INTERIM AWARD ISSUED BY AN EMERGENCY ARBITRATOR

Claimant,

vs.

TEMPORARY RESTRAINING ORDER ISSUED BY A COURT

Respondent

When I was first asked to discuss this topic, I had recently stepped off the federal bench, so I titled my talk: " TO COURT, OR NOT TO COURT, THAT IS THE QUESTION".

That was, back then, an unusual question for a former United States District Judge. But I would be the first to say that Courts can learn a lot from the processes developed by Arbitrators. [footnote: As just one example , I'd be the first to say that litigation discovery in the U.S. is too cumbersome, burdensome and expensive. And I'd been saying that for almost the entire 15 years that I served as a federal judge!]

When you need interim emergency measures to protect your client's interests in a matter before an Arbitration panel can be convened, your first decision may be the most critical to protecting your client's interests. In a rapidly evolving matter, where speed is critical to prevent dissipation or removal of assets, for example, are you better off going to Court or seeking an emergency arbitral ruling?

A decade ago, the answer would have been clear: seek an emergency Court Order. But now, many arbitral institutions and rules can be quite nimble is emergent situations. So which forum do you choose? There are many nuanced considerations; it is vital to consider them before an emergency arises.

[[[In this article, I will set forth the practical issues that counsel may face, in the order that I believe they should be considered. The universal assumption is that the

matters are those where the ultimate relief on the merits will be determined in Arbitration.]]]

1. WHAT TYPE OF RELIEF WILL YOU BE SEEKING?

The first question is likely to be what kind of interim relief you anticipate. An asset freeze?; an order preserving the status quo in a corporate dispute?; an order to enjoin obstructive behavior?; an order to prevent funds from leaving the jurisdiction?

The primary goal, of course, is to ensure that your client will have a collectible judgment at the end of the merits arbitration; or that important non-monetary rights are not lost simply by the passage of time and events that move.

Once this is decided, there are many decisions that follow.

2. IS THE RELIEF MEASURE LIKELY TO BE ADVERSE TO A PARTY OR A NON-PARTY TO THE ARBITRATION?

If the relief will likely be sought from a party to the arbitration, it is essential to stay current with the sources of arbitral authority to grant interim relief. The applicable arbitral rules that govern the dispute may well have new or updated rules that permit an emergency arbitrator to grant interim relief. Even if you had those rules committed to memory as recently as a year ago, check for updates, because this area of many arbitral institutions' rules are changing rapidly.

In addition to the arbitral rules that apply to your case under the arbitration clause, consider whether an International Convention will apply. The convention will govern whether an emergency arbitrator's ruling will be enforced in a particular country where assets are located. Also have at your fingertips the relevant national law of the country where you expect to either enforce an emergency arbitrator's ruling or seek emergent relief directly from a court.

The trend of the conventions, laws and rules is generally not to prohibit interim measures, unless the arbitration clause itself prohibits them. Note that some arbitration clauses now specifically authorize such measures, but specific authorization may not be necessary to obtain that type of relief. (If interim measures are expressly prohibited in the arbitration clause or incorporated rules, the task will be monumentally more difficult.)

However, be sure to take that extra step of researching the national laws of the country where you will need to enforce the interim measure. Some countries' laws prohibit arbitrators from granting provisional relief, even if the applicable arbitral rules permit it, so be aware of those laws from the start of the analysis.

United States law generally upholds the authority of arbitrators to order interim relief, if arbitration agreement does not ban it. While there are a very few historical cases holding that express consent is required, this is a distinctly minority view.

By contrast, if the relief to be sought is from a third party who is not bound by the arbitration clause, you will almost always need to seek that relief in a court with jurisdiction over the person and/or the asset. (If there is jurisdiction over the asset, but not the person, consider whether the national law of that country permits *in rem* proceedings.)

3.. HOW FAST WILL YOU NEED A RULING ON THE INTERIM MEASURE?

Historically, the general view was that Courts can act faster than Arbitrators, because Courts have judges and rules in place to hear an emergency motion for a Temporary Restraining Order, Preliminary Injunction, Attachment request, and/or an emergency asset freeze. Now that many arbitral institutions have procedures to appoint an emergency arbitrator before the merits panel is constituted, this view is changing, and the inquiry involves multiple factors.

It is important to stay current as the rules emerge. [[[While I was a federal judge, I was always amazed that civil rules changes seemed to take forever to be fully known by the bar. As a result, I was often the one to point out to counsel that rules had been adopted on issues such as claw-back of inadvertantly produced privileged documents, or authentication of business records]]]. The need for interim relief moves too quickly to learn about rules from the judge or arbitrator; counsel must not only keep abreast of new rules, but also have a plan in advance to move quickly if interim measures are needed.

If your arbitration agreement is ad hoc, with no rules specified, seeking relief in Court is probably the better choice, unless there is a provision for interim measures in the agreement itself. And, of course, where your client has the ability to be involved in the drafting process, make sure that you consider whether to

incorporate either a set of arbitration rules that have a procedure for interim relief, or incorporate that provision directly into the arbitration clause.

If speed is a core concern, to avoid dissipation or transfer of assets, or destruction of evidence, especially if it involves a non-party, seeking relief directly from a Court will usually be faster, because is it a one-step process rather than a 2-step process. Even if there is clear authority for an arbitral award of interim relief, only a Court can both award and enforce that relief.

4. WHAT WILL BE THE APPLICABLE LEGAL STANDARD TO WIN INTERIM RELIEF?

Although Courts have the personnel and administrative ability to act with speed to assign a judge to hear emergent applications for relief, the legal standard necessary to convince a judge to grant the relief sought may be considerably more difficult than in an arbitral process. The traditional legal standard to surmount in court is to demonstrate both a likelihood of success on the merits, and irreparable harm that is not compensable in damages. In addition, Courts also consider factors such as a balancing of the harm to the party seeking the relief compared to the prejudice to the party whose assets may be frozen before it has a chance to be heard.

Historically, Arbitrators have applied a more flexible standard, phrased in terms such as "necessary relief in the interest of justice" or "preserving the arbitral process."

The concepts of urgency, necessity and proportionality of the relief sought to the scope of the arbitration are recognized by many arbitral rules, even if the language differs.

Standards using this language are set forth in some rules as well as published case law where the rules provide for publication of the results of arbitration. While there is a fairly recent trend of arbitral standards vectoring somewhat toward the legal standard used by Courts, it is important to note that

arbitrators generally stop short of using the "likelihood of success on the merits" standard to avoid appearing to pre-judge the merits before the merits panel hears the evidence. So the standard applied in some proceedings is whether there is a "reasonable possibility" of success on the merits. This is a lesser burden than establishing "likelihood" of success, but it is also more demanding than the historically elastic standard of "necessary relief in the interest of justice" or relief "necessary to preserve the arbitral process."

5. IF YOU GET AN INTERIM AWARD, CAN YOU ENFORCE IT?

If the relief obtained is injunctive in nature, it will be necessary to obtain Court enforcement of it, absent voluntary compliance by the adverse party. As stated above, be sure that you are familiar with the law and rules of the court with jurisdiction over the party/asset.

Voluntary Compliance vs. Court-Enforced Compliance

Do not rule out the possibility of voluntary compliance, because the adverse party may not want to get on the wrong side of an arbitration panel before the case even begins! And if you are defending an interim ruling, remember that arbitrators are human and the credibility of a party can be affected if it does not comply with the interim ruling. Experience counsel often advise compliance. A negative impression of credibility is hard to erase, especially with the tribunal that will be deciding whether to award damages for noncompliance. Additionally, consider whether the merits panel can make an adverse inference from the fact of noncompliance.

Enforcement Via Court Action

The reality is that many interim awards will require enforcement in a Court of competent jurisdiction.

If you are able to persuade an emergency Arbitrator to grant interim relief, a Court will almost always enforce the interim award. Courts apply a very different standard to review of arbitration awards than is applied to cases brought to it in the first instance. Therefore, the court will likely enforce the arbitrator's interim award even if that court might not itself have granted relief under the legal standard applied by that court if the application had been made directly to that court.

OTHER CONSIDERATIONS TO KEEP IN MIND:

Nomenclature can Matter

Because enforcement of the interim award will require Court action where a party does not voluntarily comply, make sure that the interim award is styled as a "Partial Final Award" or “Final Award Granting Interim Relief” and not a "Procedural Order." This gives counsel the best chance to quickly convince a court that it is a final award of interim relief. Of course, the Court will independently decide if the

award is in fact really one that is final and enforceable, but the wording can create a strong first impression.

6. WILL ADVANCE NOTICE TO THE OTHER PARTY ITSELF TRIGGER THE HARM BEFORE COUNSEL CAN EVEN BE HEARD?

The Need to Proceed Ex Parte

When dealing with a true scoundrel, it may be necessary to seek relief ex parte. Regardless of the forum, an *ex parte* motion is always a challenge, but your chances are better in Court than in Arbitration. Arbitrators are very hesitant to act without the consent of both sides in the process. Arbitration is premised on consent, and that core principal is deeply engrained in the process and the arbitrators themselves.

[[[6. AS IF THIS WASN'T ALREADY COMPLICATED ENOUGH, WHAT ELSE MUST BE CONSIDERED?

Rules on Posting of Bonds by the Prevailing Party

The general rule in courts is to require the prevailing party to post a bond, to secure against any harm to the party who is enjoined or restrained. Courts require this, with rare exceptions, because a decision is being made to the detriment of one party without full knowledge of all the facts and evidence. If the injunction is improvidently ordered, there must be a secure way to redress the wrong to the adverse party.

Where an interim award is made by an emergency Arbitrator, a bond will also likely be sought and often granted.

The Country Where the Interim Measure Would be Enforced

If enforcement will be sought in a foreign country, an Arbitration Award is a superior choice because of worldwide recognition and enforcement, even in countries that would not enforce a Court Order of the United States.]]]

Choice of Law; Venue; Jurisdiction

These issues demand careful legal analysis in advance of the emergency to chart a smart path toward enforceable relief.

While a Choice of Law provision may be embedded in the arbitration clause, be sure to consider whether that constitutes an agreement to apply only the substantive law of that forum. Procedural law may well yield to the primacy of principles stated in the Arbitral RULES that govern the procedure.

Jurisdiction is critical to consider. Where it is likely that arbitral jurisdiction will be challenged, muster your evidence to show the emergency arbitrator why there is a prima facie showing of probable jurisdiction, and seek a finding on this to be stated in the award order.

To this end, advance research should be conducted about whether the jurisdiction must be proper over the person or *in rem* over the asset. It is important to note that United States case law has narrowed considerably about both general and specific jurisdiction over entities, especially foreign entities. However, the deference to an arbitrator's finding that she has jurisdiction will still be an important factor to court enforcement of an interim award.

[[[Choice of Law is often specified in the arbitration agreement. If it is not, be sure to know in advance what law will be applied. It could be the national law of the country where the entity or asset is located, or it may be the arbitral seat. If the measure is directed to a non-party, the law that applies will likely be the law of the forum where the party or asset is located.]]]

CONCLUSION

The ability to obtain interim relief in advance of convening an arbitration merits panel is rapidly becoming the norm rather than the exception. Whether and how to anticipate the fast-moving choices that need to be made about whether to proceed with an emergency arbitrator or a court is a true challenge. But that challenge is less daunting if advance research is done to develop a decision tree about the pros and cons of each, whether your client is the claimant or the potential respondent. You will not have the luxury of time to chart your course through these decisions, so anticipation and advance research is key.