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Obtaining Emergency Relief under a Requirement to Arbitrate

By: Rich May

Arbitration clauses in agreements are now ubiquitous. The requirement that parties submit all future disputes to arbitration – and forego traditional litigation in the courtroom – is commonly found in everything from heavily negotiated business contracts to generic click-through terms-and-conditions. The purported advantages of arbitration are that a final decision might be obtained more quickly and with less expense than by proceeding through the courts. It is debatable whether the alleged benefits of arbitration hold true, or justify the prevalence of such clauses. Parties should therefore seriously consider the pros and cons before inserting such a requirement into any agreement. One potential drawback to requiring arbitration is the potential difficulty in obtaining emergency or temporary relief[1].

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Not long ago providers of arbitration had virtually no rules or processes for delivering prompt or emergency relief. This gap in services is particularly puzzling because 'speed' has always been touted as one of arbitration's primary strengths. But what happens if you are bound by an arbitration clause and you need immediate relief? Where do you turn? How will you obtain a temporary restraining order, preliminary injunction, or attachment?

Historically, parties turned to the courts for emergency relief even when bound by an agreement to arbitrate. The American judicial system has long established mechanisms for providing relief on short notice. By contrast, arbitration as a field is still young and evolving. However, not every court was willing to grant provisional relief to parties bound by arbitration clauses. These courts pointed out that the parties were contractually required to proceed via another form of dispute resolution.

In response to this deficiency, major arbitration organizations such as the American Arbitration Association (AAA) and JAMS have adopted procedures for emergency relief. However, these procedures generally limit the type of relief that can be sought. Additionally, an "emergency" decision by an arbitrator can take several business days. For example, AAA Commercial Rule 38 lays out "Emergency Measures of Protection" but describes a procedure in which an arbitrator is appointed within one business day,

potentially replaced after another business day, a schedule is then established within two business days, and only then are all parties heard as to whether provisional relief is warranted. In order to be effective, emergency relief often needs to be faster. Furthermore, sometimes emergency relief must be granted without notice to an opposing party. A few business days is often all that is required to frustrate the purpose of any provisional relief – property can be transferred or a bank account emptied. Complicating matters further, some arbitration provisions, such as the AAA's Expedited Procedures, must be expressly adopted in agreements in order for parties to use them. By the time a dispute arises it might be too late for the parties to avail themselves of such procedures. Finally, other problems can arise if an agreement does not define which arbitration service will be used, or if a specified arbitration service does not have explicit procedures for provisional relief.

Even with the new arbitration rules around provisional relief many litigants still turn to the courts for emergency or temporary relief. However, more courts now turn parties away where arbitrators have provisions for supposed relief. The result is that even more jurisdictions are now reluctant to provide emergency relief to parties bound by arbitration agreements. This further complicates the dilemma of litigants seeking provisional relief.

The issues surrounding emergency or temporary relief via arbitration highlight two concerns: First, any arbitration clause must be carefully drafted and the parties must fully understand any procedures to which they are committing. If an arbitration clause is included in an agreement, it should precisely define the procedures around any future emergency or temporary relief. Second, parties to arbitration clauses must fully consider and understand their options when seeking emergency relief. Considerations of process, notice, timeliness, and enforceability must all be reviewed. An attorney can be of great value in navigating all of these issues, and Rich May attorneys are ready to assist in evaluating options, drafting, prosecuting, and defending arbitration clauses.

Disclaimer: This summary is provided for educational and information purposes only and is not legal advice. Any specific questions about these topics should be directed to attorney Nathaniel Donoghue.

1. Depending on the applicable law or institutional rules, the remedy may be referred to as "emergency," "prejudgment," "provisional," "preliminary," "interim," "conservatory," or "temporary." [X]