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PERSPECTIVE

When arbitrations need emergency relief

By Larry Mills

In today's fast-moving business world, parties who have agreed to arbitrate disputes can be seriously damaged by delay in protecting their rights. For example, if a joint venture agreement is breached, there may be an immediate need to stop one of the parties from using and disclosing confidential and sensitive data.

In many cases, preservation of the property that is the subject of the arbitration is necessary to protect the integrity of the arbitration process and ensure that the final award is meaningful and enforceable. Previously however, there were no provisions for pursuing emergency relief. Parties would have to either (1) file an action in court and apply for injunctive relief or (2) await the formation of the arbitral tribunal and then move for interim measures to protect or conserve property.

Most domestic and international arbitration institutions have recently developed emergency procedures to assist parties in circumstances where urgent interim relief is needed before an arbitral tribunal has been formed. JAMS, for example, released updated arbitration rules as of July 1 that include new emergency relief procedures, which provide for the prompt appointment of an emergency arbitrator.

Under the JAMS Emergency Relief Procedures (Rule 2(c) of the JAMS Comprehensive Rules and Procedures), a party in need of emergency relief before the appointment of an arbitrator or a



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three-arbitrator panel may notify JAMS and all other parties in writing of the relief sought, the basis for such relief, and why the relief is needed on an expedited basis. The written notice may be quite brief; two to 10 pages is typical. The notice must include a statement certifying that all other parties have been notified; an *ex parte* application for emergency relief is not permitted.

In most cases, JAMS will appoint an emergency arbitrator within 24 hours after receipt of notice of the request for emergency relief. Within two business days, or as soon as practicable thereafter, the emergency arbitrator is to establish a schedule for consideration of the request for emergency relief. The schedule must provide a reasonable opportunity for all parties to be heard, taking into account the nature of the relief sought. There is no requirement for an in-person testimonial hearing; due process is satisfied by notice and a reasonable opportunity to be heard in writing, by phone or videoconference.

The emergency arbitrator must determine whether the party seek-

ing emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief. At the discretion of the emergency arbitrator, a grant of emergency relief may be conditioned on the provision of adequate security by the party obtaining the relief. The emergency arbitrator will enter an award or order granting or denying emergency relief with the reasons for the ruling.

Until the arbitrator or arbitration panel is appointed, the emergency arbitrator retains jurisdiction over any request to modify the emergency arbitrator's order or award. Any modifications must be based on changed circumstances. Once an arbitrator or panel has been appointed, the tribunal assumes jurisdiction over the emergency arbitrator's order or award and the emergency arbitrator's authority ceases.

Any emergency order or award can be promptly enforced by a court if necessary. Many courts have held that only final awards may be confirmed or vacated under the Federal Arbitration Act. An order or award of an emergency arbitrator is a temporary, stop-gap measure to protect or preserve property pending resolution of the dispute on the merits and is not final in the every day sense of the word. Nonetheless, courts that have considered requests to enforce emergency arbitrator orders and awards, as well as tribunal orders and awards granting interim measures to protect or conserve property, have enforced them as final. On this basis, courts have

enforced awards of emergency injunctive relief against disclosing data and moving assets.

Courts have also demonstrated a willingness to act promptly, usually within a few days, to confirm orders or awards of emergency arbitrators. For example, in a well-publicized 2013 case involving a dispute between Microsoft and Yahoo, the federal court in the Southern District of New York confirmed an emergency arbitrator's award of injunctive relief a week after the award had been entered.

Emergency procedures in arbitration can provide prompt relief to prevent loss or damages and preserve the integrity of the arbitration process. In many cases, emergency procedures in arbitration may be a better option than seeking a preliminary injunction in court.

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