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New York Arbitration Week 2022 Redux: Who's in Charge? — The Post-Pandemic Meaning of "Public Interest" in Interim Applications

Christel Tham, Lisa Wang Lachowicz, Jane Tien (Debevoise & Plimpton LLP) · Sunday, December 4th, 2022

One of the highlights of New York Arbitration Week 2022 was "Choosing Wisely: The Challenge of Interim Measures in International Arbitration"—a panel jointly hosted by New York International Arbitration Center (NYIAC) and the Chartered Institute of Arbitrators, New York (CIArb-NY) on November 16, 2022. Departing from the traditional format, the session featured two mock interim measure hearings arising out of a New York-seated arbitration—one before a federal judge and the other before an emergency arbitrator.

"Choosing Wisely: The Challenge of Interim Measures in International Arbitration"

The mock fact pattern involved a New York-based personal protective equipment ("PPE") distributor's claims against a Malaysia-based PPE supplier for breach of their exclusive distribution agreement. In the first mock hearing before a United States district court judge (Hon. Katherine B. Forrest (fmr.) of Cravath, Swaine & Moore LLP), the PPE distributor (represented by Kerri Ann Law of Kramer Levin Naftalis & Frankel LLP), sought to enjoin the PPE supplier (represented by Andrew J. Finn of Sullivan & Cromwell LLP) from entering into a distribution agreement with another company, and to require the supplier to continue supplying PPE products on an exclusive basis pending a final award. In the second mock hearing, the PPE distributor (represented by José F. Sanchez of Vinson & Elkins LLP) sought similar relief against the PPE supplier (represented by Gretta Walters of Chaffetz Lindsey LLP) before an emergency arbitrator (Grant Hanessian, independent arbitrator). Lea Kuck Haber (independent arbitrator, formerly Skadden, Arps, Slate, Meagher & Flom LLP) and Martin B. Jackson (Sidley Austin LLP) moderated the session.

Set in April 2020, at the height of the COVID pandemic and related PPE shortages, the mock hearings brought to the fore new questions and perspectives on the role and meaning of "public interest" in granting interim measures. Counsel for both sides argued that the extraordinary public health emergency demanded a decision in their favor. Before the judge, the distributor argued that the supplier's conduct amounted to denying its customers vital medical supplies in the midst of a pandemic, while the supplier argued that switching distributors better served the public interest by ensuring on-time delivery to those who need PPE the most.

Interestingly, however, the "public interest" factor was given significantly different treatment by the federal judge and the emergency arbitrator. Noting that the public's need for PPE was her foremost concern, Judge Forrest allowed the supplier three days to solidify its contract with another distributor. In the event that such a contract can be secured, she indicated that she would deny the original distributor's request for a temporary restraining order ("TRO").

In contrast, the thrust of the parties' disagreement before the arbitrator was the applicable standard for requesting interim relief. As a result, discussions of public interest took a back seat. Reasoning that the injuries the distributor claimed to have suffered require extensive calculations at this stage, Arbitrator Hanessian concluded that the merits of the interim relief application were unclear. During the post mortem session, Arbitrator Hanessian further clarified that he did not consider public interest relevant to his determination. The diverging outcomes of the two hearings may reflect the different roles of a judge and an emergency arbitrator: The former's perspective is grounded in years of public service, while the latter presides over a private proceeding whose goal is to maintain the status quo pending constitution of an arbitral tribunal.

The Role of the "Public Interest" in Granting Interim Relief

The session raises some important questions as to the extent to which the public interest factor, in the context of interim relief, has in fact evolved since the COVID-19 pandemic, and whether this warrants changes in the strategic considerations for determining whether to seek interim relief in federal courts or before an arbitral tribunal.

As U.S. Supreme Court Chief Justice Roberts noted years before the onset of the pandemic in *Winter v. Natural Resources Defense Council, Inc.*, "[a] preliminary injunction is an extraordinary remedy never awarded of right." 555 U.S. 7, 24 (2008). Accordingly, parties seeking such relief in federal courts have a heavy burden of demonstrating (1) a likelihood of success on the merits, (2) a likelihood of irreparable injury without an injunction, (3) that the balance of hardships tips in the applying party's favor, and (4) that an injunction would not harm the public interest. *Steves & Sons, Inc. v. JELD-WEN, Inc.*, No. 3:20-cv-98, at *24 (E.D. Va. Apr. 10, 2020).

Notwithstanding the pandemic, courts for the most part have continued to examine preliminary injunction applications with characteristic caution, rejecting tangential connections to public interest. In *Steves*, for example, the court was unequivocal in referencing the Supreme Court's pre-pandemic mantra: "[T]he most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear." *Id.* at *75.

One notable exception, however, is medical supply-related contracts. For those cases, some courts have taken a great interest in stemming the spread of COVID-19, even at the expense of the parties' autonomy to contract. In *Intrivo Diagnostics, Inc. v. Access Bio, Inc.*, for example, Intrivo sued Access Bio for breaching a contract to supply over-the-counter COVID-19 rapid tests. No. 2:22-cv-00370-ODW (SKx), 2022 WL 204618, at *1 (C.D. Cal. Jan. 24, 2022). Access Bio allegedly diverted resources towards producing its own brand of rapid tests. Intrivo sought to enjoin Access Bio from using its production resources. The court observed that "[t]he public needs more tests, not fewer, and increasing Intrivo's market share to the detriment of the public's access to COVID-19 rapid testing is against the public interest." *Id.* at *2. The court noted that a TRO would not serve public interest, because such a prohibition would "reduce overall production and

availability of COVID-19 tests in the market." *Id.*

In keeping with its general approach, however, courts have not appeared to extend the same treatment to other sectors that have also experienced a spike in demand during the pandemic. For example, in *Epic Games, Inc. v. Apple, Inc.*, Epic Games alleged that Apple took a cut of *Fortnite* in-game purchases in violation of the Sherman Act. 493 F.Supp.3d 817, 827 (N.D. Cal. Oct. 2020). Moving for a preliminary injunction after Apple took *Fortnite* down from the iOS App store, Epic Games asked the court to reinstate the game. The court agreed that gaming assists in providing a safe space for the players to connect, an activity that was not otherwise available in the real world. *Id.* at 852. But the significant public interest to the contrary in requiring parties to honor their contractual obligations outweighs the need for virtual interactions. Guided by that principle, the court held that the public interest factor weighed in favor of Apple. *Id.*

Unlike federal courts, international arbitral tribunals have, as far as may be discerned from publicly available sources, placed far less weight, if any, on the "public interest" when considering interim relief applications. Admittedly, there remains ambiguity concerning the applicable standard for interim relief applications in international arbitrations, and the prevailing rules generally provide arbitral tribunals with wide discretion to consider different factors when granting interim measures.[1)] While parties continue to invoke public interest and equity arguments in their interim relief applications, a review of publicly available interim relief decisions issued during the pandemic suggests that arbitral tribunals have remained hesitant to accept them. Indeed, to the extent that such orders explicitly reference the public interest, such references have often been cursory, with little to no elaboration or reasoning.[2)] This is perhaps unsurprising given that international arbitration is the product of an agreement between two private parties, as opposed to civil law suits that are conducted under the auspices of a national judiciary. Moreover, compared to courts, arbitral tribunals are more likely to confront difficulties associated with defining the international or "global," as opposed to "national," public interest.

Conclusion

In sum, while parties will likely continue to invoke the public interest in interim relief applications before courts and arbitral tribunals alike, counsel should remain cautious whether their invocation of public interest can stand up to examination, especially in commercial cases. That examination may be more relaxed when the contract in question implicates healthcare-related public demands, such as medical supplies. In that limited instance, the decision-maker may be willing to look beyond the contract and let parties pursue actions that protect the public from COVID-19.

Each of the authors of this post is an associate in the International Dispute Resolution Group of Debevoise & Plimpton LLP in New York and an Organizing Committee Secretary of New York Arbitration Week 2022.

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References

?1 *See, e.g.*, American Arbitration Association, Commercial Rules and Mediation Procedures, amended and effective 1 October 2013, Rule 37(a) ("The arbitrator may take whatever interim measures he or she deems necessary…"); International Centre for Dispute Resolution, International Dispute Resolution Procedures, amended and effective 1 March 2021, Art. 27(4) ("The emergency arbitrator shall have the power to order or award any interim or conservatory measures that the emergency arbitrator deems necessary…"); International Chamber of Commerce, 2021 Arbitration Rules, effective 1 January 2021, Art. 28(1) ("Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate…").

?2 *See, e.g., WIIFM, Inc. d/b/a Liberty Lock & Security v. Doorbusters Lock & Safe, LLC f/k/a Liberty Lock & Key, LLC*, JAMS Case No. 1260005219, Order on Claimant's Motion for Preliminary Injunction, 8 October 2021, ¶¶ 15–16 (noting only that "this Arbitrator is not persuaded…that the public interest requires that Claimant's Motion be granted"); *EDAG Engineering GmbH v. BYTON North America Corporation*, JAMS Case No. 1100107291, Order Granting Claimant EDAG's Motion for Preliminary Injunction, 8 November 2021 (no discussion of public interest).

This entry was posted on Sunday, December 4th, 2022 at 8:43 am and is filed under COVID-19, Interim Award, Interim measures, New York Arbitration Week, Public Policy
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