Overview

A. Introduction

1. Orders granting interim relief preventing a party from aggravating a dispute or undermining the integrity of the dispute settlement process are of fundamental importance to both court and arbitral proceedings. This is equally true in the context of investor-state arbitration, and the major arbitral rules used for such disputes all contain mechanisms enabling tribunals to issue provisional measures. Indeed, we have obtained provisional measures in relation a wide array of issues, ranging from threats to our clients' lives to document disclosure. This advisory provides an overview of those mechanisms, addressing how such orders can be obtained and what conduct they can prevent or require.

2. For those unfamiliar with investor-state arbitration, we recommend reading our previous advisory for an introduction to the subject, and how investment treaties can be a useful tool for minimising political risk. These advisories are part of our Investor-State Arbitration Advisory Series.

B. The Purpose of Provisional Measures

3. Given the complexity inherent in most investor-state arbitrations and the fact that they generally involve substantial claims for damages (frequently exceeding US$1bn), such proceedings will generally last between three to five years from commencement to the rendering of a final award. Much can happen between the parties in that period which could further impair a investor’s rights, jeopardise evidence relevant to the dispute, or otherwise aggravate the dispute or undermine the integrity of the arbitral proceedings.

4. Mechanisms enabling the issuance of provisional measures are the primary means to address such threats, and are available under the major arbitral rules used for investor-state disputes. The parties to investor-state arbitrations are generally able to make use of these mechanisms at any stage in proceedings following the constitution of the tribunal. Indeed, by way of example of the importance accorded to such mechanisms, we note that tribunals convened at the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) are required to prioritise the consideration of requests for provisional measures.

5. Like injunctive relief in domestic proceedings, the scope of conduct that can be prevented or mandated by provisional measures orders in investor-state arbitration is wide. Generally speaking, any action taken by a party to the arbitration that threatens to aggravate or extend the dispute (i.e. undermine the status quo between the parties), or that would make it impossible to comply with any final award that the tribunal might render is capable of being addressed by a provisional measures order.

6. By way of example, some of the most frequently ordered measures include:

6.1 Orders preventing disclosure to the media or public of information that is subject to any confidentiality requirements;
6.2 Orders requiring the suspension of parallel litigation that addresses the same issues as are before the arbitral tribunal (akin to domestic anti-suit injunctions);

6.3 Orders requiring the preservation of evidence; and

6.4 Orders preventing interference with, or destruction of, the investor’s property or legal rights that are the subject of the proceedings.

7. Additionally, we note that respondent states have often applied for orders requiring the claimant investor to post security for the costs incurred by the state as a result of the proceedings. Such orders are readily available in domestic court litigation in many jurisdictions, but are generally not expressly permitted under the rules applicable in investor-state arbitrations. Indeed, in the ICSID context, early decisions declared that orders requiring security for costs were not possible. However, subsequent tribunals at both ICSID and under the UNCITRAL Arbitration Rules have begun to accept that such orders are possible but seemingly only in very exceptional circumstances. Indeed, at the time of writing we are aware of only one order for security for costs having been made[1]. The exceptional circumstances justifying the order in that case was the claimant’s cumulative history of non-compliance with costs orders made against it in previous investor-state proceedings and (on one view) the involvement of a third party funder.

C. The Test for Provisional Measures

8. A party to an investor-state arbitration that seeks to obtain provisional measures must make an application in accordance with the applicable procedural rules. In full ICSID arbitrations, the relevant framework is contained in Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules. In UNCITRAL arbitrations, the relevant framework is contained in Article 26 of the UNCITRAL Arbitration Rules (1976 and 2010 editions). (See our previous advisory for an overview of the differences between arbitration at ICSID and under the UNCITRAL Arbitration Rules, and the circumstances in which each are available.)

9. Although the procedural rules vary between institutions, it is possible to discern four key requirements that must be satisfied irrespective of forum:

9.1 First, the tribunal must have prima facie jurisdiction in relation to the dispute. The fact that the respondent state may be contesting the tribunal’s jurisdiction does not prevent this test from being satisfied. All that must be shown at this stage is prima facie jurisdiction, and it is said that the benefit of the doubt will usually be exercised in favour of the applicant in this regard.

9.2 Second, the provisional measures sought by the applicant must be in relation to a right held by the applicant. The question is whether an actual right or legally protected interest which could potentially be held by the applicant exists in theory; the right or interest need not be proven to exist in fact. Thus, this test has a lower threshold than will be applied on the final determination on the merits of the dispute.

9.3 Third, the request must be urgent. Again, this threshold is generally low. It is generally accepted that all that must be shown is that the action complained of is likely to be taken before the tribunal will issue its final award in the arbitration.

Further, where the request is extremely urgent (i.e. the threatened action is imminent), it will often be appropriate for the tribunal to issue an interim decision to preserve the status quo pending its full consideration of the merits of the provisional measures request. The power to render interim decisions in such circumstances has been recognised by a number of investor-state arbitral tribunals, and is reflected in the rules of other international courts and tribunals and of domestic courts. (Steptoe lawyers acted as counsel in two investor-state cases where interim decisions were rendered: Bernhard von Pezold & Ors v The Republic of Zimbabwe (ICSID Case No ARB/10/15) and Border Timbers Limited & Ors v The Republic of Zimbabwe (ICSID Case No ARB/10/25). See our earlier article for practical law company.)

9.4 Fourth, the provisional measures sought must be necessary in the circumstances then existing. Necessity will be assessed by reference to the right that the applicant seeks to protect and the action complained of. At present, there is a degree of uncertainty as to the level of necessity required to justify provisional measures. Some maintain, on the basis of the International Court of Justice’s case-law, that the applicant must show that irreparable harm will occur in the event that the provisional measures are not ordered. However, there is a strong argument that the threshold is lower and simply requires that substantial harm will occur; this standard is supported by a sizeable body of arbitral precedent and academic opinion.

D. The Strength of Provisional Measures Orders
10. Provisional measures orders issued by investor-state arbitral tribunals are generally accepted as being binding on the parties. Indeed, our experience is that the majority of parties will endeavour to comply with such orders, or any challenge to them will be made by way of a request to reconsider the decision. Complete and wilful disregard is relatively uncommon. However, when faced with non-compliance with a provisional measures order, there are generally two options.

11. First, depending on the arbitral forum, some domestic courts will be willing to assist the non-defaulting party. However, it is relatively rare for such assistance to be provided in respect of interim decisions. Further, such assistance cannot be provided in the case of full ICSID arbitration.

12. More commonly, the arbitral tribunal itself will take action in the event of a party’s failure to comply with a provisional measures order. For example, if a party fails to preserve evidence in disregard of a tribunal’s order, the tribunal may choose to draw an adverse inference against the defaulting party as to the likely content of the destroyed evidence. Further, if a disruptive party extends the length of proceedings, this may be addressed by requiring it to pay a greater share of the costs than it would ordinarily be liable to pay. Finally, other breaches may often be dealt with through requirements to pay damages in respect of the breached order, which are ordered in the final award and therefore subject to the applicable enforcement mechanisms (which will be discussed in a future advisory).

E. ICSID vs UNCITRAL

13. The substantive requirements that an applicant must meet in order to obtain provisional measures are substantially similar between ICSID and UNCITRAL tribunals (see para 9 above). There are, however, significant procedural differences between the provisional measures mechanisms that must be borne in mind, and which may be relevant to an investor’s decision as to which forum to bring the arbitration in.

14. The first major difference relates to the possibility of obtaining provisional measures from adjudicative bodies other than the arbitral tribunal seized with the dispute. With full ICSID arbitration, the parties are not able to seek provisional measures from any authority apart from the tribunal seized with the dispute, except where such action was expressly provided for in the treaty or contract pursuant to which the claim was brought. In contrast, under both editions of the UNCITRAL Arbitration Rules (1976 and 2010) (and ICSID Additional Facility Rules) a party can seek provisional measures from another judicial authority. In practice, this will depend on the domestic law of the seat of the arbitration. Where provisional measures can be sought from a national court, the advantage to the parties is that compliance with the measure can be enforced with the threat of coercive sanctions. However, sovereign immunity issues in regard to respondent states may often reduce the significance of this factor for an investor.

15. The second major difference relates to the possibility of security being required for the issuance of provisional measures. Both editions of the UNCITRAL Arbitration Rules (1976 and 2010) expressly provide that UNCITRAL tribunals may make the issuance of provisional measures conditional on the applicant providing security for the cost of such measures. This allows the tribunal to protect the respondent from suffering losses in the event that the rights that the applicant seeks to protect on a provisional basis are subsequently found to not be owed to the applicant. Neither the ICSID Convention nor the ICSID Arbitration Rules expressly contain an equivalent power, however it is possible that a tribunal may be convinced to require such security in exceptional cases where it is justified (on the basis of the residual procedural discretion afforded by Article 44 of the Convention). As such, in practice it may be possible to mitigate the difference between the two institutions with a carefully drafted application to the tribunal. Nevertheless, we consider that issuing security in such circumstances will only be issued in the most exceptional of circumstances, irrespective of arbitral forum.

16. Additionally, where losses are suffered as a consequence of provisional measures being granted where they should not have been, under the 2010 UNCITRAL Arbitration Rules, the tribunal is expressly empowered to require the party that had sought those measures to pay the other party for the losses suffered. This power is not expressly granted by the 1976 UNCITRAL Arbitration Rules nor is it granted to ICSID tribunals. However, it is possible that in practice such tribunals may determine that such a power falls within their inherent jurisdiction.

F. Conclusion

17. The ability to seek provisional measures from arbitral tribunals adjudicating investor-state disputes is a significant mechanism. This advisory has provided an overview of the requirements that must be met to obtain provisional measures, and examples of the circumstances in which they may benefit a party to arbitration. These matters continue to develop as further decisions are rendered in a wider array of scenarios. We will continue to keep you apprised of such developments.
