Emergency Relief in Arbitration: What are the Options?*

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The need for interim or emergency relief is one which may arise in any arbitration. It is sought when one party has reason to believe that the other party is taking steps to change the status quo or prejudice the outcome by disposing of evidence, hiding assets or impairing the value of the subject matter of the dispute.

In litigation such relief is sought from the court, typically at the beginning of the case, either on no notice or on short notice to the other side. In arbitration, exactly the same option is available. All modern arbitration statutes and major institutional rules provide that any party to an arbitration may apply to a court for interim or emergency relief in support of an arbitration without in any way being in breach of the agreement to arbitrate or affecting its right to have the dispute arbitrated.

In many countries, the court system does not have the confidence of both parties. There could be a concern, not only that the interim relief will not be granted or that the application will not be efficiently processed but that the court will find ways to interfere with the arbitration itself. Alternatively, while the arbitration may be taking place in a venue with good courts, the respondent may not be personally subject to the jurisdiction of the court, or the assets that are the subject of the application may be located elsewhere. In those circumstances, the ability to apply to the arbitral tribunal instead of to a court may be attractive.

But what if the arbitration tribunal has not yet been appointed, or if the applicant feels that notifying the other side of the application would potentially prejudice the application.

Attempts to resolve these issues within the arbitration process have been made by amendments, in recent years, to the rules of various arbitration institutions and to the UNCITRAL Model Law on International Commercial Arbitration. The latter has, in turn, been put forward by the Uniform Law Conference of Canada as a new Canadian Model Law for International Commercial Arbitration. There are indications that this law may be adopted in the near future by

one or more provinces and, as drafted, the provisions would retroactively apply to existing arbitration agreements.

All drafters of arbitration clauses should be aware of these changes since some of the provisions, especially those permitting *ex parte* applications to an arbitration tribunal for interim relief are controversial.

Many institutions have changed their rules to provide that an applicant for interim relief who does not want to wait for the formation of the tribunal, may ask the institution to appoint an "emergency arbitrator". Internationally, the ICC and the American Arbitration Association through its International Centre for Dispute Resolution have adopted such rules. In Canada, ADR Institute of Canada has adopted similar rules.

The emergency arbitrator procedure has its limitations. The emergency arbitrator will be an individual who is well regarded by the institution, but conflict issues relating to the appointment may delay the emergency process. The decision by the emergency arbitrator is typically not enforceable until it has been confirmed by the tribunal once it is in place. The rules themselves contain a built in undertaking to comply with the emergency arbitrator's award until the tribunal has varied or confirmed it. However, relying on voluntary compliance may be counterintuitive in circumstances which genuinely justify the appointment of an emergency arbitrator.

A key limitation is that any interim award, by an emergency arbitrator, or by the tribunal itself, is not enforceable against non-parties to the arbitration, such as banks or information custodians, without having first been converted into a court judgment in the relevant jurisdiction.

Ex parte applications in an arbitration context raise additional concerns, especially if they are made to the tribunal that will decide the merits. There is a danger that the one sided procedure will be used strategically to taint the other side in the minds of the tribunal (unlike *ex parte* court applications which are never heard by the trial judge).

In addition, many arbitration practitioners feel strongly that *ex parte* applications will undermine the consensual and collaborative nature of arbitration.

It is understandable that those who have chosen to arbitrate rather than to litigate may prefer to have all possible remedies included in the private arbitration forum. However, where it seems likely that such relief may be needed, other options may be used to achieve that result. For example, parties may include in the arbitration agreement a panel of named individuals from which the party initiating the arbitration may select a sole arbitrator when the dispute arises. That way a tribunal is immediately in place to deal with the arbitration as a whole, and available to hear applications for interim relief as appropriate.

In any event, the issue of emergency relief is less critical when the arbitration is sited in a jurisdiction with a good court system. In their agreement, the parties should consider excluding the possibility of *ex parte* applications to the tribunal that will hear the merits. Should the need truly arise, i.e. in an urgent situation involving bad faith conduct, the court is likely to be a more effective forum in any case where a good seat for the arbitration has been selected.

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* Published as " Hitting the Stop Button…" by *The Lawyers Weekly,* October 30, 2015. (Published title not chosen by the author.)

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