

When Speed and Cost Matter: Emergency and Expedited Arbitration

By Peter Michaelson

Often, a disputant needs immediate relief. This happens when a counter-disputant, anticipating the commencement of legal action against it, unilaterally attempts to suddenly change the status quo to the detriment of his adversary. The disputant may expeditiously need to, e.g.: protect or secure property, including essential evidence, then in possession of a counter-disputant from destruction; enjoin the counter-disputant from disclosing confidential information of the disputant; or secure assets, which the counter-disputant is otherwise likely to transfer out of a tribunal's jurisdiction.

Historically, if the disputant initiated arbitration, it was unable to obtain any arbitral relief until a tribunal was fully constituted—a process that could consume several weeks to a few months. In such instances, the disputant had no choice but to apply to a local court for interim relief. That approach was problematic. The relief needed may not have been available as the counter-disputant was then outside the court's jurisdiction and, if located overseas, unwilling to consent to jurisdiction based on a fear that a national court would be biased against it. And court proceedings were public, potentially lengthy and costly, and often veered in unexpected directions. Thus, the disputant had no real choice but to wait until the tribunal was established and run the risk posed by imminent adverse action taken by its counter-disputant.

To provide immediate relief in such situations, arbitral institutions supplemented their rule sets to provide emergency arbitration procedures. For use where urgent relief was not required but transaction cost and pendency time were still of primary concern, institutions added expedited proceedings featuring significantly shortened deadlines and other abbreviated aspects over standard arbitration.

Specifically, in 1999, the American Arbitration Association (AAA) implemented its Optional Rules for Emergency Measures of Protection. These rules were seldom employed as

parties affirmatively needed to agree, in their arbitration agreement, on their use. Subsequently, the AAA amended its arbitration rule set effective Oct. 1, 2013, to incorporate, through Rule 38, much of the optional rules and make the underlying procedures mandatory in all AAA administered arbitrations (under arbitration agreements entered into on or after Oct. 1, 2013) subject to parties expressly opting-out (Rule 38a). Emergency arbitration provisions now also exist in the rule sets of many major international arbitral institutions, such as, e.g., Article 6 of the current ICDR Arbitration Rules (the ICDR is the international arm of the AAA).

Emergency arbitration is very rapid. As of Sept. 15, the ICDR has administered 40 emergency arbitrations with an average pendency of just three weeks—starting from the time a request is made to the AAA/ICDR to initiate the procedure, to the time an award is rendered.

Under AAA Rule 37, an arbitrator has the power to order whatever interim or conservancy measures she deems necessary and to condition such measures upon an applicant's posting sufficient security.

Under AAA Rule 38, an applicant seeking emergency relief must first submit a written request to the AAA, copied to all other parties, specifying the relief sought, and why it is entitled to that relief and requires it on an emergency basis (Rule 38b). No *ex parte* requests are allowed. Within one day of receiving the request, the AAA appoints a single emergency arbitrator. Upon appointment, that arbitrator makes all necessary disclosures. Challenges to that appointment must be made within one day after the parties receive notice of the appointment (Rule 38c). Within two days after the appointment, the emergency arbitrator establishes a schedule for the emergency proceeding (Rule 38d) typically through teleconference, videoconference or email. The arbitrator can hold a formal-merits hearing, whether in-person or not and through whatever modality she deems best, and require written submissions or proceed solely on submissions. The arbitrator can rule on her own jurisdiction and whether emergency arbitration is even applicable (Rule 38d). If the applicant shows that: (a) immediate or irreparable loss or damage would occur in the absence of the requested relief; and (b) is entitled to the relief sought, the arbitrator issues a reasoned award/order granting that relief (Rule 38e), subject to appropriate security being posted (Rule 38g), with that relief being broadly defined in Rule 37. Until the arbitral panel is

constituted, the emergency arbitrator, upon request of a party and on the basis of changed circumstances, can modify the award/order. The emergency arbitrator has no further power once the arbitral tribunal is constituted and, absent party agreement to the contrary, cannot serve on that tribunal (Rule 38f). Alternatively, any party can judicially seek interim relief without waiving its right to arbitration (Rule 38h). Costs for the proceeding are initially apportioned by the emergency arbitrator, subject to the tribunal changing that apportionment as part of its costs award (Rule 38i). Highly similar provisions exist in the ICDR rules.

Emergency arbitration rules are silent on discovery, thus leaving the emergency arbitrator with broad discretion to order it. Nonetheless, the extremely short deadlines in these proceedings effectively preclude any discovery, thus relegating parties to solely rely on their own evidence.

Although an emergency arbitrator has very broad authority, the AAA/ICDR rules (and others) do not articulate any standard to be applied, how it should be exercised and to what extent, and the corresponding burden of proof placed on an applicant. Published reports of decisions of emergency arbitrators reveal that such arbitrators require an applicant to demonstrate: (1) urgency; (2) at least a *prima facie* case on the merits at least to the extent of the relief requested; and (3) some concept of irreparable harm, i.e., the applicant cannot be made whole in the event of a subsequent monetary award by the tribunal.

An emergency arbitrator immediately takes control of the process, and very rapidly, in succession, organizes the proceeding, issues a scheduling order, obtains submissions from counsel, undertakes a merits hearing, if desired, and renders a reasoned award—all within a matter of a couple of weeks. Counsel and their clients must prepare themselves for a short but very intense, frenetic, focused process, with extremely tight time periods within which to create their submissions and prepare for and attend hearings.

Advantageously, parties to an emergency arbitration often gain invaluable early insight into how an ensuing tribunal would perceive the merits of their dispute simply by extrapolating the emergency arbitrator's decision. Often, they use that insight to quickly resolve their entire dispute, either because the party seeking emergency relief realized it had no realistic possibility

to obtain an effective remedy should it ultimately prevail in the ensuing arbitration, or was persuaded that the tribunal would skeptically view its success of prevailing on the merits of its underlying claims. Such early resolution eliminates further arbitration, thus yielding considerable savings in both time and cost.

Judicial decisions concerning emergency arbitration are scant. While none have yet issued in the state or federal courts in New Jersey, the Federal District Court in New York in *Yahoo! Inc. v. Microsoft Corp.* (2013 WL 5708604, Case No. 13CV7237 (Part I)) (U.S.D.C. S.D.N.Y., Oct. 21, 2013) recently enforced a AAA emergency arbitration award. There, Microsoft and Yahoo contractually agreed that, by 2011, Yahoo would transition its search queries originating in two foreign markets onto Microsoft's Bing search engine. Technical problems ensued. Consequently, the parties agreed to delay the transition to the end of October 2013. On Sept. 20, 2013, Yahoo notified Microsoft that it was then not proceeding with the transition but hopefully would resume in early 2014.

That same day, Microsoft informed Yahoo that it considered Yahoo in breach of their agreement. On Sept. 26, Microsoft commenced an emergency arbitration, through the AAA, seeking specific performance to compel Yahoo to timely complete the transition. On Oct. 14 (only 18 days after the emergency arbitration was initiated) and after extensive briefing and a two-day hearing, the emergency arbitrator rendered his award through which he denied the request for specific performance, but issued an injunction that "restores the parties to the activities they were ready to proceed with before the pause." The next day, Yahoo filed a motion in the Southern District to vacate the award on either of two grounds: first, the emergency arbitrator exceeded his powers by ordering "final permanent relief" rather than interim relief; and second, the arbitrator manifestly disregarded the law by finding an emergency and irreparable harm.

District Judge Patterson rejected Yahoo's first ground by holding that, under the parties' agreement, which expressly authorized the arbitrator to "compel and award interim injunctive or emergency relief," there is more than a "colorable basis" for finding that the arbitrator was authorized to grant the requested relief. The court rejected Yahoo's second ground by holding

that the arbitrator made factual findings, based on the evidence presented, of both an emergency and immediate irreparable harm, and Yahoo's inability to point to a clear rule of law that the arbitrator either ignored or failed to apply in awarding final equitable relief. As no basis existed to vacate the award under the Federal Arbitration Act, the court confirmed it. The court noted that if "an arbitral award of equitable relief based on irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made," hence recognizing the importance of enforcing arbitral awards granting emergency and interim relief.

As New Jersey statutory law recognizes the broad powers of an arbitrator to grant interim relief, a very strong likelihood exists that New Jersey courts will similarly follow the Southern District of New York in recognizing and enforcing an emergency arbitration award. Section 2A:23B-8(b) ("Provisional Remedies") of the New Jersey Revised Arbitration Act states in pertinent part:

After an arbitrator is appointed and is authorized and able to act:

(1) the arbitrator may issue 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 pursuant to the same conditions as if the controversy were the subject of a civil action.

Expedited arbitration is similar to emergency arbitration. Deadlines are significantly relaxed over those in emergency arbitration but still considerably shorter than in a standard arbitration. An expedited proceeding has a three-month pendency with, e.g., a scheduling order issued within 14 days of the appointment of the arbitrator. An expedited arbitration tribunal consists of a single arbitrator, appointed through a strike-list process, with full power to grant interim and other forms of relief. This procedure (e.g., Rules E-1 through E-10 of the AAA Arbitration Rules), while time- and cost-efficient, is normally reserved for relatively low-value disputes, such as \$75,000 or less, though parties are free to agree to use it for any dispute.

Through emergency arbitration, disputants can now obtain emergency relief often in just a few weeks. Where such urgency is not necessary, expedited arbitration provides a useful alternative. Counsel and parties should seriously consider these procedures as, under appropriate

circumstances, they can yield substantial efficiencies and be extraordinarily beneficial where speed and cost matter.

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