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2023 PAW Recap – Day 3: Provisional Measures in International Arbitration: Strategic Lessons From Recent Practice

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As the 2023 Paris Arbitration Week (PAW) unfolded, Bredin Prat organized a discussion on Day 3 on the strategic tools that arbitrating parties can resort to in the context of provisional measures and emergency arbitrator requests as well as potential hurdles and strategies to avoid them.

The panel was composed of Dr. Sébastien Besson, Barton Legum (Honlet Legum), Dr. Greg Lourie (ICC International Court of Arbitration) and Marina Weiss (Bredin Prat), and was introduced by Elsa Paparemborde (Bredin Prat). This post provides a summary of the discussion.

What is a Provisional Measure and Does it Coincide With a Final Relief?

According to Barton Legum, the definition of provisional measures partly depends on the legal culture. From a US perspective, it is not infrequent that measures are granted at a provisional stage but are final in terms in effect. A provisional measure is either a measure that is limited in time and there it coincides with the final relief sought or a measure that does not coincide with the final relief sought but is addressing a collateral issue so it does not prejudge the merits (e.g., measures aimed at preservation of evidence or production of documents or security for costs).

According to Sébastien Besson, the notion of provisional measures has evolved from being limited

to the protection of the substantive rights in dispute, to the protection of the arbitration itself, which is expressed in Article 26.2 of the 2010 UNCITRAL Rules. A link between the requested provisional measure and a relief on the merits is not necessary for the broader modern notion of provisional measures. Similar evolution is not present in litigation.

Greg Lourie observed that while provisional measures used to be a small element of a principal dispute, they now sometimes address its significant part. This can, to some extent, challenge the notion of 'urgency' in the context of provisional measures.

Dynamics of Development in Commercial and Investor-State Arbitration

Dr. Besson explained that in ICSID arbitration, Article 47 of the ICSID Convention provides that provisional measures are "any provisional measures which should be taken to preserve the respective rights of either party". Tribunals broadly interpret the notion of 'respective rights', which now includes rights to the preservation of the *status quo*, to non-aggravation of a dispute, to exclusivity of ICSID proceedings, and the right to integrity of proceedings. This bears the risks of some abuse.

Mr. Legum also sees a difference in the types of measures requested in investment treaty arbitrations, where many measures generally prevent a state from changing the control of the claimant in a case, appointing different directors or from appointing a liquidator. Such measures would not be seen in commercial arbitration. Another element is the impact of administrative and criminal proceedings brought by the state. Requests for provisional measures sometimes miraculously come when the other side is preparing its pleading. Occasionally, it can be an attempt by a party to have an early decision by a tribunal on issues in dispute before the other side has had its chance to prepare its full case in response.

Marina Weiss emphasized that while Article 26(1) of the 1976 UNCITRAL Rules refers to "any interim measures [a tribunal] deems necessary in respect of the subject-matter of the dispute", this language does not appear in the new edition of the Rules. The same provision now reads: "[t]he arbitral tribunal may, at the request of a party, grant interim measures".

Elaborating on the directness requirement between the measure and the dispute, Ms. Weiss observed that in *Nova v. Romania*, the tribunal required the measure to relate closely enough to the dispute, and found the commercial arbitral practice to be too narrow. In *Plama v. Bulgaria*, the tribunal held that the request for suspension of the bankruptcy proceedings made by the claimant was unfounded as, whatever the outcome, those proceedings would not affect claimant's ability to pursue its only claim in the proceedings – for damages. This raises questions as to whether it is advisable for an investor to request various types of final relief to keep its options open.

Mr. Legum added that the rules for deciding the merits of an investment case may be quite different from the practical considerations that a tribunal takes into account in deciding on the request for provisional measures. For example, while a state might be responsible for the acts of its judiciary under international law, this does not mean that the state has control over a truly independent judiciary.

Dr. Lourie, in his turn, contended that states have different ways to intervene as a commercial party. Whenever a provisional measure is about enjoining a state from exercising crucial elements

of its sovereign power, tribunals are less likely to order it.

Ms. Weiss concluded that the notion of provisional measures evolves depending on whether it is in a commercial or an investment arbitration setting. Mr. Legum stated that, generally, investment law may not affect the policies adopted by the state. Many treaties also limit the final relief that a tribunal can grant (see e.g., Article 1134 of NAFTA). Even in cases where there is no such restriction, ICSID tribunals carefully analyze whether the requested relief is legally possible. For instance, if a provisional measure or a final relief presupposes compelling specific performance by a state, such as contractual performance, investment tribunals decline to go that far.

Lack of Uniform Standard

Mr. Legum noted that as the ICC Rules do not foresee any express criteria, the argument that the standard is entirely within the tribunal's discretion is tenable. Despite this, over the years, ICC tribunals have set out a clear and consistent standard for granting provisional measures.

Dr. Besson recalled that according to the conflict of laws back in the 1990s, the *lex causae* applied on the ground of the existence of a link between the protection of the requested measure and the relief. The present role of the *lex causae* is now very limited. The Model Law and the UNCITRAL Rules rely on three criteria: (i) harm not adequately reparable by an award on damages, (ii) balance of harm, and (iii) *prima facie* case. Other institutional rules or national legislation are silent as to the test used. To identify a relevant test, arbitrators mainly rely on the arbitral practice. Requirements often include urgency, *prima facie* jurisdiction, *prima facie* case, substantial prejudice or irreparable harm, balance of interests, and the prohibition to prejudge the merits of the dispute.

There is thus no established standard, and tribunals enjoy discretion on a case-by-case basis. This makes the standard less predictable, compared to court proceedings. Dr. Lourie contended that even though arbitral tribunals have discretion, they would essentially consider the same criteria and adopt a flexible approach. Ms. Weiss confirmed that the analysis is conducted based on a sliding scale approach: while these criteria will be considered, they might not all be relevant in each case.

Assessment of Urgency Criteria

Dr. Lourie opined that when provisional measures proceedings go on for months with extensive submissions involved, a party may have a hard time arguing that obtaining provisional relief is so urgent that the application should be decided *ex parte*. This might, however, be possible in emergency arbitrations, where there are naturally shorter deadlines set in place.

Ms. Weiss noted that where a party had no immediate opportunity to react, tribunals bear the risk of a potential challenge of the measures granted. Dr. Lourie stated that it is certainly an issue dealt with on a case-by-case basis. Mr. Legum highlighted that arbitral decisions on provisional measures require the cooperation of the parties to be effective, particularly in the short term. The parties buying into the process when they have had a chance to fairly participate in it is an important part of the arbitral process in general and also in respect to the provisional measures in particular.

Dr. Besson opined that courts care much less about the reaction of the parties. This has a bearing on the outcome of the case and the reasoning. As compared to courts, arbitral tribunals are much more prudent when it comes to rejecting a party's request. Ms. Weiss explained this by tribunals being reticent to take a position which could be seen as prejudging the merits of the case. It could also be a matter of the inherently unpredictable nature of the relevant standard in arbitration, or judges dealing with such requests more frequently.

Assessment of Harm Criteria

Turning to the criterion of harm, Ms. Weiss observed a diverging practice, with tribunals relying e.g., on tests such as "irreparable", "substantial", or "a risk of harm". Mr. Legum confirmed that the practice of ICC tribunals is to rely on "substantial" or "serious" harm standards rather than a strict standard of "irreparable" harm. The new ICSID Rules refer to "current" or "imminent" harm and encourage the tribunal to look at the *effect* of the granted measures. The standard's evolution is thus codified in arbitration rules.

Referring to the ICC Arbitration and ADR Commission Report on Emergency Arbitrator Proceedings, Dr. Lourie highlighted that out of the first 80 ICC emergency arbitration cases, emergency arbitrators considered the "irreparable" harm standard in 50% of cases. In at least 21 of those 40 cases, emergency arbitrators considered that "irreparable harm" should not be interpreted in a literal sense, but should instead refer to serious and substantial harm. Mr. Legum also highlighted that a significant feature of the new ICSID Rules is the 30-days limit for the decision.

Assessment of the Prima Facie Case

Addressing the *prima facie* case requirement, Dr. Besson observed a clear difference between its application by domestic courts and arbitral tribunals. Arbitrators show greater prudence and try to carefully avoid prejudging the merits. He does not see any distinction between commercial and investment arbitration. Dr. Lourie added that since emergency arbitrators are not final adjudicators of the case, they are usually less reluctant with expressing views on the merits of the case. Therefore emergency arbitration is also used as an early determination of the case, which may facilitate the parties' settlement discussions.

Dr. Besson maintained that when you dissociate so much the notion of provisional measures from the notion of what you seek on the merits, then the *prima facie* case makes less sense. In court, the *prima facie* case is much more restrictively applied, because a provisional measure is designed to secure a substantive right in dispute.

Balance of Interests

Barton Legum contended that the circumstances are intrinsically different when it comes to commercial and investment arbitration, but the balancing approach itself is not particularly different. Dr. Besson agreed and stated that while the terminology used differs, the content is the same, e.g., "necessity", "proportionality", "balancing of harm".

Mr. Legum contended that the balancing goes into assessing the effect of the provisional measures that are granted, i.e. whether if the measure is granted, it is going to create a disproportionate burden for one party as opposed to the other.

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