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Interim, Provisional and Conservatory Measures in U.S. Arbitration

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U.S. Legal Framework for Arbitration

Arbitration in the U.S. is governed by both federal and state law. The main source of U.S. arbitration law is the Federal Arbitration Act ("FAA"),[1] which applies in the state and federal courts of all U.S. jurisdictions. The FAA applies to all arbitrations arising from maritime transactions or to any other contract "involving commerce," which is defined broadly. This effectively means that the FAA applies to all international arbitrations and most domestic arbitrations seated in the U.S.

Seeking Interim Relief Before Courts and Arbitrators

Arbitration governed by institutional rules such as the American Arbitration Association ("AAA") Commercial Arbitration Rules (as amended on September 9, 2013, for arbitrations that commence on or after October 1, 2013) ("AAA Rules") and the International Centre for Dispute Resolution ("ICDR") International Arbitration Rules as amended and effective June 1, 2014 ("ICDR Rules") specify that the arbitrators have the power to grant interim, provisional and conservatory measures and specify procedures for obtaining relief even before the tribunal is constituted.[2]

Provisional relief is often necessary before arbitration when:

- A party has evidence that is relevant to the dispute but this evidence is likely to be destroyed, damaged or lost absent an interim order protecting it.
- A dispute is concerned with the ownership of perishable goods that may deteriorate before the dispute can be determined. An interim order requiring the sale of the goods (with the sale proceeds to be held pending the final award), or requiring the goods to be sampled, tested or photographed before the sale is often granted in this case.

Who May Provide Relief

Interim, provisional and conservatory relief in aid of arbitration may be provided by:

- The arbitral tribunal;
- An "emergency arbitrator" appointed by an administering body;
- A federal or state court.

The precise scope of the powers of each of these to act depends on:

- The arbitration agreement;
- Applicable arbitration rules;
- Applicable federal and state law.

Court-imposed Limits

Under the FAA, a court may grant interim relief pending arbitration.[3] The question of whether a federal court should grant preliminary injunction is generally one of federal law even in diversity actions, but state law issues are sometimes considered.[4]

Court-issued interim orders generally last only until the arbitrators have the opportunity to consider the request for emergency or injunctive relief.[5] In effect, restraints issued by courts often serve the same function as temporary restraining orders.

While some U.S. courts have held that they lack power to grant interim relief where the underlying dispute is subject to an arbitration agreement governed by the New York Convention[6] other courts have rejected this approach.[7] In *Sojitz Corp. v. Prithvi Info. Solutions Ltd.*, 921 N.Y.S.2d 14, 17 (1st Dep't 2011), for example, the court held that a creditor can attach assets, for security purposes, in anticipation of an award that will be rendered in an arbitration seated in a foreign country, even where there is no connection between the arbitral dispute and the state, as long as there is a debt owed by a person or entity in the state to the party against whom the arbitral award is sought.

Where admiralty jurisdiction is invoked, federal law governs attachments of ships and other assets.[8] In proceedings begun by libel and seizure of vessels or other properties in admiralty proceedings, Section 8 of the FAA provides the federal courts with jurisdiction to direct the parties to proceed with arbitration and to enter a decree on the award.

Procedure under State Law

Outside of admiralty, state law governs the availability of the provisional remedy of attachment in federal court.[9] Most state laws authorize provisional remedies in aid of arbitration.[10] Some state statutes that have adopted the UNCITRAL Model Law expressly allow for applications for interim measures of protection in aid of an arbitration.[11]

Whether to Apply to the Arbitral Tribunal or the Court

Parties generally can apply either to a court or to arbitrators for interim relief. Parties should consider applying to the court when:

- The arbitral tribunal has not yet been constituted and therefore cannot yet act. In these cases, unless the applicable arbitral rules contain emergency arbitrator provisions, an application to the court is necessary.
- The party seeking interim relief needs judicial compulsion. Although arbitrators can impose negative consequences on parties (for example, drawing adverse inferences if a party does not produce evidence), they have no ability to make a party carry out their orders and no power that can be applied to non-parties.
- The party needs *ex parte* relief. Under most institutional rules, a party seeking emergency measures of protection must notify the other parties.[12] Notice of the application gives the party an opportunity to dissipate the evidence or assets that are the subject of the application. By the time the tribunal makes an order, it can be too late. By contrast, federal courts and most state courts (*e.g.*, California and New York) permit an applicant to proceed without notice in urgent cases.
- The matter is urgent and the arbitrator does not act timely or does not provide an adequate remedy.[13]Absent a showing of urgency, under the RUAA parties may seek relief only from the arbitrator after the arbitrator is appointed and is authorized and able to act.
- The arbitrator may not have the power to grant the relief sought. For example, arbitrators may not have the authority to appoint a receiver.[14]

Parties should consider applying to the arbitral tribunal for interim relief when:

- The tribunal has been constituted and is available on short notice;
- The applicant is satisfied that the other party will respect orders issued by the tribunal;
- The federal or state courts at the place of arbitration are reluctant to grant provisional remedies in aid of arbitration;
- The parties' agreement or the applicable institutional rules empower the arbitral tribunal to grant broader interim relief than would be available in court.[15]

Interim Relief from the Arbitral Tribunal

Institutional Rules

Interim relief is available under, *inter alia*, the:

- AAA Rules;
- ICDR Rules;
- JAMS Arbitration Rules (effective July 1, 2014);
- The International Institute for Conflict Prevention & Resolution (CPR) Administered Arbitration Rules (effective July 1, 2013).

This section summarizes the interim relief available under the AAA and ICDR Rules. A review of the other institutions is included in the online version of this practice note at *http://us.practicallaw.com/0-587-9225.*

AAA Rules

Under the AAA Rules:

- The tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim award and the tribunal may require security for the costs of the interim measures.[16]

AAA Rule 38 provides that where a party requires emergency relief before the tribunal has been formed, the AAA appoints an "emergency arbitrator." The emergency arbitrator has the power to order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case.[17] The authority of the emergency arbitrator ceases once the panel has been constituted.[18]

The rules also provide for parties to seek temporary relief in court, stating that:

> A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate.[19]

ICDR Rules

Under the ICDR Rules:

- At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim award and the tribunal may require security for the costs of the interim measures.[20]

Furthermore, the rules expressly permit the tribunal to apportion the costs of the application in any interim award or in the final award.[21] In many cases it is prefer-

able for costs to be dealt with globally at the end of the arbitration, rather than at the application itself.

The rules further provide that where a party requires emergency relief before the tribunal has been formed, the ICDR appoints an "emergency arbitrator."[22] The emergency arbitrator has the power to order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case.[23] The authority of the emergency arbitrator ceases once the tribunal has been constituted.[24]

The rules also provide for parties to seek temporary relief in court, stating that:

> A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.[25]

When to Apply

As a general principle, applications for interim and conservatory relief should be made as early as possible. This is because:

- Failure to apply early may prejudice the application for practical reasons. Evidence or assets may be disposed of or property may deteriorate.
- Delay in applying may be taken into account by the tribunal. If the matter is not urgent enough to cause a party to seek relief promptly, a tribunal may decide that the relief is not necessary.

How to Apply

The procedure for applying to the tribunal depends in the first instance on the arbitration agreement or any applicable rules. However, the following points are generally applicable to arbitration under any institution's rules:

- **Apply in writing.** In the absence of any particular procedural requirements, most applications to the tribunal for interim measures should be made in writing.
- **Submit evidence.** The applicant should provide evidence in support of its position. For example, if a party is seeking conservatory orders in relation to property, it should identify the property and its whereabouts, and provide evidence that establishes why the relief sought is necessary. If the applicant is seeking to enforce an employee non-compete agreement, provide affidavits establishing the employer's business interest in enforcing the non-compete and the potential harm to the employer if the tribunal does not issue an order preserving the *status quo*. The applicant should also brief the applicable law regarding its entitlement to the relief sought.
- **Specify relief sought.** State the precise order sought clearly in the application. Do not apply for an order that is too broad in scope. Provide a carefully formulated draft order so that the tribunal can easily see what is being requested and why.

Ex Parte Applications to Arbitrators

The rules of the major arbitral institutions prohibit applications for interim relief being made without notice. In any event, proceeding before an arbitrator on an *ex parte* basis would be ill-advised because:

- Most arbitral tribunals are extremely reticent about proceeding without giving both parties an opportunity to address them.
- Any steps taken without notice may affect the enforceability of the ultimate award. *Ex parte* evidence submitted to an arbitration panel that disadvantages any of the parties in their rights to submit and rebut evidence violates the parties' rights and is grounds for vacatur of an arbitration award.[26]

No Power to Bind Fully Constituted Arbitral Tribunal

Under the institutional rules considered here, the emergency arbitrator does not have the power to bind the full arbitral tribunal. The fully constituted tribunal has the power to vacate, amend or modify any order, award or decision by the emergency arbitrator.

The usual default position is that the emergency arbitrator cannot become a member of the full arbitral tribunal unless the parties agree otherwise.

Enforcing Preliminary Relief Awarded by Arbitrators in Court

Courts have held that they do not have the power to review an interlocutory ruling by an arbitration panel,[27] but have relaxed this rule when parties seek confirmation of provisional remedies awarded by arbitrators.[28]

In *Yahoo! Inc. v. Microsoft Corp.*, the court confirmed an award issued by an emergency arbitrator appointed under the AAA rules to grant emergency relief "until the matter can be fully and fairly decided by a three arbitrator panel of industry experts following discovery."[29] The *Yahoo!* case shows how quickly interim relief can be obtained in arbitration. The emergency arbitrator held two days of evidentiary hearings starting 11 days after Microsoft commenced arbitration and issued a decision six days after conclusion of those hearings. The next day, Yahoo! moved in court to vacate the award and Microsoft cross-moved to confirm. The court ruled for Microsoft less than a week later. In going from commencement to judicial confirmation in merely 25 days, the *Yahoo!* case demonstrates that even where the tribunal is not constituted, the use of emergency procedures provided by arbitral institutions can provide expeditious and effective relief. Moreover, the court respected the parties' agreement to keep proceedings confidential. The motion

papers were filed under seal and the only part of the proceeding that was made public was the judge's decision.

More recently, in *Companion Property & Casualty Insurance Co. v. Allied Provident Insurance, Inc.*, the arbitrators issued an interim award requiring the respondent to post security.[30] When the respondent ignored the interim award, the claimant made a motion in court to confirm it. The court reviewed the case law that supports the court's power to confirm interim awards of security and noted that "[w]ithout the ability to confirm such interim awards, parties would be free to disregard them, thus frustrating the effective and efficient resolution of disputes that is the hallmark of arbitration." Having concluded that it had the power to confirm the interim award, the court noted that it should confirm as long as there is a "barely colorable justification." On that standard, the court confirmed the award because the agreement between the parties required that the respondent provide collateral for its obligations.[31]

Where, on the other hand, a court is asked to vacate an interim award issued by arbitrators, the same considerations may not apply. In *Chinmax Med. Sys. Inc. v. Alere San Diego, Inc.*, the court refused a request to vacate an emergency arbitrator's interim order for certain conservatory measures under the ICDR Rules.[32] In *Chinmax*, the court in addressing a challenge to the interim order found that it did not have jurisdiction to vacate the order because it was not final and binding for the purposes of the New York Convention. The order itself stated that it would be subject to the consideration of the full arbitration tribunal, and on this basis the court refused to grant the motion to vacate.

Courts will only enforce that part of the interim relief that requires judicial intervention at that stage of proceedings. To determine whether to enter grant relief, a court must consider:

- The likelihood that the harm alleged by the party will ever come to pass.
- The hardship to the parties if judicial relief is denied at this stage in the proceedings.
- Whether the factual record is sufficiently developed to produce a fair adjudication of the merits.[33]

Resisting Interim Relief

In response to a request for interim relief, a party should marshal its legal arguments and supporting evidence to convince the tribunal or a court not to grant the requested relief. The opposition should address whether the tribunal or court has the power to grant the request and should give reasons why the application should be denied as a matter of discretion.

In addition to its main argument, the respondent should consider arguing in the alternative that if the relief sought by the applicant is granted, it should be conditioned on the applicant providing adequate security. Most institutional rules provide for security as a condition of interim relief granted by arbitrators.

Before an Emergency Arbitrator

The respondent should check how long it has under the rules to object to the appointment of the arbitrator and make the relevant objections in the permitted time frame. There may be grounds to resist the granting of emergency relief if the respondent has not been given proper notice of the application, or if the application fails to establish that the award to which the applicant may be entitled may be rendered ineffectual without interim relief.

In its response to the application, the respondent may consider whether it can object to the:

- Jurisdiction of the emergency arbitrator;
- Application on these grounds, among others:
  - the emergency arbitrator provision of the relevant rules do not apply;
  - the applicant is unlikely to succeed on the merits;
  - there is no urgent need for the interim relief to be granted;
  - irreparable harm would be suffered by the respondent if the emergency relief were granted; or
  - greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

Before the Arbitral Tribunal

The respondent should check the applicable rules regarding the power of the tribunal and the procedures for interim relief. In its response to the application, the respondent may consider whether it can object to the application on these, among other grounds:

- The applicant is unlikely to succeed on the merits;
- There is no urgent need for the interim relief to be granted;
- Irreparable harm would be suffered by the respondent if the emergency relief were granted;
- Greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

Before a Court

The respondent should consider:

- Whether federal or state courts in the state where the arbitration is seated have held that they lack power to grant the relief requested.[34]
- The application can be opposed on the ground that courts should intervene only until the arbitrators

have the opportunity to consider the request for emergency or injunctive relief.[35] Where the arbitral tribunal is authorized to grant the equivalent of preliminary injunctive relief, it has been inappropriate for the district court to do so.[36]

- The applicant is unlikely to succeed on the merits;
- There is no urgent need for the interim relief to be granted;
- Greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

Endnotes

1. 9 U.S.C. §§ 1-16, 201-208, 301-07.
2. See AAA Rules 37 and 38 and Articles 6 and 24, ICDR Rules.
3. *See Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 (4th Cir. 2012), *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 214-15 (7th Cir. 1993) and *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1051-54 (2d Cir. 1990).
4. *See AIM Int'l Trading LLC v. Valcucine SpA.*, 188 F. Supp. 2d 384, 387 (S.D.N.Y. 2002).
5. *See Fairfield Cnty. Med. Ass'n v. United Healthcare of New England, Inc.*, 557 F. App'x 53, 56 (2d Cir. 2014) and *Next Step Med. Co. v. Johnson & Johnson Int'l*, 619 F.3d 67, 70 (1st Cir. 2010).
6. *See, e.g., McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1037-38 (3d Cir. 1974) and *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981).
7. *See Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990); *Aggarao*, 675 F.3d at 376; *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 365 (5th Cir. 2003); *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v. Lauro*, 712 F.2d 50, 54-55 (3d Cir. 1983).
8. *See Result Shipping Co. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394, 399 (2d Cir. 1995).
9. Federal Rules of Civil Procedure (FRCP) 64 states: "[a]t the commencement of and throughout an action [for attachment in federal district court], every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment."
10. Section 7502(c) of the New York Civil Practice Law and Rules ("CPLR"), for example, provides that to obtain provisional relief, the movant must demonstrate that "the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." CPLR 7502(c) provides that a showing of an ineffectual award is the "sole ground for the granting of the remedy" (compare *JetBlue Airways v. Stephenson*, 932 N.Y.S.2d 761 (Sup. Ct. N.Y. Co. 2010), *aff'd*, 931 N.Y.S.2d 284 (1st Dep't 2011) (denying motion for injunctive relief under CPLR 7502(c) because, although the movant presented arguments regarding the CPLR Article 63 criteria, it ignored the "ineffectual award" requirement) with *Winter v. Brown*, 853 N.Y.S.2d 361 (2d Dep't 2008) (lower court erred when it granted preliminary injunction in favor of seller in breach of contract action where seller failed to satisfy the traditional equitable criteria for preliminary injunctive relief)). CPLR 7502(c) also provides that if an arbitration is not commenced within 30 days of the granting of provisional relief, the order granting relief expires and costs, including reasonable attorneys' fees, are awardable to the respondent.
11. *See, e.g., Bahr Telecomms. Co. v. DiscoveryTel, Inc.*, 476 F. Supp. 2d 176, 184 (D. Conn. 2007) (federal court applying state law of attachment) and *Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 647 S.E.2d 102, 105 (N.C. App. 2007) (granting preliminary injunction under the Revised Uniform Arbitration Act (RUAA)). States that have adopted this rule include Colorado, Florida, Minnesota and Washington.
12. *See* AAA Rule 38(b) and Article 6, ICDR Rules.
13. *See* section 8 of the RUAA.
14. *Compare Stone v. Theatrical Inv. Corp.*, No. 14 CIV. 6494 PAE, 2014 WL 6790262, at *12 (S.D.N.Y. Dec. 2, 2014), *reconsideration denied*, No. 14 CIV. 6494 PAE, 2015 WL 195848 (S.D.N.Y. Jan. 14, 2015) (arbitrator has the power to appoint receiver as part of a final award) with *Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C.*, 839 A.2d 52, 57-58 (N.J. Super. Ct. App. Div. 2003) and *Pursuit Capital Management, LLC v. Claridge Associates, LLC*, No. 654301/12 (Sup. Ct. N.Y. Co. Mar. 21, 2013) (unpublished) (arbitrators may not appoint a receiver as a provisional remedy).
15. *See, e.g., CE Int'l Res. Holdings LLC v. S.A. Minerals Ltd. Pship*, No. 12 CIV. 8087 CM, 2012 WL 6178236, at *3-*5 (S.D.N.Y. Dec. 10, 2012).
16. AAA Rule 37.
17. AAA Rule 38(e).
18. AAA Rule 38(f).
19. AAA Rule 38(h).
20. Article 24, ICDR Rules.
21. Article 24.4, ICDR Rules.
22. Article 6(2), ICDR Rules.
23. Article 6(4), ICDR Rules.
24. Article 6(5), ICDR Rules.
25. Article 24(3), ICDR Rules.
26. *See Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1025 (9th Cir. 1991).
27. *See Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980).
28. *See Sperry Int'l Trade v. Gov't of Isr.*, 532 F. Supp. 901, 909 (S.D.N.Y. 1982), aff'd, 689 F.2d 301 (2d Cir. 1982) (confirming an arbitrator's order to place a disputed $15 million letter of credit in escrow pending a decision on the merits, finding that the award would be rendered a meaningless exercise of the arbitrator's power if the order were not enforced); *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1059 (6th Cir. 1984) (upheld the confirmation of the award that preserved the status quo, reasoning that the injunction issued by the arbitral tribunal would be meaningless absent judicial confirmation of it) and *S. Seas Navigation Ltd. v. Petroleos Mexicanos*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985) (holding that if "an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made").
29. 983 F. Supp. 2d 310 (S.D.N.Y. 2013).
30. No. 13-CV-7865, 2014 WL 4804466, at *3 (S.D.N.Y. Sept. 26, 2014).
31. *Zurich Am. Ins. Co. v. Trendsetter HR, LLC*, 2016 WL 4453694 (N.D. Ill. Aug. 24, 2016) (confirming interim award requiring insured to post security for insurance carrier's claims) and *see also Ecopetrol S.A. v. Offshore Exploration & Prod.* LLC, 46 F. Supp. 3d 327, 337 (S.D.N.Y. 2014) (enforcing interim awards requiring seller to tender certain amounts to purchaser with funds not derived from amounts in escrow).
32. No. 10CV2467 WQH NLS, 2011 WL 2135350 (S.D. Cal. May 27, 2011).
33. *See Draeger Safety Diagnostics, Inc. v. New Horizon Interlock, Inc.*, No. MC 11-50160, 2011 WL 653651, at *4 (E.D. Mich. Feb. 14, 2011).
34. *See, e.g., McCreary Tire*, 501 F.2d at 1037-38, *see also Bowers v. N. Two Cayes Co. Ltd.*, 2016 WL 3647339, at *3 (W.D.N.C. July 7, 2016) (confirming arbitrator's grant of injunctive relief ordering a percentage of the sale of certain real estate to be placed in an escrow account pending the outcome of the arbitration but denying confirmation of arbitrator's ruling that that the arbitration is binding on the parties).
35. *See, e.g., Next Step Med.*, 619 F.3d 67 at 70.
36. *See, e.g., Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999).