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TO THE HIGH COST OF LITIGATION

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Arbitration

Assessing the Options: Go for an Interim Emergency Award? Or a Temporary Restraining Order Issued by a Court?

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"Go to court? Or not to court?" Those are the questions, with apologies to the late great bard.

This is an unusual inquiry coming from a former U.S. District Court judge who retired from the bench just last year. But this author would be the first to say that courts can learn a lot from processes developed by arbitrators.

As just one example, litigation discovery in the U.S. is too cumbersome, burdensome and expensive. But 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, for example, speed is critical to prevent dissipation or removal of assets, 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. Now, however, many arbitral institutions and rules can be quite nimble in emergent situations.

So which forum do you choose? There are many nuanced considerations; it is vital to consider them before an emergency arises.

This article sets forth the practical issues that counsel may face, in the order that this author believes they should be considered. The universal assumption is that the matters that should go before an emergency arbitration tribunal are those where the ultimate relief on the merits will be determined in arbitration.

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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.

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

(continued on page 6)

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Commentary

(continued from previous page)

- … That had a generally accepted method of enforcing its determinations …
- … And that had a sound basis for the traditional practice of binding private dispute resolution.

These attributes are essential to the very concept of arbitration as a method of non-judicial, consensual, final, and binding resolution of disputes. Yet many of them seem no longer to pertain to either mercantile or religious communities.

Just as the absence of the practice of Quaker arbitration—or some other clear, defined, final, authoritative and Spirit-led procedure for addressing disputes within Quaker congregations—may reflect a disinclination of contemporary Friends to join a truly covenanted faith community, so current trends of commercial arbitration might also reflect a similar departure from its mercantile origins of seeking accountability, authority and self-regulation for the advancement of the trade.

Modern theories of arbitration contemplate that the process—which originally relied on informed consent and participation in a defined body of users—may now bind employees, consumers, credit card users, software purchasers, and others who share few attributes of a community, and indeed may be unaware that they have agreed to participate in the arbitration process.

Quakers appear to have abandoned—even forgotten—a historic practice of arbitration. The eventual disuse of arbitration in the religious community may hold disquieting lessons for those questioning the integrity of commercial arbitration.

Generally applicable legal principles, rather than standards of behavior unique to a shared and intentional community, are now applied to the determination of these conflicts. No distinct practice or tradition of private adjudication has survived this evolution, and no distinct social, economic, or spiritual objectives are served by modern arbitration that the general law does not equally address.

Rather, the arbitration process is perceived merely as an alternative forum to vindicate the same rights deriving from the same standards and the same inter-relational behaviors as would be addressed by a public court in the application of broadly applicable legal principles.

COMMERCIAL DEVOLUTION

The study of the disuse of Quaker arbitration, then, leads us to reassess the devolution of modern arbitration itself. In any community—whether one sharing a common faith or one sharing a common mercantile practice—private arbitration among members of a close and dependent society is, ultimately, an exercise in mutual accountability.

In the absence of that accountability, and in light of the broadly accepted modern practice of disputants' engaging advocates to argue law, rather than directly and frankly engaging each other in a search for an outcome reflecting their shared values, an essential attribute of arbitration is missing and its practice is skewed.

At its core, arbitration over the centuries has relied upon a closed community with common goals, accepting that mutual accountability is essential to its welfare. The acknowledgement within the community of specific expectations for behavior—unique to that specific community—is an essential element of private dispute resolution and the key to the practice of arbitration as a means of the community's achieving its objectives.

The Quaker community changed, and as it lost those principles of mutual reliance, the practice of arbitration ceased to address its wounds or affirm its basic strengths. Might commercial arbitration have lost its essential character, as well?

Arbitration

(continued from front page)

those rules committed to memory as recently as a year ago, check for updates, because this area of many arbitral institutions' rules is 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.)

Nevertheless, 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 the arbitration agreement is silent and 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.

For a discussion on the current caselaw, see Bruce E. Meyerson, "Interim Relief in Arbitration: What Does the Case Law Teach Us?" 34 *Alternatives* 131 (October 2016)(available at http://bit.ly/2eHITCI).

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 often had to point out to counsel that rules had been adopted on issues such as claw-back of inadvertently 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 required.

If your arbitration agreement is ad hoc, with no rules specified, seeking court relief 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, seeking relief directly from a court will usually be faster, because is it a one-step process rather than two steps. Even if there is clear authority for an arbitral award of interim relief, only a court can both award and enforce that relief.

Weighing Your Options

The arbitration dilemma: Where should you go for emergency relief?

Don't always follow your instincts: By definition, judges and courts are set up for timely intervention/preservation. But today's arbitration rules accept pre-hearing arbitration action as part of the full dispute resolution scheme. They are a solid option.

Have a game plan: Despite the ubiquity of interim procedures, the rules have been changing fast. This article provides you with the evaluation steps for getting help before your case is arbitrated.

The arbitral rules that govern the dispute may have new or updated provisions 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. This area is changing rapidly at many arbitral institutions.

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." Standards using this language are set forth in many conventions and rules.

But there is a fairly recent trend of arbitral standards vectoring somewhat toward court legal standards. While arbitrators generally have shied away from using the standard of "likelihood of success on the merits" to avoid appearing to prejudge the case before the merits panel hears the evidence, 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 also is 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 and the asset.

Voluntary Compliance vs. Court-Enforced Compliance: Do not rule out the possibility of voluntary compliance, because the

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Arbitration

(continued from previous page)
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. 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 most interim awards will have to be enforced 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 to be applied if the application had been made directly to the court.

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" 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 Trigger the Harm before Counsel Can Even Be Heard?

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 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.

Counsel often advise compliance with interim rulings. A negative impression of credibility is hard to erase, especially with the tribunal that will be deciding whether to award damages for noncompliance.

7. 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 also likely will 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.

Jurisdiction is critical, and 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 law has narrowed considerably about both general and specific jurisdiction over entities, especially foreign entities.

Choice of Law often is 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.

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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.

REVIEWING THE LAW

Once you are comfortable with the decision-making practice pointers for getting interim relief in arbitration, you need to align it with familiarity with the law. *Alternatives* covered the case law and statutes on interim measures in arbitration during the fall in an article by former Arizona state court judge and veteran practitioner Bruce E. Meyerson. See his article, "Interim Relief in Arbitration: What Does the Case Law Teach Us?" in the October 2016 issue, at 34 *Alternatives* 131 (available at http://bit.ly/2eHITCI). A sidebar features a guide to the state law adoptions of the latest version of the Revised Uniform Arbitration Act.