purpose of interim relief is for the court hearing the case to take measures to protect the plaintiff's material and legal interests from possible unfair actions by the defendant to ensure that the plaintiff can actually and effectively enforce the court decision if it is made in the plaintiff's favour, including to prevent potential difficulties in further enforcement of such a decision.

When deciding on interim measures, the commercial court must assess the validity of the applicant's arguments regarding the need to take appropriate measures, taking into account the reasonableness, validity, adequacy, and proportionality of the applicant's claims for interim relief, balancing the interests of the parties and other participants in the proceedings, the existence of a connection between a particular interim measure and the subject matter of the claim, the likelihood of difficulty in enforcing or failing to enforce the commercial court's decision, and other factors.

The existence of factual circumstances, which are confirmed by evidence that give rise to applying a particular type of interim relief, is sufficiently justified to secure a claim. The adequacy of an interim measure applied by a commercial court is determined by its compliance with the requirements for which it is applied.



It should also be investigated whether the failure to apply the requested interim relief will lead to a violation of the requirement for fair and effective protection of the violated rights whether the plaintiff will be able to protect them within the same court proceedings on his claim without new appeals to the court.



Proportionality requires the commercial court to consider the ratio of the negative consequences of taking measures to secure the claim to the negative consequences that may result from the failure to take these measures, considering the right or legitimate interest for which the applicant is applying to the court, and the property consequences of prohibiting the defendant from taking certain actions.



The Supreme Court stated that interim measures may be taken by the court only within the scope of the claim and should not violate the rights of other participants (shareholders) of the legal entity. When deciding whether to take interim measures, commercial courts should consider that such measures should not block the business activities of a legal entity, violate the rights of persons who are not parties to the litigation, or apply restrictions not related to the subject matter of the dispute.

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