



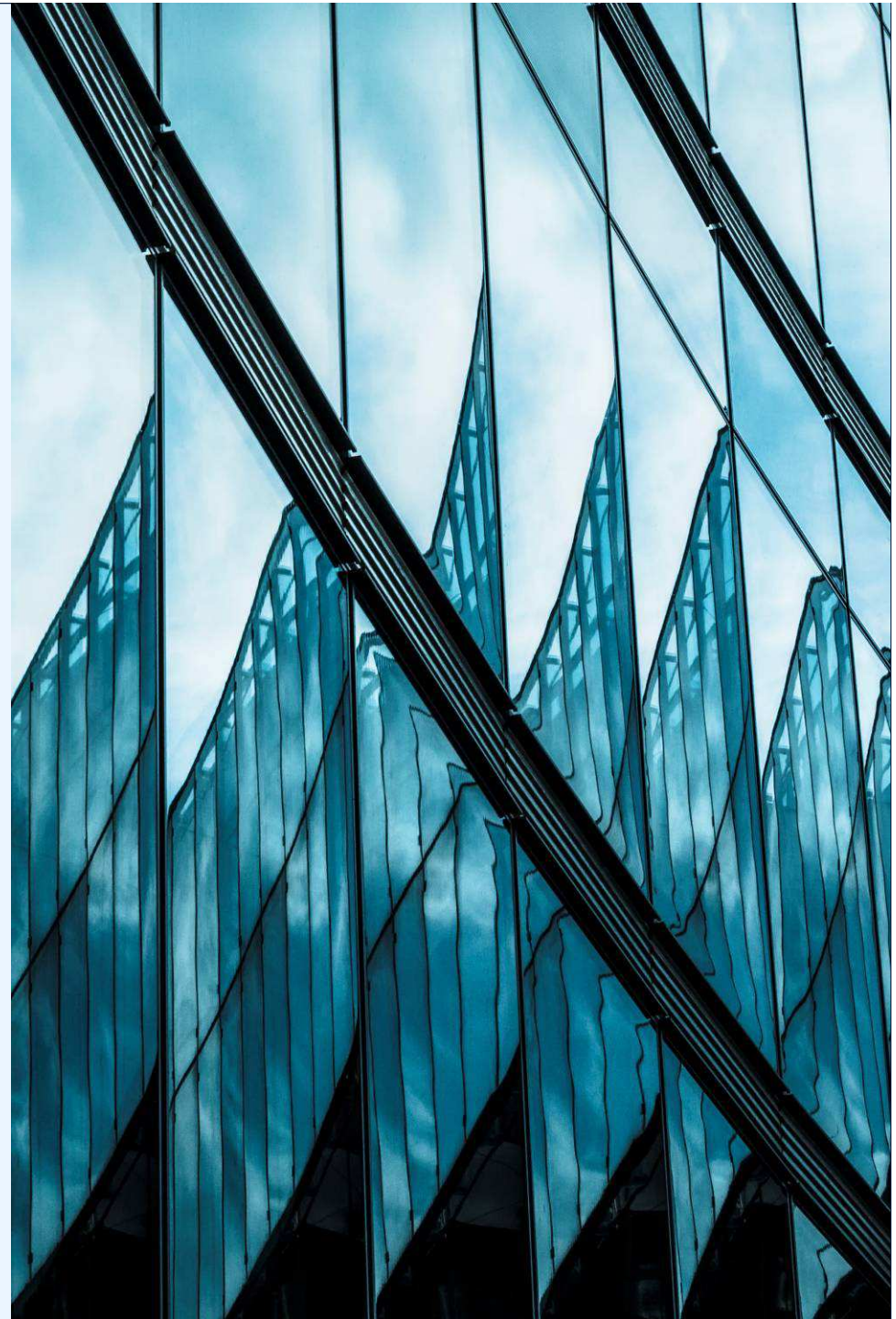
Freshfields Bruckhaus Deringer

Interim and permanent relief in bondholder disputes

German courts and international tribunals

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Interim relief under German law

Requirements under § 935 ZPO

- Reasonable risk that a change of the status quo could endanger realisation of a party's rights
- Petitioner must show:
 - *Prima facie* claim
 - Need for interim relief / urgency



Permanent relief under German law

- Claim against the issuing State for breach of contractual obligations
- If the obligor violates a duty or contractual obligation, the obligee is, in principle, entitled to specific performance



Interim and permanent relief from international tribunals

Bilateral investment treaties

- Investor v host State
 - Direct access to arbitration against host State: prerogative of qualifying investor with qualifying investment in host State
 - Typically, investor has choice of ICSID, UNCITRAL, sometimes SCC or other arbitration rules
- Investor: nationals or entities incorporated under the laws of Contracting Party
- Investment: generally defined broadly to include “every kind type of asset”; may include sovereign bonds and related entitlements

- *Abaclat v Argentina* (ICSID Case No ARB/07/5); *Ambiente v Argentina* (ICSID Case No ARB/09/9); *Alemanni v Argentina* (ICSID Case No ARB/07/8); *Poštová banka v Greece* (ICSID Case No ARB/13/8)



Investment treaties

Standards of protection:

- Prompt, adequate and effective compensation for expropriation
- Fair and equitable treatment
- Full protection and security
- No arbitrary or discriminatory measures
- Protection from discrimination vis-à-vis other investors by nationality
- Protection under umbrella clauses (host State's duty to satisfy contractual obligations and undertakings)

Relief:

- Damages
- Specific performance (rarely)

Interim relief under the ICSID Convention (1965)

Tribunal may “recommend” provisional measures in an order

Art. 47

“Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.”

Arbitration Rule 39

- At any time after the institution of proceedings
- Provisional measures are discretionary with broad scope as to the type of relief

Maffezini v Spain

Measures are “binding” on the parties (ICSID Case No. ARB/97/7)

Interim relief in non-ICSID proceedings

§ 1033 ZPO (like Article 9 UNCITRAL Model Law)

- It is not incompatible with an arbitration agreement for a court to grant, before or during arbitral proceedings, an interim measure of protection relating to the subject matter of the arbitration upon request of a party

§ 1041 ZPO (like Article 17 UNCITRAL Model Law)

- Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, grant such provisional or protective measures that it considers necessary in relation to the matter in dispute.
- Arguably, wider range of relief available than under § 935 ZPO

Interim relief under the UNCITRAL Arbitration Rules

Tribunal may grant interim measures “at any time prior to the issuance of the award”

Art. 26 UNCITRAL Rules

“The arbitral tribunal may, at the request of a party, grant interim measures”

- Relief includes, without limitation, measures to:
 - maintain or restore the status quo pending determination of dispute;
 - prevent (i) current or imminent harm or (ii) prejudice to the arbitral process;
 - provide a means to preserve assets out of which an award may be satisfied;
 - preserve evidence
- Requirement for interim measures:
 - Harm not adequately reparable by damages is likely to result if the measure is not ordered;
 - Such harm outweighs the risk of harm resulting to other party as a result of the measure; and
 - A reasonable possibility that the requesting party will succeed on the merits

Interim relief under the SCC Rules

Appointment of an Emergency Arbitrator before arbitration has commenced: Appendix II, SCC Rules

- A party may apply at any time before the case has been referred to a Tribunal
- Appointment will be made within 24 hours of the application
- Powers of the Emergency Arbitrator are same as those under Art. 32 SCC Rules
- Emergency decisions on interim measures must be made within 5 days
- Emergency decisions are “binding” on the parties but not on the Tribunal

Tribunal may order “*any interim measures it deems appropriate*”: Art 32 SCC Rules

- Requesting party may be asked to provide security
- Measures may take the form of an order or award



Enforcement under the ICSID (1965) and New York (1958) Conventions

Enforcement of interim relief and awards – the ICSID Convention

- Compliance with interim orders from ICSID Tribunals can only be policed from within the ICSID arbitration proceedings
- ICSID Convention awards have the quality of enforceable judgments

Enforcement of interim relief and awards – outside the ICSID Convention

- Interim relief orders by domestic courts are enforceable in accordance with national law (including daily penalties, contempt of court)
- Arbitral awards are enforceable in accordance with national law at the seat of the arbitration tribunal
- In more than 150 other jurisdictions, arbitral awards are enforceable in accordance with the New York Convention