How to Obtain and Enforce Emergency and Interim Relief in U.S. and International Arbitration

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Program Description: Emergency and interim relief are vastly underutilized tools that can assist in compelling arbitration, maintaining the status quo, preventing destruction and compelling production of evidence, and preserving assets. Issues on obtaining and enforcing such relief abound. Should emergency and interim relief be sought from a court or a tribunal, and do emergency arbitrator procedures preclude a court from granting emergency relief? What steps must be followed and what circumstances justify such relief? What are the consequences if an emergency or interim order is improperly granted, and what security can be required to mitigate those consequences? How can such an order be effectively enforced? This panel of U.S. and international counsel and arbitrators will address these issues and provide creative approaches to enhance the ability of new and seasoned practitioners to take full advantage of the availability of emergency and interim relief.

Revised Uniform Arbitration Act (RUAA)

- Revised Uniform Arbitration Act specifically authorizes arbitrators to grant provisional relief
- Definition of provisional relief can vary by state; it also includes injunctive relief
- Arbitrators handling the merits of case can incorporate any provisional or interim ruling made at beginning of arbitration into a final award
- The RUAA provision allows a party to take an interim or provisional or emergency relief have it confirmed into an award. This is not available under Federal Arbitration Act (FAA).
- In middle of an arbitration proceeding, parties may go to court where there is an urgent matter and the arbitrator cannot act or cannot provide adequate remedy. This is not available under the FAA.

Emergency Relief

- In 2006, the AAA International Centre for Dispute Resolution (ICDR) adopted first fully-integrated opt-out emergency arbitrator procedures.
- Today, almost all international and domestic providers have emergency procedures. Many adopted only within the past five years.
- The JAMS Engineering & Construction, and Construction Dispute Resolution Rules don't include an emergency arbitrator procedure, but the AAA Commercial and Construction do have emergency arbitrator procedures.
- Dubai adopted an emergency arbitrator procedure in 2018 but has not yet formally issued it.

Procedural Issues

- All rules, both domestic and international, are opt-out.
- In most cases, they apply to arbitrations that are filed and arbitration agreements entered into after effective date of the provider's rules.
- Whether Emergency relief is available before the demand:
    - All domestic providers: Parties cannot file request for emergency relief unless it's included in the demand or after the demand for arbitration has been filed.
    - Most International providers have the same rules, but a few allow emergency relief application before demand filed.
    - When drafting clauses under international arbitration rules, lawyers should consider the differences in selecting provider's rules.
- Most International rules require the arbitral institution to act as a gatekeeper by making an initial determination as to whether to accept the request for emergency measures.
- Almost all rules require the application to state why relief is sought on emergency basis. They also require proof of notice to other party. The Swiss rule is the only exception to this rule.
- Only the Institute for Conflict Prevention and Resolution (CPR) rules allow parties to select the emergency arbitrator, and only if parties agree within one day of the request for emergency relief. The International Chamber of Commerce (ICC) rules state that the secretary appoints the emergency arbitrator, but the ICC has indicated that if parties agree to an emergency arbitrator, they would accept it.
- Appointment of emergency arbitrator is very fast -- within one business day of request for emergency relief.
- The procedure for determination of the application is decided by the arbitrator. Most rules require that all parties be given an opportunity to be heard. None require a formal hearing. If an emergency arbitrator decides it isn't possible for the other party to be heard, the arbitrator can issue a decision.

- Some rules don't specify what proof is required for granting of emergency relief. Some require proof of immediate and irreparable loss of damages. Only Hong Kong rules have a list of considerations
- Most rules require that a decision must be submitted within two weeks of arbitrator's appointment or receipt of the file.
- The emergency arbitrator can modify his or her decision for good cause or changed circumstances. The decision is not binding on tribunal, which can vacate or modify the decision for any reason. Only the AAA commercial rules limit the tribunal's power to change the decision.
- All rules allow the emergency arbitrator to require security for the decision. Most rules allow the arbitrator to allocate costs on a provisional basis. Only the London Court precludes emergency arbitrator to allocate costs, which is up to permanent tribunal.

Expedited Formation of Tribunal

- Many institutions have expedited procedures but many only apply to smaller cases and don't have a provision for shortening time limits based upon extreme urgency.

Factors for Interim Relief

- The arbitrators consider potential irreparable harm versus the likelihood of success based upon the merits. If the likelihood of success is greater, then the arbitrator would be less likely to worry about irreparable harm and vice versa.
- If there is no reference to state law or no reference to the FAA, the FAA is the default.
- Courts are unlikely to grant affirmative relief to change the status quo.
- The emergency arbitrator doesn't have jurisdiction over third parties. Parties need to go to court to get jurisdiction over third parties.
- Many emergency arbitration rules don't apply to states or state entities.
- There is anecdotal evidence of high voluntary compliance with emergency arbitrator and interim awards.

Enforceability

- One of attorneys' greatest concerns is whether they want to seek emergency arbitration.
- Some foreign jurisdictions enacted statutes specifically providing that courts should enforce emergency arbitration decisions. Without a statute, parties must look to the FAA or NY convention to determine the enforceability of emergency decisions.
- Case law on finality: Because it's so new, there are only a few cases directly addressing enforcement of arbitration decisions. Case law has demonstrated arbitration decisions are final in cases where there was a separate discrete issue that was resolved.

Tips for Practitioners

- What should litigants think about when claimants are seeking monetary award judgment? The conventional strategy is to put energy into obtaining an award. Measures can be taken before obtaining award and enforcing that can help increase chances of recovery.
- Process of investigation and discovery. It's important to understand adversaries' assets. This should start whenever there is any indication there will be an issue with enforcement.
    - The overall purpose is to exert pressure on a future debtor to get a settlement.
    - Usually the respondent takes steps to make enforcing an award very costly and time consuming by transferring assets, or liquidating assets, etc.
    - All states have different discovery rules pre-suit. For example, Texas is renowned for the ability to obtain information in pre-suit discovery. New York also has some good rules. There could be ways to obtain information on a fraudulent transfer of assets by an international company pre-suit.
    - You should try to get information about more than just the assets. The purpose of investigating is to understand commercial relationships and sources of capital, and the respondents' "pressure points."
    - Usually when dealing with a debtor who doesn't want to pay, sources of recovery will be those who owe money to the debtor, and you'll have the ability garnish assets owed to the debtor.
    - You also can look to their current sources of capital, and try to gag and seal orders.
- Judicial Methods of Freezing Respondents' Assets
    - This varies across jurisdictions. A court doesn't have the inherent power to enter a preliminary judgment to freeze assets to assure future awards. However, there may be useful state court procedures under state statutes. For example, New York has specific statutes that permit preliminary injunction and attachment.
    - Clients need to assess risks in posting security. The rules differ overseas, so clients need to be aware of the possibility of a different fee-shifting regime.
    - A "Mareva Injunction" is a worldwide asset freeze against a respondent. Clients need to meet a "good arguable case standard" originating in common law. This means something more than barely capable of serious consideration but not necessarily more than a 50% chance of prevailing. This can be a great mechanism for causing respondent to settle.

- New plenary actions that can be brought against respondents or entities affiliated with respondents. This has the advantage that separate actions provide discovery tools that are not allowed in normal arbitration proceedings.
- Consider other creditors. If you have a claim but not yet an award, consider the possibility of other creditors who are further ahead of you. Instead of seeing them as competition in obtaining an award, they could be seen or as having information helpful to you. If your client has a big claim, the other creditor could be interested in using its tools from having an adjudicated claim to seek same discovery you're seeking, at a lower cost.