



A Possible Change to the Value of Arbitral Injunctions

By Theo Cheng

Alternative dispute resolution processes like arbitration and mediation help resolve a wide variety of disputes. With respect to arbitration, that process is generally defined to be a private dispute resolution mechanism in which the parties engage a neutral, disinterested third party (called the arbitrator), who is tasked with determining the merits of the dispute in a final and binding manner, according to rules and procedures that are agreed upon by the parties. Arbitration can resolve a broad array of disputes and is well-suited to addressing disputes where the parties anticipate requiring that the decision maker have specific subject matter and/or industry expertise. The selection of the appropriate arbitrator (or arbitrators) – those who can appreciate both the legal issues and the technical industry concepts involved – is critical to achieving a just result. Moreover, if properly managed by the arbitrator or arbitral tribunal, the parties, and their counsel, arbitration can result in a dispute resolution process that is fair, expeditious, and cost-effective.

The Availability of Interim Relief in Arbitration

The availability of interim relief from an arbitral tribunal in advance of the hearing on the merits may be of significant value to a litigant. There are myriad situations where short-term relief might be needed to stop offending conduct or maintain the status quo. Also known as provisional, preliminary, or interlocutory relief, some simple examples might include:

- freezing a bank account to prevent monies from dissipating;
- enjoining a ship from leaving a pier to stop cargo from entering international waters;
- issuing a temporary restraining order to enforce the terms of a former employee's restrictive covenant;
- stopping a licensee from engaging in conduct that exceeds the scope of the limited license granted by the licensor; or
- compelling the seller of an ongoing business concern to provide to the buyer the business' financial records, customer lists, and passwords to various social media accounts.

Notably, under the Federal Arbitration Act (FAA),¹ courts have routinely held that arbitral tribunals possess the power to issue non-monetary remedies, and, in particular, to issue interim remedies before a hearing on the merits.² The power to grant interim relief has also been expressly granted by statute in 22 states and the District of Columbia, all of which have adopted the 2000 Revised Uniform Arbitration Act (RUAA), which provides:

the arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceed-

ing and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action.³

In New York, which has not adopted the RUAA, courts have nonetheless held that arbitrators have the authority under New York law to issue preliminary relief.⁴

Moreover, all of the major arbitration providers provide in their rulesets that an arbitrator possesses the authority to issue interim relief. For example, the AAA's Commercial Arbitration Rules expressly authorize arbitral tribunals to broadly afford interim relief, "including injunctive relief and other measures for the protection or conservation of property and disposition of perishable goods."⁵ More recently, providers have also included emergency arbitrator provisions in their default rules (although each expressly allows the parties to opt out of these provisions in their arbitration agreements). For example, for arbitrations conducted under clauses or agreements entered into on or after October 1, 2013, the AAA Commercial Arbitration Rules explicitly create a default procedure for the issuance of emergency measures of protection prior to the time the merits arbitrator is appointed (or the full merits tribunal is constituted). Under that procedure, the AAA will appoint a single emergency arbitrator to rule solely on emergency applications within one business day of its receipt of a written notice identifying the nature of the relief sought and the reasons the relief is required on an emergency basis.⁶ Within two business days of the appointment, the emergency arbitrator will set down a schedule for consideration of the application and is vested with the authority to enter an interim order or award granting the relief.⁷

This procedure was effectively utilized in a contract dispute between Microsoft Corporation and Yahoo! over the timing of the transfer of the Yahoo! search capabilities and ad services to Microsoft's Bing search engine. In that arbitration, the emergency arbitrator entered an injunction within 18 days of an evidentiary hearing, with a federal court confirming that decision one week later.⁸ That case also involved certain work to be performed in Taiwan and Hong Kong, and because the offending conduct had an international dimension, this U.S. arbitration procedure also possessed the salient feature of affording enforcement overseas through the operation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which recognizes and enforces arbitral awards in most other countries in the world.⁹

As illustrated by the forgoing case, the issuance of interim relief—even on an emergency basis—can be efficient, effective, and fair. It can provide the parties with a valuable short-term

[O]ne of the well-known drawbacks to having an arbitral tribunal issue injunctive relief is the limitation that the tribunal only has jurisdiction (or authority) over those who appear before them.

remedy that will either stop offending conduct or maintain the status quo until the underlying dispute can be resolved through a robust evidentiary hearing on the merits. As is true in court proceedings, depending on the circumstances, the interim relief ordered by the arbitral tribunal alone may afford the parties complete relief.

Injunctive Relief in the Arbitral Forum When Nonparties Are Involved

Inasmuch as interim relief, and, specifically, injunctive relief, can be effective as between the parties to the disputes, one well-known drawback of seeking injunctive relief in arbitration is the jurisdictional limitation placed on the tribunal with respect to nonparties who do not appear before the tribunal. That is, a tribunal could not, for example, enjoin entities or persons who act in concert with one of the parties to the arbitration proceeding. Although arbitral tribunals can assuredly issue injunctive relief against parties who have contracted for arbitration and are before them, tribunals cannot exercise jurisdiction over those who are not properly before them. A tribunal also could not extend an injunction to similar cases that are not before the same tribunal.

By contrast, until recently, federal courts were able to issue what are known as universal or nationwide injunctions that bar the enforcement of a law anywhere in the country, even as against individuals and entities who are not a party to the lawsuit in which the injunction arose. Unlike arbitral tribunals, even in civil actions between private parties, federal courts could extend the scope of its injunction to individuals and entities who act in concert with the parties properly before the court. The U.S. Supreme Court's decision at the end of the last term in *Trump v. CASA, Inc.*¹⁰ appears to have diminished the importance of this distinction in the scope of authority to grant injunctive relief as between federal courts and arbitral tribunals.

In *CASA*, the Court was presented with three overlapping, universal preliminary injunctions that had been entered by three different federal district courts enjoining the implemen-

tation and enforcement of President Trump's Executive Order No. 14160. As summarized in the decision,

[t]he Executive Order identifies circumstances in which a person born in the United States is not "subject to the jurisdiction thereof" and is thus not recognized as an American citizen. Specifically, it sets forth the "policy of the United States" to no longer issue or accept documentation of citizenship in two scenarios: "(1) when [a] person's mother was unlawfully present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when [a] person's mother's presence in the United States was lawful but temporary, and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth." The Executive Order also provides for a 30-day ramp-up period. During that time, the order directs executive agencies to develop and issue public guidance regarding the order's implementation.¹¹

On certiorari, the Court addressed whether federal district courts possess the authority to issue universal or nationwide injunctions that block the enforcement of federal policies by anyone other than the parties appearing before the trial court. Writing for the 6-3 majority, Justice Amy Coney Barrett grounded her analysis in the Judiciary Act of 1789 and the historical limits of equitable relief, concluding that federal courts may grant only those remedies traditionally available in equity, i.e., relief tailored to the specific plaintiffs in the action. Because universal injunctions extend relief to nonparties and lack grounding in historical practice, the Court held that such injunctions likely exceed the equitable authority granted to the federal courts. Consequently, the Court partially stayed the lower courts' nationwide injunctions to the extent that they went beyond providing "complete relief" to the plaintiffs. The majority emphasized that it was not deciding the underlying constitutional question (here, the validity of an executive order concerning birthright citizenship) and noted that broader relief might still be achieved through mechanisms such as class actions. The dissent, however, argued that limiting nationwide relief risks allowing potentially unconstitutional policies to operate against nonparties. Thus, a key takeaway from the *CASA* decision is that injunctions issued by federal courts must be tailored to the parties involved in the lawsuit, and not the entire country. By limiting the power of lower federal courts to halt federal policies on a national scale, the decision represents a major shift.

However, in the context of examining and comparing court proceedings to arbitral proceedings, *CASA* narrows the disparities and reduces the gap in authority to grant injunctive relief, thereby changing the calculus for assessing the differences. Said differently, if the availability of injunctive relief is a significant factor in forum selection, the *CASA* decision arguably ameliorated the perceived drawback of arbitration, and arbitral tribunals and courts now stand on a more equal footing.

Of course, *CASA* is distinguishable on at least two grounds. First, the case involved governmental actors and policies, which is hardly the typical case that ends up in the arbitral forum. Specifically, the case addressed the nature and scope of universal preliminary injunctions pertaining to the implementation and enforcement of executive branch policies, which are distinct from the commercial, tort, employment, consumer, and other disputes that are more commonly found in the arbitral forum. Second, *CASA* involved prohibitive injunctions – ones that are entered to preserve the status quo and prevent the implementation of a newly promulgated governmental policy. There is an open question as to whether the holding in that case applies equally to mandatory injunctions, which compel a party to take specific affirmative action or perform a particular act, often to undo a previous wrong or comply with a legal obligation. Presumably, though, the reasoning of the *CASA* Majority would apply with equal force irrespective of the type of injunction.

In any case, the perceived drawbacks of seeking injunctive relief in the arbitral forum may be reduced due to the *CASA* decision. It remains to be seen what empirical impact that perception may have on parties' contractual choices to arbitrate that are reflected either in pre-dispute agreements or in post-dispute submission agreements.

Theo Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property, technology, entertainment, and employment disputes. He is a AAA Master Mediator, a fellow of the College of Commercial Arbitrators, a member of the National Academy of Distinguished Neutrals, and a former chair of the New York State Bar Association Dispute Resolution Section. Cheng is also an adjunct professor at New York Law School where he teaches two ADR-related courses. He has nearly 25 years of experience as an intellectual property and commercial litigator. More information is available at www.theocheng.com, and he can be reached at theo@theocheng.com.

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Endnotes

1. 9 U.S.C. § 1 *et seq.*
2. See, e.g., *CE Int'l Res. Holdings LLC v. S.A. Minerals Ltd. P'ship*, No. 12 Civ. 8087 (CM), 2012 U.S. Dist. LEXIS 176158, at *13-15 (S.D.N.Y. Dec. 10, 2012) (confirming and enforcing arbitrator's interim award that provided for pre-judgment security and a so-called *Mareva-style* injunction preventing respondent from transferring any assets, wherever located, up to the amount of \$10 million until that security is posted); *On Time Staffing, LLC v. Nat'l Union Fire Ins. Co.*, 784 F. Supp. 2d 450, 455 (S.D.N.Y. 2011) ("Prior to the rendering of its final decision, the Panel, in the absence of language in the arbitration agreement expressly to the contrary, possesses the inherent authority to preserve the integrity of the arbitration process to which the parties have agreed by, if warranted, requiring the posting of pre-hearing security."); see also *British Ins. Co. of Cayman v. Water St. Ins. Co.*, 93 F. Supp. 2d 506, 516 (S.D.N.Y. 2000) ("Courts in this Circuit have firmly established the principle that arbitrators operating pursuant to [the FAA] have the authority to order interim relief in order to prevent their final award from becoming meaningless."); accord *Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1022-23 (9th Cir. 1991) (same).
3. RUAA, § 8(b)(1).
4. See, e.g., *Park City Assocs. v. Total Energy Leasing Corp.*, 58 A.D.2d 786, 786-87 (1st Dep't 1977) ("Special Term properly refused to exercise its discretion and grant injunctive relief since the parties have selected the arbitration forum for the resolution of their controversies, and in such circumstances equitable relief by the arbitrator may be appropriate.>").
5. AAA Commercial Arbitration Rules (Sep. 1, 2022), Rule R-38(a).
6. *Id.*, Rule R-39(b), (c).
7. *Id.*, Rule R-39(d), (e).
8. See *Yahoo! Inc. v. Microsoft Corp.*, 983 F. Supp. 2d 310 (S.D.N.Y. 2013); see also Kim Landsman, *Microsoft Case Is Great Example of Emergency Arbitration*, Law360 (Dec. 13, 2013), www.law360.com/articles/495144/microsoft-case-is-great-example-of-emergency-arbitration.
9. There are numerous resources that provide more information on the New York Convention. See, e.g., New York State Bar Association's Choose New York Law For International Commercial Transactions (2014) and Choose New York for International Arbitration (2011); United Nations Commission on International Trade Law (UNCITRAL) (<https://uncitral.un.org/en>); New York Arbitration Convention (<https://www.newyorkconvention.org/>).
10. 606 U.S. 831 (2025).
11. *Id.* at 838-39 (quoting and citing Executive Order 14160).

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