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Practice Update

A New International Option: The "Emergency Arbitrator"

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For many years, the common belief was that international arbitration was not suitable for cases in which emergency relief could become necessary. The time required to impanel an arbitration tribunal and the logistics of organizing an arbitration hearing made it almost impossible to obtain an interim award in time to address an emergency situation. In such cases, a separate action for emergency relief in a court with jurisdiction over the dispute was the only viable option.

This option was patently counterintuitive, of course, as the desire to avoid litigation in a public forum is usually one of the main reasons to have disputes resolved through arbitration in the first place.

The main arbitral institutions have heard the demands of the legal community, and the figure of the so called "emergency arbitrator" has arrived in the international arbitration world, offering the option of a forum within the arbitration context to provide temporary emergency relief. This new option is a welcome development in the international arbitration world.

The concept is very simple. The party seeking emergency relief must file a written request for emergency relief with the arbitral institution.

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Although the time frames may vary depending on the arbitral institution, the rules of the International Chamber of Commerce and the International Centre for Dispute Resolution both provide for the quick appointment of a solo emergency arbitrator by the institution. The emergency arbitrator then has to promptly schedule a hearing and issue an award or an order. Generally, the emergency arbitrator may grant emergency relief if the movant shows that immediate and irreparable loss or damage will result if emergency relief is not granted, and that the requesting party is entitled to such relief.

These requirements are similar to the requirements for injunctive relief in U.S. federal and state courts. The interim award or order must be reasoned and may require the posting of security from the party seeking the relief as a condition of the interim award. The emergency arbitrator is, of course, an optional procedure, and the parties may opt out of such provisions in the agreement.

On its face, the existence of an emergency arbitrator makes emergency relief more accessible in an arbitration proceeding than in the courts of general jurisdiction. Indeed, the practical guarantee of an expedited hearing is a significant advantage over federal or state courts.

Another advantage is that the emergency arbitrator is not part of the arbitral tribunal that will ultimately decide the case on the merits. Having two panels—one for emergency relief and one for the merits—is necessary, as the emergency relief arbitrator is selected by the arbitral institution and not by the parties. But this provision has the collateral benefit of separating the emergency proceedings from the proceedings on the merits.

At the same time, a party that has been enjoined by an emergency arbitrator has the ability to move the permanent arbitration panel to reconsider, modify or vacate the interim award or order of emergency

relief issued by the emergency arbitrator once the arbitration tribunal has been fully constituted.

Given these clear benefits, the figure of the emergency arbitrator should be promoted as one of the advantages of arbitration, particularly considering that the vast majority of arbitration awards are voluntarily accepted and followed without the need of a subsequent judicial confirmation process.

Concept Embraced

Federal courts in the United States have quickly embraced the concept of the emergency arbitrator and treated emergency awards with the same deferential protections afforded to final arbitral awards.

The most prominent case so far has been the case of *Yahoo v. Microsoft*, where a district court judge in the Southern District of New York confirmed an award issued by an emergency arbitrator ordering Yahoo Inc. to continue redirecting searches in certain international markets to Microsoft Corp.'s search engines.

The request for an emergency order was filed September 26, 2013, an emergency evidentiary hearing was held October 7-8, 2013, and the emergency award was issued October 14, 2013. In other words, the emergency award was issued 18 days after the request was filed. Yahoo moved to vacate the award, and Microsoft countered with a petition to confirm. The Court confirmed the award on the grounds that the relief was "final and that the emergency arbitrator neither exceeded his authority nor manifestly disregarded the law in awarding such relief."

This is not to say that the figure of the emergency arbitrator does not have its critics. A number of arbitrators have questioned whether an emergency award issued by an emergency arbitrator is

enforceable under the New York Convention or the Federal Arbitration Act. The argument is that an emergency award is by definition interim and not final, and therefore, such an award does not enjoy the protections afforded to final awards.

These are all compelling arguments, particularly under the International Chamber of Commerce rules, which provide that the emergency arbitrator's decision shall take the form of an order, not an award.

However, it cannot be disputed that the option of the emergency arbitrator empowers the parties to tailor their methods of dispute resolution as they see fit and confirms the flexibility of the arbitral process. As such, we should all welcome the figure of the emergency arbitrator and acknowledge its benefits, even as we recognize that it is fertile territory for law review articles, judicial discourse, and future arbitration conferences.

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