Court Decisions

Interim Relief in Arbitration: What Does the Case Law Teach Us?

BY BRUCE E. MEYERSON

We see it all the time in arbitration clauses.

There is an exclusion for the right of one party, or both parties, to seek interim or provisional relief without regard to the parties' agreement to arbitrate all disputes.

Presumably, arbitration clauses are drafted this way to avoid the concern that by seeking some form of interim relief from a court, an argument may be made that a party has waived the right to arbitrate.

The thesis of this article is that such a concern is unfounded.

Whether an arbitration agreement is governed by the Federal Arbitration Act, the Revised Uniform Arbitration Act, or simply the rules of an administering agency or organization, such as the American Arbitration Association, courts routinely will entertain requests for interim or provisional relief for the purpose of maintaining the status quo in arbitration, without limiting in any way the right to arbitrate.

And, some states even have statutory authority for either party to an arbitration agreement to seek preliminary injunctive relief. For example, in *Baltazar v. Forever 21 Inc.*, 367 P.3d 6, 14 (Cal. 2016), the California Supreme Court refused to find unconscionable a provision in an arbitration agreement permitting both parties to obtain a temporary restraining order or preliminary injunctive relief.

The court noted the provision "merely confirms, rather than expands, rights available" under Cal Code Civ. Proc. § 1281.8(b). The code section provides: "A party to an arbitration agreement may file in the court in the county in which an arbitration proceeding is pending, or if an arbitration proceeding has not commenced, in any proper court, an application for a provisional remedy in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief."

A carve out for preliminary injunctive or interim relief is often included in an adhesion contract on behalf of the employer or corporate party. This is particularly common in the employment area, where an employer is concerned that a disgruntled employee will make off with trade secrets or other proprietary information.

Some courts view such one-sided provisions as unconscionable—when in adhesion contracts—and will sever such provisions, but in the process, needless and expensive satellite litigation has occurred. See *Lara v. Onsite Health Inc.*, 896 F. Supp. 2d 831, 844 (N.D. Cal. 2012)("[B]ecause the Arbitration Agreement allows the parties access to the courts only for injunctive relief, and this form of relief favors employers, the Court finds that this provision is substantively unconscionable."); contra *Louisiana Extended Care Centers LLC v. Bindon*, 180 So. 3d 791, 800 (Miss. Ct. App. 2015) (although an exclusion for injunctive relief favored the nursing home, the court did not find it "so one-sided or oppressive that it renders the arbitration clause unconscionable").

This article suggests that such exclusions are not necessary as the ability of one party to seek preliminary injunctive relief or other interim relief to maintain the status quo in arbitration is well recognized.

ANALYZING THE FAA

In 1985, the U.S. Supreme Court had the opportunity to speak definitively to the question of whether the FAA prohibited a court from issuing a temporary injunction pending arbitration of a contractual dispute.

In *Merrill Lynch, Pierce, Fenner & Smith Inc. v. McCollum*, 469 U.S. 1127 (1985), the Court denied a petition for certiorari from a ruling by the Texas Court of Appeals, holding that FAA Section 3 prohibited any further judicial proceedings once a court determines an action is arbitrable. (Section 3 provides in part that "upon being satisfied that the issue involved … is referable to arbitration … [the court] shall on application of one of the parties stay the trial of the action until such arbitration has been had.") Justices Byron White and Harry Blackmun dissented, expressing the view that the Court should take up the issue.

In the intervening years, however, the federal appellate courts have filled the void, and quite consistently, with one circuit dissenting, have made clear there is no impediment under the FAA for a district court to grant an injunction to preserve the status quo pending an arbitration. Once an arbitrator is appointed, however, and the arbitrator has the opportunity to consider whether to grant preliminary relief, "the injunction must be dissolved. … 'In other words, the entire case is shifted from the judge to the arbitrator in order to keep the two adjudicators from stepping on each other's toes.'" *Am. Laser Skincare LLC v. Morgan*, 2013 WL 1679518, at *4 (N.D. Ill. Apr. 17, 2013)(available at http://bit.ly/2bx0Hhn)(citations omitted).

Examples of the willingness of the federal courts to grant interim relief under the FAA include:

- *Puerto Rico Hosp. Supply, Inc. v. Boston Sci. Corp.*, 426 F.3d 503, 505 (1st Cir. 2005) ("A district court has jurisdiction to issue preliminary injunctions to preserve the status quo pending arbitration.")

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- *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1054 (2d Cir. 1990) ("The issuance of an injunction to preserve the status quo pending arbitration fulfills the court's obligation under the FAA to enforce a valid agreement to arbitrate.")
- *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 812 (3d Cir. 1989) ("[A] district court has the authority to grant injunctive relief in an arbitrable dispute, provided that the traditional prerequisites for such relief are satisfied.")
- *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1053 (4th Cir. 1985)("[W]here a dispute is subject to mandatory arbitration under the Federal Arbitration Act, a district court has the discretion to grant a preliminary injunction to preserve the status quo pending the arbitration of the parties' dispute if the enjoined conduct would render that process a 'hollow formality.'")
- *RGI Inc. v. Tucker & Assocs. Inc.*, 858 F.2d 227, 228 (5th Cir. 1988)("Because the preliminary injunction serves both to implement a bargained-for relationship clearly specified in the subcontract and is in accordance with federal policy to expedite arbitration which is articulated in the Federal Arbitration Act, we conclude that the district court did not abuse its discretion in issuing the preliminary injunction.")
- *Performance Unlimited Inc. v. Questar Publishers Inc.*, 52 F.3d 1373, 1380 (6th Cir. 1995) ("[A] grant of preliminary injunctive relief pending arbitration is particularly appropriate and furthers the Congressional purpose behind the Federal Arbitration Act, where the withholding of injunctive relief would render the process of arbitration meaningless or a hollow formality because an arbitral award, at the time it was rendered, 'could not return the parties substantially to the status quo ante.'").
- *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 214 (7th Cir. 1993) ("'pro-arbitration policies … are furthered, not weakened, by a rule permitting a district court to preserve the meaningfulness of the arbitration' by granting injunctive relief").
- *Toyo Tire Holdings of Americas Inc. v. Cont'l Tire N. Am. Inc.*, 609 F.3d 975, 981 (9th Cir. 2010) ("[W]e conclude that a district court may issue interim injunctive relief on arbitrable claims if interim relief is necessary to preserve the status quo and the meaningfulness of the arbitration process—provided, of course, that the requirements for granting injunctive relief are otherwise satisfied.").
- *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dutton*, 844 F.2d 726, 727 (10th Cir. 1988) ("[A] preliminary injunction preserving the status quo until the arbitration panel takes jurisdiction does not violate § 3.").

Why Worry?

The practice: Drafters insist on including carve outs for court injunctions in their arbitration agreements.

The reason: Emergency measures may be needed before the tribunal is convened.

The revision: This seemingly sensible step isn't needed. The law accepts interim relief in ADR. The former best practice may just spark "needless and expensive satellite litigation" on top of the proceedings for the relief sought.

- *Drago v. Holiday Isle, L.L.C.*, 537 F. Supp. 2d 1219, 1222 (S.D. Ala. 2007) ("The Eleventh Circuit has not spoken directly to the issue of whether jurisdiction exists to grant a preliminary injunction to preserve the status quo pending arbitration. … [T]he court adopts the reasoning espoused in *Bradley* [see above], i.e., that equitable relief to preserve the status quo is appropriate only where an arbitral award could not return the parties substantially to the status quo."). See *Wine Not, Int'l Inc. v. 2atec LLC*, 2006 WL 1766508, at *12 (M.D. Fla. June 26, 2006)(available at http://bit.ly/2bxX7QV).
- *Owen-Williams v. BB & T Inv. Servs., Inc.*, 2006 WL 6593816 (at *9), U.S. Dist. LEXIS 52392 (D.D.C. July 31, 2006)(available at http://bit.ly/2bNBC2i)("Even when a claim filed in court is subject to arbitration, a court retains the authority to enter a preliminary injunction to preserve the *status quo ante* and prevent irreparable harm pending a decision by the arbitration panel.").

The Eighth U.S. Circuit Court of Appeals has approached this issue in a slightly different way. That court has held "in a case involving the Federal Arbitration Act (FAA), courts should not grant injunctive relief unless there is 'qualifying contractual language' which permits it." *Manion v. Nagin,* 255 F.3d 535, 538-39 (8th Cir. 2001). The court reasoned:

> This approach is consistent with the plain meaning of the FAA and the 'unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.'

Id. at 539 (emphasis added).

In that case, the appellate court upheld the ruling by the district court denying a request for injunction finding the parties' contract did not contain "qualifying language to provide 'clear grounds to grant relief without addressing the merits of the underlying dispute.'" Id. (citation omitted). "Qualifying contractual language is 'language which provides the court with clear grounds to grant relief without addressing the merits of the underlying arbitrable dispute.'" Id.

With the exception of the Eighth Circuit, the overwhelming weight of authority is that even without a specific contractual provision authorizing a party to obtain an injunction to preserve the status quo before an arbitration, courts have that authority.

UNDER THE AAA

The American Arbitration Association Commercial Arbitration Rules, referred to here as the Commercial Rules (and available in full at http://bit.ly/2cd0EZr), specifically provide that by seeking interim relief from a court, such action does not amount to a waiver of the right to arbitrate.

R-37 provides that a party's request for injunctive relief is not deemed "incompatible with the agreement to arbitrate." *DHL Info. Servs. (Americas) Inc. v. Infinite Software Corp.*, 502 F. Supp. 2d 1082, 1083 (C.D. Cal. 2007)(Rule 37(c) of the AAA Rules "states

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.' [Citation omitted.] Thus, the right to arbitrate is not waived by seeking interim relief in the Court."); *MacArtney v. GCG SBIC Mgmt. Corp*., 2005 WL 1970956, at *3 (Conn. Super. Ct. June 28, 2005)(available at http://bit.ly/2bOzPXU)("The very rules which the defendants argue the parties are bound to arbitrate under provide for application to the court for relief pending the outcome of arbitration.").

Moreover, where parties adopt the AAA Commercial Rules, the "arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods." R-37. This rule consistently has been found to authorize the arbitrator to grant interim or provisional relief to preserve the status quo in arbitration. *Mount Holly Partners LLC v. AMDS Holdings LLC*, 2009 WL 1507148, at *2 (D. Utah May 27, 2009)(available at http://bit.ly/2bxQjJ3)("[T]he question of whether the status quo should be preserved pending arbitration was submitted to and considered by the arbitration panel. The arbitration panel unquestionably had the power to grant the relief sought if it so chose."); *CSA-Credit Solutions of Am. Inc. v. Schafer*, 408 F. Supp. 2d 503, 511 (W.D. Mich. 2006)("The rules of the AAA themselves provide that an arbitrator has the authority to issue injunctive and other equitable relief."); see also *Tenneco Auto. Operating Co. Inc. v. Hyrad Corp*., 2002 WL 1632499, at *3 (N.D. Ill. July 23, 2002)("The arbitrator is not bound by legal rules, and may grant any appropriate relief.").

R-37 has been interpreted to permit an arbitrator to grant an interim award, followed by a final award. *BFN-Greeley LLC v. Adair Grp. Inc*., 141 P.3d 937, 941 (Colo. App. 2006) ("[U]nder the AAA Procedures, the arbitrators had the authority to issue an interim award followed by a final award."). This is a common practice. A panel will often issue an interim award on the dispute's merits, reserving a ruling and entry of a final award until the panel rules on any application for attorneys' fees and costs.

Somewhat more controversial is whether the Commercial Rules authorize an arbitrator to appoint a receiver. The cases differ on this issue. *Sun Valley Ranch 308 Ltd. P'ship v. Robson*, 294 P.3d 125, 132 (Ariz. Ct. App. 2012)(The AAA Commercial Rules "permit arbitrators to impose interim measures deemed 'necessary for the protection or conservation of property.' [Citation omitted.] Appointing a receiver for a limited partnership is a measure designed to protect or conserve property."); contra *Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen P.C. v. Lowenstein Sandler P.C.*, 839 A.2d 52, 58 (N.J. App. Div. 2003)("[T]here is a vast difference between the general concept of 'injunctive relief,' the phrase used by the AAA in [R. 37(a)], and the appointment of a receiver, whether statutory or custodial, an act that usually deprives a corporation entirely of the ability to govern itself. A reasonable interpretation of the parties' contract does not support the proposition that plaintiff agreed to subject its governance to the control of a receiver answerable, in turn, to an arbitrator whose awards are almost entirely unreviewable in court.").

Another source of obtaining interim relief under the AAA Commercial Rules is R-38, "Emergency Measures of Protection." Absent an agreement of the parties to the contrary, R-38 applies to all arbitration agreements that adopt the AAA Commercial Rules entered into on or after Oct. 1, 2013.

Under this rule, after receiving notification from a party that it is seeking emergency relief, the AAA will appoint a "single emergency arbitrator." R-38(c). That person, as soon as possible, but within no more than two days of the appointment, will "establish a schedule for consideration of the application for emergency relief." R-38(d).

The emergency arbitrator may grant the requested relief if the arbitrator "is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief." R-38(e). A request for emergency relief is not "incompatible" with the agreement to arbitrate. R-38(h).

Other major providers have adopted similar rules. JAMS' Comprehensive Arbitration Rules & Procedures allow for interim relief under Rule 2, Party Self-Determination and Emergency Relief Procedures. (Available at http://bit.ly/2bPs1VC.) JAMS Streamlined Arbitration Rules & Procedures also contemplate interim relief awards. (Available at http://bit.ly/2c31G8e.)

The CPR Institute, which publishes this newsletter, has in its Administered Arbitration Rules Rule 13, "Interim Measures of Protection." (Available at http://bit.ly/2c32U3i.) Rules 13 and 14 of CPR's Non-Administered Arbitration Rules provide for interim relief as well as the appointment of a special arbitrator for purposes of ruling on emergency measures. (Available at http://bit.ly/2bQvGWn.) Analogous rules appear in the CPR Institute's subject-specific rules, too, including patent and construction rules.

RUAA CLARIFIES THE POWER

The Revised Uniform Arbitration Act, or RUAA, includes an important new section, not found in the Uniform Arbitration Act, clarifying an arbitrator's power to grant preliminary relief including provisional remedies, and providing a court may grant such preliminary relief even before an arbitration is initiated. (Some provisions of the RUAA may be waived in a predispute agreement to arbitrate. The provision regarding interim relief, Section 8, is not one of them. RUAA § 4(b)(1).)

The RUAA also clarifies that obtaining such relief does not constitute a waiver of the right to arbitrate. Eighteen states and the District of Columbia have adopted the RUAA.

The RUAA makes clear an arbitrator has broad power to grant interim relief:

> [T]he arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action.

RUAA § 8(b)(1). The RUAA also has been interpreted to authorize an arbitrator to appoint a receiver. *Sun Valley Ranch 308 Ltd. P'ship ex rel. Englewood Props. Inc. v. Robson*, 294 P.3d 125, 132 (Ariz. Ct. App. 2012).

This section is intended to give arbitrators very broad authority. As the Comments to the RUAA point out,

> The case law, commentators, rules of arbi-

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> tration organizations, and some state statutes are very clear that arbitrators have broad authority to order provisional remedies and interim relief. … This authority has included the issuance of measures equivalent to civil remedies of attachment, replevin, and sequestration to preserve assets or to make preliminary rulings ordering parties to undertake certain acts that affect the subject matter of the arbitration proceeding. (RUAA § 8 Comment 4.))

An interim ruling by an arbitrator prior to the issuance of a final award may be incorporated into an award and confirmed by the court. A party may move the court for an expedited order confirming the award, in which case the court "shall summarily decide the motion." The court must confirm the award unless the court vacates, modifies or corrects the award under the applicable RUAA provisions.

According to the Comments to the RUAA, see Id. § 8 Comment 3, this provision is derived from cases such as *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, supra, where the court upheld a district court decision granting a temporary restraining order prior to the initiation of the arbitration because it "served to maintain the status quo without prejudice to the merits of any of the parties' claims or defenses until an arbitration panel could consider the issues presented." Id. Although not explicit in the statute, the RUAA Comments provide that after "a court makes a ruling [under this section] an arbitrator is allowed to review the ruling in appropriate circumstances." RUAA § 8 Comment 6.

The RUAA provides that before an arbitrator is appointed, upon a showing of "good cause," a court may enter an order for an interim remedy "to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action." RUAA § 8(a).

Even after an arbitrator is appointed, a party may still seek an interim remedy in court, but "only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy." RUAA § 8(b)(2). The Comments to the RUAA suggest the court's role under these circumstances should be "limited." Id. § 8 Comment 3. The RUAA makes clear that seeking judicial relief either before an arbitrator is appointed, or during the arbitration, does not constitute a waiver of arbitration. Id. § 8(c).

The RUAA's provision authorizing a court to grant injunctive relief during an arbitration is very different than the FAA. Under the FAA, it would be highly unusual, indeed almost unheard of, for a court to order injunctive relief during an ongoing arbitration. See *In re Sussex*, 781 F.3d 1065, 1073 (9th Cir. 2015)(noting that a majority of circuits prohibit "mid-arbitration intervention"); *Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 748 F.3d 708, 716 (6th Cir. 2014)(reversing district court's entry of injunctive relief halting ongoing arbitration proceedings finding that the district court erred "in entertaining an interlocutory challenge to an ongoing arbitration proceeding").

But "[u]nder the FAA, courts may intervene into the arbitral process to select an arbitrator upon application of a party, if the arbitration agreement does not provide a method for selecting arbitrators." *Broussard v. First Tower Loan LLC*, 2015 WL 8478573, at *11 (E.D. La. Dec. 10, 2015)(available at http://bit.ly/2bPoGKR).

Also, "where an arbitration panel has already been empaneled and that tribunal has the power to grant the injunctive relief sought, a federal court may intervene only in a very narrow circumstance, namely, if a party has already petitioned the arbitrator for injunctive relief and a provisional remedy is necessary to maintain the status quo 'until the arbitral panel can consider and rule upon [the] application for interim relief.'" *Dealer Computer Servs. Inc. v. Monarch Ford*, 2013 WL 314337, at *4 (E.D. Cal. Jan. 25, 2013)(available for download at http://bit.ly/2bznjPJ)(citation omitted).

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The cases interpreting the FAA, the RUAA and the AAA Commercial Rules, with the exception of the Eighth Circuit, compel the conclusion that carving out language in an arbitration agreement to permit a court to grant interim or provisional relief to maintain the status quo is not necessary. Avoiding that drafting issue is one way to reduce disputes over the enforceability of arbitration agreements.

Updating the Arbitration Act Update

The 2000 Revised Uniform Arbitration Act, updating the widely adopted Uniform Arbitration Act of the mid-1950s, is now adopted in 18 states and the District of Columbia.

The state law citations for the act are: Alaska Stat. Ann. §§ 09.43.300 to -.595 (West, Westlaw through 2015 1st Reg. Sess. & 2015 29th Spec. Sess.); Ariz. Rev. Stat. Ann. §§ 12-3001 to -29 (West, Westlaw through 2015 1st Reg. Sess.); Ark. Code Ann. §§ 16-108-201 to -230 (West, Westlaw through 2015 Reg. Sess. & 2015 1st Ex. Sess); Colo. Rev. Stat. Ann. §§ 13-22-201 to -230 (West, Westlaw through 2015 1st Reg. Sess.); D.C. Code §§ 16-4401 to -4430 (West, Westlaw through Oct. 1, 2015); Fla. Stat. Ann. §§ 682.01 to -.25 (West, Westlaw through 2015 1st Reg. Sess. & 2015 Spec. Sess A); Haw. Rev. Stat. Ann. §§ 658A-1 to -29 (West, Westlaw through 2015 Reg. Sess.); Mich. Comp. Laws §§ 691.1681 to -1713 (West, Westlaw through 2015 Reg. Sess.); Minn. Stat. §§ 572B.01 to -.31 (West, Westlaw through 2015 1st Spec. Sess.); Nev. Rev. Stat. Ann. §§ 38.206 to -.248 (West, Westlaw through June 30, 2015); N.J. Stat. Ann. §§ 2A:23B-1 to -32 (Westlaw through Oct. 22, 2015); N.M. Stat. Ann. §§ 44-7A-1 to -32 (West, Westlaw through 2015 1st Spec. Sess.); N.C. Gen. Stat. §§ 1-569.1 to -.31 (West, Westlaw through 2015 Reg. Sess.); N.D. Cent. Code §§ 32-29.3-01 to -29 (West, Westlaw through 2015 Reg. Sess.); Okla. Stat. Ann. tit. 12 §§ 1851 to -1881 (West, Westlaw through 2015 1st Sess.); Or. Rev. Stat. §§ 36.600 to -.740 (West, Westlaw through 2015 Reg. Sess.); Utah Code Ann. §§ 78B-11-101 to -131 (West, Westlaw through 2015 1st Spec. Sess.); Wash. Rev. Code Ann. §§ 7.04A.010 to -.903 (West, Westlaw through 2015 1st Reg. Sess. and 3d Spec. Sess.); W.Va. Code §§ 55-10-1 to -33 (West, Westlaw through 2015 Reg. Sess.).

The National Conference of Commissioners on Uniform State Laws charts the law's progress and maintains its legislative and development history on the Uniform Law Commission's website at http://bit.ly/2bxlcdJ.