PROVISIONAL REMEDIES IN ARBITRATION-POWERFUL TOOLS SELDOM USED

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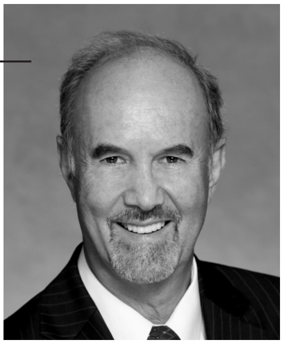

INTRODUCTION

Arbitrators have the power and authority to order provisional remedies under the arbitration laws of most states, including California, and under the rules of most ADR provider organizations, and in international arbitrations. Yet in my experience as a commercial arbitrator in well over one hundred arbitrations provisional or injunctive relief is seldom requested by lawyers, and if requested seldom pursued, even if the applicable arbitration agreement and arbitration rules empower the arbitrator to order them. This reluctance could be because counsel are unaware provisional remedies are available in arbitration and may believe, erroneously, an arbitrator's order granting a provisional remedy is not enforceable or somehow waives a right to seek it in court if it first sought in arbitration. This article sheds light on the use of provisional remedies in arbitration in the hope counsel will request them more often, thus providing parties in arbitration with the benefits of these necessary tools.

WHAT ARE PROVISIONAL REMEDIES?

Provisional remedies are temporary or interim remedies intended to preserve the status quo pending determination of a dispute, such as by preserving assets out of which a subsequent award may be satisfied or preserving relevant evidence pending the evidentiary hearing. The California Arbitration Act defines a "'provisional remedy'" as including attachments, temporary protective orders, writs of possession, preliminary injunctions and temporary restraining orders, and the appointment of receivers. (Code Civ. Proc., § 1281.8.) This list is not exhaustive.

Examples from recent arbitrations over which I presided include requesting emergency relief to preserve essential healthcare data where there was evidence the custodian of the data was dissolving, requesting injunctive relief to prevent the misuse of software codes allegedly misappropriated, and requesting a temporary restraining order preventing controlling members of an LLC from denying other members rights to financial books. The American Arbitration Association (AAA) Commercial Arbitration Rule r-38 provides "the arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods."

SHOULD THE COURT OR THE ARBITRATOR RULE ON PROVISIONAL RELIEF?

The California Arbitration Act provides that a party that has already commenced arbitration can file an application for a provisional remedy in court without waiving the party's right to arbitration. (Code Civ. Proc., § 1281.8(b); see also *DHL Info. Servs. (Americas) Inc. v. Infinite Software Corp.* (C.D.Cal. 2007) 502 F.Supp.2d 1082 [injunction]; *Lambert v. Superior Court* (1991) 228 Cal.App.3d 383 [mechanics lien].) The statute empowers California courts to enforce a provisional remedy in arbitration "upon the ground that the award to which the applicants may be entitled may be rendered ineffectual without provisional relief." The statute does not, however, address court enforcement of an arbitrator's award of provisional relief. It addresses only a court issuing its own provisional relief order for a case in arbitration.

There is good reason to believe that a court will enforce an arbitrator's provisional relief award so long as there is an enforceable arbitration agreement that gives the arbitrator the power to award the relief. (Code Civ. Proc., § 1286 [courts shall confirm awards as made unless the award is vacated or corrected]; Federal Arbitration Act (FAA) 9 U.S.C. § 2 [commercial arbitration agreements are valid, irrevocable and enforceable].) Arbitration agreements incorporating provisional relief are enforceable in California even in consumer employment cases. (See *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237 [enforcing Code Civ. Proc., § 1281.8(b)].)

Courts asked to rule on an application for a provisional remedy in fact often decline to rule on it so the arbitrator can rule on it instead. (See *Simula, Inc. v. Autoliv, Inc.* (9th Cir. 1999) 175 F.3d 716 [injunction]; *China Nat. Metal Product v. Apex Digital, Inc* (C.D.Cal. 2001) 155 F.Supp. 1174 [writ of attachment].) The notion that courts should not rule on a provisional remedy application from an arbitration where the arbitrator can instead is found also in the Revised Uniform Arbitration Act of 2000 (RUAA) adopted in most states, which provides that "a party to an arbitration proceeding may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy." (RUAA, § 8(b)(2).) Under the FAA, federal courts may lack authority to provide injunctive relief in a case in arbitration where the relief is best left to the arbitrator, although there is conflicting case law holding they may have authority but only where the relief is needed to preserve the status quo. (See *Peabody Coalsales Co. v. Tampa Elec. Co.* (8th Cir. 1994) 36 F.3d 46.)

A party in arbitration requesting provisional relief against a third party may have no choice but to obtain the relief from a court because the arbitrator would not have enforcement powers against the third party, unlike a judge. If an arbitrator ordered a freeze of a bank account or enjoined a third party from using misappropriated trade secrets, the arbitrator would have no power to enforce the order if it was violated. If the provisional relief affects only the parties in the arbitration, or nonsignatory parties such as agents or alter egos of named parties who are compelled by the arbitrator or a court to participate in the arbitration, there should be no need for judicial enforcement. Parties usually will comply with an arbitrator's provisional relief order just as they would comply with other orders from the arbitrator to avoid potential sanctions, and to avoid making the dispute public if they seek enforcement in court. For example, if an arbitrator orders a corporation not make withdrawals from its bank account without notifying opposing party, or orders an employee of a party not to use allegedly misappropriated trade secrets without notifying opposing party, it is likely the parties will comply without court intervention so long as the orders are clear and reasonable in scope and duration.

PROVISIONAL REMEDIES IN ARBITRATION ARE EASIER TO OBTAIN

Obtaining provisional relief in arbitration should be easier than in court because of the laxity of evidentiary conventions and procedural formalities in arbitration versus court. Rules of evidence are not generally observed in arbitration. California law provides that rules of evidence and judicial procedure need not be observed in arbitration, unless the arbitration agreement otherwise provides, or unless the parties to the arbitration otherwise provide by an agreement which is not contrary to the arbitration agreement. (Code Civ. Proc., § 1282.2(d).) Rules of most ADR provider organizations enable arbitrators to consider evidence in their discretion and not in conformance to the rules of evidence. (See AAA Commercial Arbitration Rules, r-35(b).) Arbitrators usually admit most evidence and sustain limited evidentiary objections, such as privilege and work product. Arbitrators use their experience and subject matter expertise to weigh evidence that would be objectionable or inadmissible in court. Briefs are letter briefs which do not have to satisfy pleading requirements. The formatting and due dates for briefs are discussed with the parties and agreed upon at a hearing and approved by the arbitrator to fit the nature and complexity of the case, not prescribed by a code of civil procedure as "one size fits all."

Motion practice in arbitration practice is much more efficient than in court. For example, in a request to enjoin a subsidiary of a parent company in arbitration from using trade secrets allegedly misappropriated by employees of the parent, in court there likely would be extensive motion practice on whether the subsidiary is controlled by the parent, whether there existed overlapping roles that would give the subsidiary access to the secrets and whether the data is a protectible trade secret. These related issues would be resolved, perhaps in one hearing, on a convenient date and time without the formality and potential delays of formal motion practice. Requests and responses for related action by the arbitrator, such discovery disputes, would be via email. Trade secrets would be litigated confidentially in arbitration without the need to file documents under seal, as would be required in court to protect confidentiality. A court may require a bond for the injunction, whereas an arbitrator would encourage the parties instead to agree on terms of a proposed order to avoid the expense and burden of a bond.

Arbitrators are asked "to . . . achieve a fair, efficient and economical resolution of the case." (AAA Commercial Arbitration Rules, r-24.) Parties in court do not pay for the judge, but parties in arbitration pay for the arbitrator. Efficiency and economy are more important considerations in arbitration than in court. When ruling on provisional relief arbitrators would avoid unnecessary, burdensome or time-consuming procedures even if required by statute or rule. For example, the strict notice requirements for motion papers under Code of Civil Procedure section 1005 and the separate hearings and deadlines in section 527 to determine if a temporary injunction order should become preliminary likely would not be followed. In court, a plea by counsel not to comply with statutory requirements would fall on deaf ears. Despite not following legal procedures arbitrators would usually comply with legal principles for provisional relief, such as determining if the requesting party will likely prevail on the merits and balancing the interim harm from granting the relief against the harm to the requesting party if the relief is denied. While California law defers to arbitral decisions even if the arbitrator does not follow the law, arbitral awards can be vacated when an arbitrator is aware of the law and ignores it. (*EHM Prods. v. Starline Tours of Hollywood, Inc.* (2021) 1 F.4th 1164.)

CONCLUSION

In sum, lawyers in arbitration would do their clients well by pursuing provisional relief from the arbitrator when warranted pending the final evidentiary hearing. An arbitral award granting it should be enforceable under federal and state law.

Robert S. Amador is a full-time commercial arbitrator and mediator based in Los Angeles. He is on the national panels of various ADR providers including the AAA, CPR, AHLA and ARC. He is a member of the Academy of Distinguished Neutrals.