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PERSPECTIVES

PROVISIONAL MEASURES IN INVESTMENT TREATY ARBITRATION: PROTECTING THE PLAYING FIELD

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Contentious disputes are fought on many fronts. Beyond the legal proceedings themselves, there are a number of strategic considerations to keep in mind to ensure that a company has the best chance of success.

These strategies are particularly relevant in investment treaty arbitration where the claimant investor is up against a sovereign state, which has at its disposal the resources of the state. For example, the respondent state has use of its criminal and civil domestic courts, which has led to a large proportion of provisional measures applications to suspend parallel domestic proceedings. In contrast, the claimant investor often lacks access to information, particularly in expropriation cases, where the claimant investor no longer has use of its investment or documents. Thus, the claimant investor often finds itself in less than ideal circumstances, and potentially on the wrong side of a power imbalance.

This potential disparity sits ill at ease with the well-accepted principle of equality of arms. Left unchecked, this discrepancy risks undermining the effectiveness of the arbitration as a dispute resolution process, by interfering with the legal playing field.

The efficacy of any arbitration rests on two premises. The first is that the parties are able to present their cases to the tribunal fairly and without

impingement. This is known as the right to be heard or the right to procedural integrity. The second is the maintenance of the status quo throughout the proceedings: i.e., that during the course of arbitral proceedings, no party's rights or position should be damaged in the period of time needed to adjudicate the dispute. The potential power imbalance between state and investor, however, risks jeopardising this as there are many tactics states can employ to obstruct an investor's right to be heard and exacerbate the dispute at hand. This is particularly problematic when considering the lengthy nature of investor-state proceedings, where the final relief will not be decided until the end of the proceedings often many years later.

Provisional measures can provide an important solution to this issue, affording a means for parties to obtain interim relief when a final decision on the merits would simply be too late. It is therefore vital for companies to pre-emptively understand the ways in which they may be vulnerable in an investor-state arbitration and be aware of the potential remedies available to level the playing field.

Below is a brief guide to provisional measures, followed by an overview of the key areas of exposure for an investor and how provisional measures can address those vulnerabilities.

What are provisional measures?

There is no concrete definition of provisional measures in international arbitration. Nor is there consistent terminology: the terms 'conservatory', 'protective' or 'interim' relief are also used by different arbitral institutions. In broad terms, provisional measures are temporary remedies ordered by a tribunal in an arbitration to preserve the rights of parties to proceedings pending a final determination by the tribunal.

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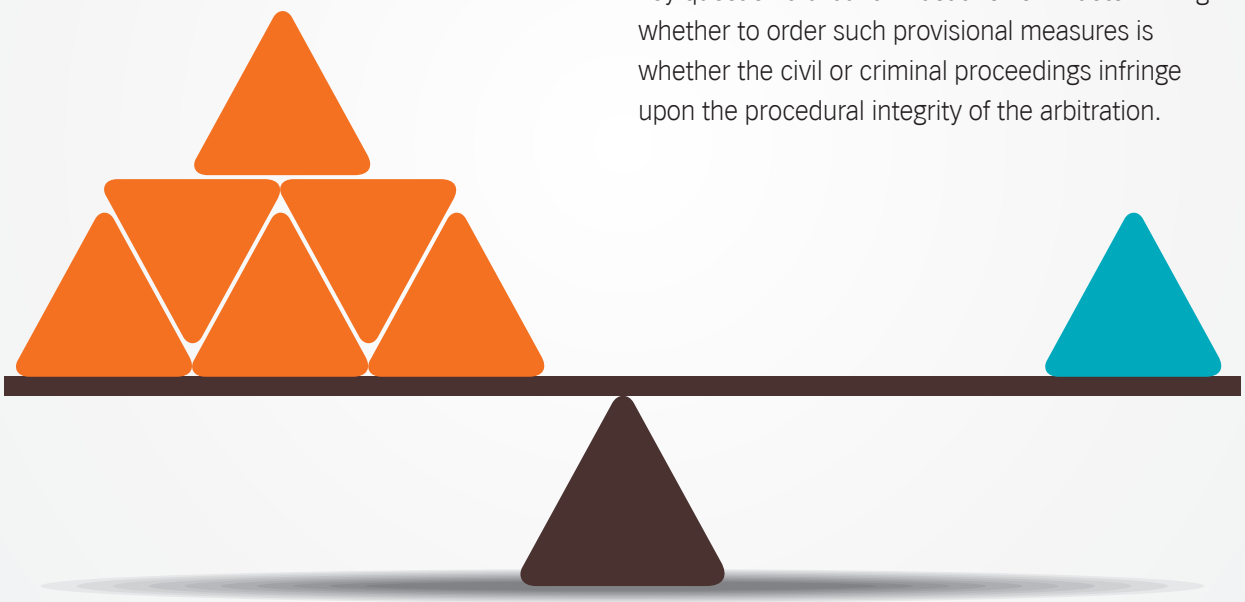
Although there has been a rise in the number of provisional measures sought, they are only granted in exceptional circumstances. Generally speaking, the applicant must seek to preserve a right relating to the specific dispute in the arbitration, and show urgency and necessity (i.e., a risk of serious irreparable harm). As of 2018, less than 40 percent applications for provisional measures were granted in investor-state arbitrations; of that 40 percent, less

than half were granted in full. As such, provisional measures are not ordered lightly: they are exceptional remedies for exceptional circumstances. That said, because of the unusual power dynamic that exists in investment treaty arbitrations, such 'exceptional' circumstances are by no means rare.

Key areas of exposure for investors in investor-state arbitrations

There are a number of ways in which a respondent state could interfere with an arbitration. Of course, the precise detail of these tactics depends heavily on the facts of the case, but a few areas where investors have been vulnerable are set out below.

Parallel domestic proceedings. In International Centre for Settlement of Investment Disputes (ICSID) proceedings, one of the most commonly sought provisional measures is to suspend parallel-domestic proceedings (criminal or civil) brought by the state against the investor. Provisional measures are more often awarded in civil proceedings, which are less problematic than criminal proceedings. Notwithstanding this, however, ordering a state to suspend either of these things is not done lightly, since it involves issues of state sovereignty. The key question a tribunal must answer in determining whether to order such provisional measures is whether the civil or criminal proceedings infringe upon the procedural integrity of the arbitration.



Parallel domestic proceedings pose two main risks to the arbitral proceedings which can be addressed by provisional measures. First, there is a risk of the domestic proceedings purporting to answer the same issues as those before the tribunal. For example, in *Ceskoslovenska Obchodni Banka AS (CSOB) v The Slovak Republic*, the respondent state ran domestic bankruptcy proceedings in the Slovak courts. Because those domestic proceedings sought to resolve the same issue as was before the tribunal, the tribunal granted the claimant's request to suspend the domestic bankruptcy proceedings. This allowed the arbitration to continue without the risk of a conflicting decision being made in the Slovak courts. In contrast, a similar request was rejected in *Plama Consortium Limited v Republic of Bulgaria* on the basis that the causes of action, claims and relief were different in the domestic parallel proceedings.

Second is a less straightforward risk: the risk that pursuit of proceedings will adversely affect the ability of the claimant to fairly present its case. For example, in *Hydro Srl and Ors v Republic of Albania*, parallel criminal proceedings in Albania exposed one of the claimants to extradition and imprisonment in Albania. The tribunal in *Hydro* granted provisional measures to suspend the criminal proceedings, finding that they posed an imminent risk to the claimants' ability to effectively participate in this arbitration. Another example can be seen in *Ipek Investment Limited v Republic of Turkey*, where the tribunal ordered the suspension of criminal proceedings against several of the claimant's potential witnesses, noting that "the continued pursuit of the criminal process" would "prejudice the equality of the Parties by enabling the Respondent to obtain testimony and other evidence from the Claimant's witnesses under compulsion of internal law".

Preservation of documents and evidence. Another area of exposure for investors is the preservation of documents. Often in investor-state arbitrations, the investor no longer has access to its investment and documentation; given the importance of documentary evidence, this is clearly problematic for the investor. In *Ipek Investment Limited v Republic of Turkey*, the claimant submitted that the respondent had seized the claimant's documents through the execution of search warrants in connection to the domestic criminal proceedings, and by virtue of the respondent's transfer of the claimant's asset to a state entity. As such, the claimant requested provisional measures ordering the respondent to preserve certain categories of documents. The tribunal granted the request in part, noting that both parties had a general duty to preserve relevant evidence, and ordering the respondent to take steps to preserve the named categories of documents.

Tribunals have declined to order such provisional measures on the basis that the orders sought were too broad. For example, in *Railroad Development Corp v Republic of Guatemala*, the tribunal rejected the claimants' request for provisional measures

on the basis that the categories of documents requested were "excessively broad and their relevance difficult to assess".

Other areas of exposure. Inevitably, investor-state arbitrations are very fact dependent. There are a wealth of potential issues that do not fall into a clear category, but that should be noted nonetheless. Examples include issues relating to surveillance of the claimant and its legal counsel (*Cementownia 'Nowa Huta' SA v Republic of Turkey*), threats to the life of claimants and witnesses (*Bernhard Von Pezold and Ors v Republic of Zimbabwe*), and risks of disclosure of confidential information to the media (*Biwater Gauf (Tanzania) Ltd v United Republic of Tanzania*). These showcase the breadth of the potential issues and corresponding provisional measures available in investor-state arbitrations.

Key considerations for in-house counsel

Given the varying nature of investor-state arbitrations it is difficult to provide a formula for how best to protect the client and the arbitral playing field. That said, it is worth keeping in mind the following insights.

First, maintaining a holistic view of the case is vital for perceiving potential threats to the integrity of the arbitration proceedings. Even though an event occurs outside of the arbitration proceedings, it may well have an impact on the arbitration and recognising that in advance will be key when it comes to protecting the integrity of proceedings. This includes monitoring events all the way through the arbitration, even up to the hearing, as states often continue to engage in conduct that could affect the proceedings.

Second, a forensic lens to events surrounding the client is essential. Viewed in isolation, it may be difficult to ascertain how an incident outside of the arbitration might impact the proceedings. When scrutinised in detail, however, a pattern may emerge linking those external occurrences with the arbitration. For example, close monitoring of parallel proceedings and interference with key witnesses may uncover a pattern of problematic state behaviour.

Finally, keep any request for provisional measures precise and specific. As we have seen, provisional measures are only provided in extraordinary circumstances, and a request which is too broad and cannot be tied to the arbitration will inevitably be unsuccessful. CD

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