New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 259—NO. 27
THURSDAY, FEBRUARY 8, 2018

Outside Counsel

Expert Analysis

Interim and Emergency Measures in International Commercial Arbitration: Time to Say Goodbye to Irreparable Harm and Likelihood of Success on the Merits?

By **Robert B. Davidson**

And **Cliff Bloomfield**

Virtually all of the major arbitration provider rules expressly authorize an arbitrator to order interim relief in order to preserve the status quo or assure the effectiveness of an award pending a full merits hearings. These orders can take various forms including orders in the nature of prohibitive or mandatory injunctions, anti-suit injunctions, orders compelling a party to post security for costs or orders to preserve evidence or property. Arbitrators have even issued orders in the nature of *Mareva*-type injunctions forbidding a respondent to transfer assets pending an award. See, e.g., *CE Int'l Res. Holdings v. S.A. Minerals Ltd. P'ship*, No. 12 Civ. 8087, 2012 WL 6178236, at *1 (S.D.N.Y. Dec. 10, 2012) (enforcing interim award granting a *Mareva*-style injunction even though the relief could not be awarded by a federal or New York court).

While the enforceability of such interim orders is far from a foregone conclusion (it takes a court order to compel a reluctant respondent to comply), the availability of interim relief has long been a hallmark of the arbitral process. For example, UNCITRAL Article 26, was used to great effect in the 1980's to provide further security for the payment of awards to be rendered by the Iran-U.S. Claims Tribunal.

Even though arbitration provider rules permit the granting of interim relief, there is also often a need for such relief on an emergency basis, that is, prior to the empanelment of a tribunal or the appointment of a sole arbitrator, a process which can take several weeks. These situations typically result in aggrieved parties running into court to seek interim relief from a judge in aid of arbitration pending the appointment process. However, the ability to rely upon a national court for such relief pending the appointment of arbitrators in a proceeding venued outside of the U.S. may be illusory. The unreceptiveness of the local judiciary, or cumbersome court procedures abroad, often preclude or inhibit the moving party's ability to obtain such relief. The jurisdictional prerequisites for obtaining interim relief in an international setting may also be unclear.

In the last decade, international arbitral provider organizations have answered the call by providing for a fast decision by an Emergency Arbitrator (EA) in such situations. While interim or partial final awards rendered by EAs are not self-enforcing, EAs have nonetheless been busy. As of mid-2016, the major international arbitration institutions report that there were at least 175 EA applications across international providers. See Grant Hanessian & E. Alexandra

While the enforceability of such interim orders is far from a foregone conclusion (it takes a court order to compel a reluctant respondent to comply), the availability of interim relief has long been a hallmark of the arbitral process.

ROBERT B. DAVIDSON *is the Executive Director of JAMS Arbitration Practice.* CLIFF BLOOMFIELD *is associated with JAMS.*

Dosman, "Songs of Innocence and Experience: Ten Years of Emergency Arbitration," 27 Am. Rev. Int'l Arb. 215, 216 (2016). Given the frequency of applications for interim relief and the rising popularity of emergency applications under provider rules, it is useful to explore the standards used by arbitrators when considering such requests, especially in the context of international commercial arbitration.

The standard for the granting of preliminary relief is fairly well-settled in the United States. In the Second Circuit, an applicant must show: (1) irreparable harm and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. Irreparable harm, as we all learned in law school, means harm that cannot be remedied by money damages. While there is some flexibility in the definition, there isn't much. Courts in the United States have found irreparable harm where a defendant's conduct threatens the existence of the plaintiff's business; a defendant is dissipating assets to make itself judgment proof; or where damages are particularly difficult to quantify, such as injury to reputation or loss of goodwill. Otherwise, the standard is difficult to meet. "Likelihood of success," when applicable, is also strictly applied.

Are these traditional standards too strict? Should they apply at all in the context of an international arbitration?

To answer these questions, the first order of business is to determine the source of the legal standard. Assume an international commercial arbitration under the ICC rules taking place in New York pursuant to a contract calling for application of the substantive law of Illinois. Are the standards deemed procedural, thus militating for the application of New York law? Or substantive, calling for the application of Illinois law? Or do the rules of the chosen provider organization trump whatever standards would otherwise apply? The answer is far from obvious. See, e.g., Elliot E. Polebaum, International Arbitration: Commercial and Investment Treaty Law and Practice §6.03[2] (Law Journal Press 2016); Gary B. Born, International Commercial Arbitration §17.02[G], at 2464-65 (2d ed. 2014). As Polebaum explains, a persuasive argument exists that the standards set forth in the provider rules chosen by the parties ought to govern. Id. §6.03[3]. In practice, unless the parties agree that the controlling law is different, most arbitrators sitting in international disputes will apply the rules of the provider organization rather than either the law of the forum (lex arbitri) or the chosen law under the contract (lex causae). Regarding the standards set forth in provider rules, it is interesting to note that no major provider even mentions "irreparable harm" or "likelihood of success" in its rules.

For example, the ICC Rules allow arbitrators to grant conservatory and interim measures that "the arbitral tribunal considers appropriate." ICC Art. 28(1); see also LCIA Art. 25.1 (stating that the Arbitral Tribunal may respond to an application for interim relief "as the Arbitral Tribunal considers appropriate in the circumstances"). Similarly, both JAMS and the ICDR state that a tribunal may order interim measures that "it deems necessary." JAMS Int'l Arb. Rules (JIAR) Art. 32.1; ICDR Art. 24(1). The UNCITRAL Rules are the only procedural rules that actually give some guidance, providing in Article 26(3) for a three-pronged test: First, the requesting party must satisfy the tribunal that "Harm not adequately reparable by an award of damages is likely to result"; that the "harm [to the requesting party] substantially outweighs the harm that is likely to result to the [other] party"; and that "There is a reasonable possibility that the requesting party will succeed on the merits of the claim." (Note the compromise way to express the notion of "irreparable harm" and the absence of "likelihood of success.") This gives substantial discretion to the arbitrator—discretion that seems to be deliberately conferred if for no other reason than to deal with the disparate standards the might exist in various jurisdictions.

Notwithstanding the fact that none of the major international provider rules mention either irreparable harm or likelihood of success on the merits, surveys of interim awards made by tribunals in commercial, treaty-based, and other arbitrations indicate that many arbitrators still adhere to the traditional standards. See generally Francisco González de Cossío, *Interim Measures in Arbitration: Towards a Better Injury Standard* (2015).

However, a growing number of tribunals have adopted less restrictive notions of harm and likelihood of success. See, e.g., Marc J. Goldstein, "A Glance Into History for the Emergency Arbitrator," 40 Fordham Int'l L.J. 779, 792-94 (2017). With regard to harm,

some tribunals recognize that even where losses can be compensated with money damages, they may be sufficiently "substantial" or "serious" to warrant interim relief. See, e.g., *Kompozit v. Republic of Moldova*, SCC Arbitration No. 2016/095, Emergency Award on Interim Measures, ¶¶86-88 (June 14, 2016); *PNG Sustainable Dev. Program v. Indep. State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award, ¶ 109 (May 5, 2015). To take another example, a tribunal reasoned that the granting of interim relief would be appropriate to prevent the *aggravation* of the dispute in arbitration. *Distrib. A v. Mfr. B*, ICC Case No. 10596. There, after the termination of two distribution agreements, the manufacturer sought an order directing the distributor to deliver certain documents so that it could continue to sell products in a particular country. There was virtually no dispute that the contracts required delivery upon termination. The Tribunal granted the requested relief despite the absence of traditional irreparable harm. It reasoned that the parties had an obligation not to take actions that would aggravate the dispute.

With regard to "likelihood of success," the standard has been applied in a number of ways, many of which suggest a reluctance of panels to delve too deeply into the merits prior to the arbitration hearing, but others which suggest the opposite. See Hanessian & Dosman, supra, at 228 (listing various formulations of the standard, including "reasonable probability of success on the merits," "prima facie case," "reasonable possibility," "serious claim," "probable cause," "real probability of success," "good arguable case," "good prospects of success on the merits," and "a likelihood of success on the merits").

Notably, in a recent survey of requests for interim relief, de Cossío found that, whether explicitly or not, tribunals often base their rulings on a balancing of harms. See de Cossío, supra, at 266-69. In that article, de Cossío makes a compelling case for why balancing—in essence, harm reduction—should be the lodestar for interim relief.

An applicant for interim or emergency relief should only be required to establish that immediate loss or damage will result if relief is not granted, that it has an arguable case on the merits and that the equities are balanced in its favor.

While the institutional rules that permit emergency applications recite detailed procedures governing the application, as with interim measures more generally, the vast majority of providers do not invoke specific standards for awarding emergency relief. See generally ICC Art. 29 and App. V, Art. 6 (stating, among other things, that the EA's Order "shall be made in writing and shall state the reasons upon which it is based"); ICDR Art. 6(4) (stating that the EA shall have the power to order or award relief "that the emergency arbitrator deems necessary"). By contrast, JIAR Art. 3.3 directs an EA to "determine whether the party seeking emergency relief has shown that immediate loss or damage will result in the absence of emergency relief and whether the requesting Party is entitled to such relief." Note the use of the word "immediate" rather than "irreparable" and, again, no mention of "likelihood of success."

As can be seen above, virtually all of the major provider organizations implicitly reject the traditional common law test that requires a showing of irreparable harm and likelihood of success. Furthermore, as a jurisdictional matter, an arbitrator's power to ignore these standards in most circuits is well-settled. For example, it has been the rule for many years in the Second Circuit that an arbitrator has wide discretion to craft interim relief that would even be unavailable in a court of law. *Sperry Int'l Trade v. Gov't of Israel*, 689 F.2d 301, 306 (2d Cir. 1982).

Consistent with that rule, and the growing recognition that the traditional standard is often too rigid a construct in international commercial arbitration, it is submitted that an applicant for interim or emergency relief should only be required to establish that immediate loss or damage will result if relief is not granted, that it has an arguable case on the merits and that the equities are balanced in its favor. "Irreparable harm" and "likelihood of success" should not be an arbitrator's guiding star.