# Injunctive Relief Pending Arbitration: The Evolving Role of Judicial Action

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From a franchisor's perspective, arbitration is a popular means of resolving franchise disputes for many reasons. First, because of the initial cost of filing an arbitration demand, arbitration may serve as a deterrent to legal action. Second, an agreement stating that arbitration must be conducted on an "individual" basis and may not be combined with other franchisee claims is likely to deter collective action by franchisees. Individual arbitration makes it harder to assert and prove claims that the franchisor engaged in a pattern of misconduct or that it treated franchisees differently, which are the types of claims likely to increase the scope of discovery, disrupt the franchise system, and influence arbitrator opinion. Third, arbitration proceedings are private, and the proceedings may be kept confidential by private agreement. Even if the proceedings are not "confidential" *per se*, submissions are not publicly available on databases such as PACER. Because of the lack of a public audience, submissions also may be more concise and less disparaging of the other party. Fourth, arbitration may provide a more predictable way for a franchisor to work with its preferred counsel because the rules that require attorney licensing or special permission to appear in a foreign state's courts do not always apply to counsel's participation in arbitration.[1] Finally, arbitration awards are

1. However, counsel must review a state's local and state laws to determine whether a *pro hac vice* application is required. Under ABA Model Rule 5.5(c)(3), a lawyer admitted in one United States jurisdiction may provide legal services on a temporary basis in a different jurisdiction that "are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are

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enforceable both under state law and by international treaty.[2] In domestic actions, the ability to enter or transfer a judgment is no more onerous than entering and transferring a judgment entered by a court. In international actions, arbitration is the preferred method of resolving disputes because enforcing an international arbitral award is often far easier than enforcing a judgment entered by a court.

In choosing arbitration, parties generally have the freedom to choose which disputes will be subject to arbitration and which disputes, if any, will be resolved through the judicial system. In the franchise context, it is not unusual for a franchise agreement to designate arbitration for most disputes but to carve out claims for declaratory and injunctive relief. In such cases, a dispute may arise concerning the scope and applicability of the carve-out. In these cases, either the court or the arbitrator must determine, in the first instance, the arbitrability of the claim.

Even where a claim is subject to arbitration, however, courts have the discretionary power to grant injunctive relief in aid of arbitration—to preserve the status quo in order to prevent the arbitration proceeding from being a meaningless exercise. Therefore, historically, parties to an arbitration agreement routinely applied to the courts for injunctive relief pending the outcome in arbitration. In 2013, however, several of the major arbitral institutions amended their rules to include emergency measures, including appointment of an emergency arbitrator with the power to grant injunctive relief before the arbitrator is appointed. This paper examines the effect of emergency relief in arbitration and the desirability of judicial intervention if emergency relief is available through arbitration.

## I. Emergency Measures in Arbitration

The International Chamber of Commerce (ICC) was one of the first arbitration organizations to adopt rules for emergency relief.[3] Adopted in 1990, the rules required parties to affirmatively "opt in" for the rules to

reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice *and are not services for which the forum requires pro hac vice admission. . . .*" Model Rules of Prof'l Conduct R. 5.5.(c)(3) (Feb. 8, 2019). And in California, for example, "an attorney who wants to provide legal help as arbitration counsel in California, but does not have a State Bar of California license can still serve as long as he or she applies to the Out-of-State Attorney Arbitration Counsel (OSAAC) program." *See Out-of-State Attorney Arbitration Counsel*, State Bar of Cal., http://calbar.ca.gov/Admissions/Special-Admissions/Out-of-State-Attorney-Arbitration-Counsel-OSAAC.

2. Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (also known as the New York Convention). The United States adopted the New York Convention, with an effective date of December 29, 1970. 9 U.S.C. § 201. Article II of the New York Convention provides for the enforcement of agreements to arbitrate, which provisions are beyond the scope of this paper.

3. Raja Bose & Ian Meredith, *Emergency Arbitration Procedures: A Comparative Analysis*, 15 Int'l Arb. Rev. 186, 187 (2012).

apply.[4] During the 1990s, the World Intellectual Property Organization (WIPO) also contemplated enacting its own emergency arbitration rules. Although WIPO ultimately decided not to do so at that time, it has recently adopted emergency relief rules.[5] In 1999, the American Arbitration Association (AAA)[6] adopted its Optional Rules for Emergency Measures of Protection, which, as the name suggests, required the parties' express agreement to use the emergency rules as their chosen framework for seeking emergency relief.[7]

After the turn of the century, the "opt-in" approach was abandoned in favor of an "opt-out" approach. In 2006, the International Centre for Dispute Resolution (ICDR), AAA's international division, adopted emergency rules that applied to disputes unless the parties contracted out of the rules.[8] AAA and the International Institute for Conflict Prevention & Resolution (CPR)[9] adopted mandatory rules for emergency measures in 2013.[10] Judicial Arbitration & Mediation Services (JAMS) followed suit shortly afterward in 2014, adopting emergency relief measures of its own.[11] Each of these new rules provides for the immediate selection of an arbitrator[12] and prompt

4. Grant Hanessian & E. Alexandra Dosman, *Songs of Innocence and Experience: Ten Years of Emergency Arbitration*, 27 Am. Rev. of Int'l Arb. 215, 216 (2016). One could question the success of these measures, as they were reportedly used only fourteen times during the first twenty-four years they were in place. *See* Bose & Meredith, *supra* note 3.

5. *See* World Intellectual Prop. Org., WIPO Arb. Rules r. 49 (2014).

6. The American Arbitration Association (AAA) was founded in 1926, shortly after the enactment of the Federal Arbitration Act, and is the oldest arbitration organization. David McLean, *US Arbitration Tribunals and Their Rules*, LexisNexis, https://www.lw.com/thoughtLeadership/us-arbitral-institutions-and-their-rules.

7. Peter Michaelson, *When Speed and Cost Matter: Emergency and Expedited Arbitration*, N.J. L.J. (Oct. 27, 2014), https://www.ccaarbitration.org/wp-content/uploads/Emerg-Relief(102714-NJLJ)(reprint).pdf.

8. Hanessian & Dosman, *supra* note 4, at 217.

9. The International Institute for Conflict Prevention & Resolution (CPR) was founded in 1977 as a way for corporations to lower the costs of litigation. CPR is well-known for having developed the CPR Pledge in the 1980s, which advocates for parties to engage in alternative dispute resolution prior to filing suit. Since the Pledge's creation, over "4,000 companies and 1,500 law firms have signed." *History*, CPR, https://www.cpradr.org/about/history.

10. *See* Am. Arb. Ass'n, Commercial Arb. Rules r. 38 (2016); Int'l Inst. for Conflict Prevention and Resolution, 2014 CPR Rules for Administered Arb. of Int'l Disputes r. 14 (Mar. 1, 2019). CPR, however, had a form of non-administered rules allowing emergency relief since 2007. Email from Helena Tavares Erickson, senior vice president, Dispute Resolution Services & Corporate Secretary, CPR (on file with author); *see also* Int'l Inst. for Conflict Prevention and Resolution, 2014 CPR Rules for Administered Arb. of Int'l Disputes r. 14 (Nov. 1, 2007).

11. JAMS was founded in 1979 and has over 350 neutrals arbitrators. *Arbitration Services*, JAMS, https://www.jamsadr.com/arbitration.

12. AAA will appoint an emergency arbitrator within one business day. Am. Arb. Ass'n, Commercial Arb. Rules r. 38(c) (2016). CPR gives parties one business day to select an emergency arbitrator, but, if parties cannot agree on an emergency arbitrator, CPR will appoint an arbitrator for them. Int'l Inst. for Conflict Prevention and Resolution, 2014 CPR Rules for Administered Arb. of Int'l Disputes r. 14 (Mar. 1, 2019), http://internationalarbitrationlaw.com/about-arbitration/international-arbitration-rules/icdr-arbitration-rules/icdr-arbitration-rules. JAMS shall "promptly appoint" an emergency arbitrator, which is "in most cases" within twenty-four hours from the initial request for an emergency arbitration. JAMS, JAMS Comprehensive Arb. Rules & Procedures r. 2(c)(ii) (July 1, 2014).

consideration of the matter in dispute.[13] Today, most arbitral institutions worldwide have adopted emergency arbitration procedures that apply unless the parties' agreement to arbitration expressly provides otherwise.[14]

Whether parties are now actually choosing to use the emergency relief measures is somewhat uncertain, but the limited available data suggest otherwise. For example, according to information provided by AAA in June 2015, only twelve "emergency arbitrations" were conducted in the twenty-one month period after its emergency relief rule was adopted in October 2013.[15] According to the 2017 Annual Report published for the ICDR, that agency administered seventy-six emergency arbitrations since adopting its emergency relief rules in 2006.[16] And according to the most recent JAMS statistics, which are through 2016, emergency arbitration under JAMS had been invoked only twelve times since the inception of its emergency relief rules in July 2014.[17] And as of January 2019, CPR reported only five requests for interim or emergency arbitration relief since it first adopted its non-administered rules in 2007, including the more recent 2013 rules.[18] The published success rates of parties seeking emergency relief are much lower, although it is unknown what percentage of initiated proceedings were settled or abandoned.[19]

13. AAA requires the emergency arbitrator to establish a schedule for consideration of the application for emergency relief, "as soon as possible, but in any event within two business days of appointment." Am. Arb. Ass'n, Commercial Arb. Rules r. 38(d) (2016). JAMS also requires the emergency arbitrator to establish a schedule "within two business days, or as soon as practicable thereafter." JAMS, JAMS Comprehensive Arb. Rules & Procedures r. 2(c)(iii) (July 1, 2014). CPR does not have requirements for a schedule but requires that the emergency arbitrator "conduct the proceedings as expeditiously as possible." Int'l Inst. for Conflict Prevention and Resolution, 2014 CPR Rules for Administered Arb. of Int'l Disputes r. 14.8 (Mar. 1, 2019).

14. Hanessian & Dosman, *supra* note 4. A number of other international arbitral institutions have adopted emergency rules, including the Singapore International Arbitration Centre (SIAC), Stockholm Chamber of Commerce (SCC), and London Court of International Arbitration (LCIA).

15. *See* Kristen M. Blankley & Peter R. Silverman, *The New Emergency Relief Arbitration Rules—The Death Knell for Court-Ordered Injunctions Pending Arbitration?*, Am. Arb. Ass'n (Apr. 13, 2016), https://www.slk-law.com/portalresource/lookup/poid/Z1tOl9NPluKPtDNIqLMRVPMQiLsSw43Em03D/document.name=/PRS.AAA%20webinar.April%202016.pdf. Pete Silverman and Kristen M. Blankley received statistics from Ryan Boyle, AAA Vice President—Statistics and In-House Research, who reported twelve arbitrations prior to June 15, 2015.

16. 2017 Am. Arb. Ass'n Annual Report & Financial Statements, 1, 20, https://www.adr.org/sites/default/files/document_repository/AAA_AnnualReport_Financials_2018.pdf.

17. Blankley & Silverman, *supra* note 15.

18. Email from Helena Tavares Erickson, Senior Vice President, Dispute Resolution Services & Corporate Secretary, CPR (on file with author).

19. Blankley & Silverman, *supra* note 15. Author Pete Silverman received information from JAMS on April 11, 2016. As of 2016, JAMS provided information on nine of the emergency arbitrations, although not of the applicant's success. Of the nine matters that JAMS had statistics on, "five requests did not go forward for various reasons." In the other four:

- "An emergency arbitrator was appointed, issued a ruling, and then the parties settled the matter.
- An emergency arbitrator was appointed and issued a ruling. The parties stipulated to moving forward with the arbitration, and asked for the emergency arbitrator to serve for all purposes.

Parties may be reluctant to seek emergency relief in arbitration for several reasons. First, cost may be a consideration. Judges and court personnel are paid with taxpayer dollars; arbitrators and arbitral institute staff are paid by the parties. Second, an arbitration tribunal lacks the power to hold parties in contempt. Third, the arbitration rules likely require advance notice to the other party,[20] which may deprive the moving party of the ability to obtain relief before the damaging act has occurred; court-ordered injunctions may be obtained, in some instances, without advance notice. Finally, and significantly, unless the arbitration clause specifically provides for appeal, there is no right to appeal the grant or denial of injunctive relief by an arbitration tribunal; in comparison, under federal law, orders "granting, continuing, modifying, refusing or dissolving injunctions" are appealable as a right.[21]

## II. Where Claims for Injunctive Relief Are Excluded from Arbitration

The Federal Arbitration Act does not confer an absolute right to compel arbitration—it only places agreements to arbitrate on the same footing as other contracts and confers a right to obtain an order directing that "arbitration proceed *in the manner provided for in [the parties'] agreement.*"[22] As the United States Supreme Court has recognized, arbitration is a matter of contract, and, consistent with that oft-stated admonition, courts must "rigorously enforce arbitration agreements according to their terms."[23]

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- An emergency arbitrator was appointed and issued a ruling. The parties then appointed a new arbitrator and [the case proceeded].
- An emergency arbitrator was appointed and determined that he could not rule because the requested relief was the permanent relief requested in the matter. The parties chose the emergency arbitrator to be the permanent arbitrator, and the case . . . proceed[ed]."

For CPR, out of the five requests to invoke the rules, one request resulted in the grant of emergency relief, two resulted in the denial of emergency relief, one resulted in a stipulation, and one request was withdrawn. Email from Helena Tavares Erickson, Senior Vice President, Dispute Resolution Services & Corporate Secretary, CPR (on file with author).

20. *See*, *e.g.*, Am. Arb. Ass'n, Commercial Arb. Rules r. 38(b) (2016) (noting that a party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought. . . . Such notice . . . must include a statement certifying that all other parties have been notified or an explanation of the steps take in good faith to notify other parties."); Int'l Inst. for Conflict Prevention and Resolution, 2014 CPR Rules for Administered Arb. of International Disputes r. 14.3 (Mar. 1, 2019) ("Emergency measures . . . are requested by written application to CPR . . . and shall certify that all other parties affected have been notified of the request or explain the steps taken to notify such parties"); JAMS, JAMS Comprehensive Arb. Rules & Procedures r. 2(c)(i) (July 1, 2014) ("A Party in need of emergency relief prior to the appointment of an Arbitrator may notify JAMS and all other Parties . . . . The Notice must include a statement certifying that all other Parties have been notified. If all other Parties have not been notified, the Notice shall include an explanation of the efforts made to notify such Parties.").

21. 28 U.S.C § 1292(a)(1); *see also* Tex. Civ. Prac. Rem. Code § 51.014(a)(4).

22. Volt Info. Sciences, Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) (citing 9 U.S.C.A. § 4).

23. Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (citing Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010)); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

When seeking injunctive relief that relates to an arbitrable substantive claim, the language of the arbitration agreement must be examined to determine whether it excludes *claims* in which injunctive relief is sought or the *remedy* of injunctive relief. In either case, if the carve-out is explicit and clearly applies to the type of relief sought, then the court will likely decide the merits of the claim. If the opposing party can establish a plausible argument that the carve-out does not apply (i.e., that the claim or remedy of injunctive relief must be submitted to arbitration), then the question of arbitrability must be resolved before the merits of the application may be reached.

Questions of arbitrability generally are for the court to decide, unless "the parties have themselves 'clearly and unmistakably agreed' that the arbitrator should decide whether an issue is arbitrable."[24] A broad arbitration provision (such as a referral of "any and all" controversies) may be construed as a "'broad grant of power to the arbitrators' as to evidence the parties' clear 'inten[t] to arbitrate issues of arbitrability.'"[25] Incorporating the rules of an arbitration tribunal (such as AAA, which provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim")[26] in the arbitration provision also may constitute a "clear and unmistakable agreement to arbitrate arbitrability."[27]

An example of a well-drafted carve-out provision is found in *Mr. Rooter LLC v. Akhoian*, in which the franchisor sought injunctive relief against the franchisee for enforcement of the franchise agreement's non-compete provisions and for protection of its trademarks.[28] The franchise agreement contained a broad arbitration clause but also contained the following carve-out:

> During the course of a Dispute, should a situation arise relating to the Marks or relating to a situation in which Franchisor will suffer irreparable loss or damage

24. *See* Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 10 (1st Cir. 2009) (quoting Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002)); Grand Wireless, Inc. v. Verizon Wireless, Inc., 748 F.2d 1, 7 (1st Cir. 2014) (quoting AT&T Techs, Inc. v. Commc'ns Workers of Am., 563 U.S. 333, 345 (2011); *see also* Benihana, Inc. v. Benihana of Tokyo, LLC, 784 F.3d 887 (2d Cir. 2015) (quoting PaineWebber Inc. v. Bybyk, 81 F.2d 1193, 1198–99 (2d Cir. 1996)).

25. *Benihana*, 784 F.3d 887 (2d Cir. 2015) (citing Shaw Grp., Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 121 (2d Cir. 2003)).

26. *See* Am. Arb. Ass'n, Commercial Arb. Rules r. 7(a).

27. *See*, *e.g.*, Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp., 748 F.3d 249, 262 (5th Cir. 2014) ("[I]ncorporation of the AAA rules 'constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.'"); Petrofac, Inc. v. DynMcDermott Petrol. Ops. Co., 687 F.3d 671, 675 (5th Cir. 2012).

28. Mr. Rooter LLC v. Akhoian, 2017 WL 5240886 (W.D. Tex. Jan. 30, 2017). *But see* Grasso Enters., LLC v. CVS Health Corp., 143 F. Supp. 3d 530 (W.D. Tex. 2015) (district court compelled arbitration of all issues, including whether exception allowing party to file for injunctive relief in federal or state court applied, noting that a provision permitting "either party from seeking preliminary injunctive relief to halt or prevent a breach [of the contract] did not apply to the claims at issue concerning an alleged violation of federal law"); A&C Discount Pharm., LLC v. Caremark, LLC, 2016 WL 3476970 (W.D. Tex. June 27, 2016) (adopting the *Grasso* rationale, and declining to rule on plaintiff's request for preliminary injunctive relief).

> unless Franchisor takes immediate action, including but not limited to threatened or actual conduct in violation of Sections 9 and 12 of this Agreement [dealing with non-competition, franchisor's marks, trademarks, system and trade secrets], Franchisor shall be free to seek declaratory relief, restraining orders, preliminary injunctive relief and/or other relief; and such actions or lawsuits shall not be considered in violation of the provisions of this Section 13.

The franchisee moved to compel arbitration of the injunctive relief claim, arguing that claims of arbitrability should be determined by the arbitrator. The district court rejected this argument, stating that "the matter of arbitrability should be arbitrated where there are *plausible* arguments both in favor of, and against, the arbitrability of a claim," and that "[i]f the argument supporting arbitrability is 'wholly groundless,'" then a motion to compel arbitration should be denied.[29] Because the franchisor laid out a highly plausible basis against arbitrability of the injunctive relief claim, and because (1) the contract plainly permitted bypassing arbitration for an injunction and (2) Fifth Circuit precedent has upheld contract provisions that provide for injunctive relief even where the underlying dispute is subject to arbitration, the district court denied the franchisee's motion to compel arbitration.[30]

An example of problematic carve-out language (which led to an undesired result) was addressed in *Plump Engineering, Inc. v. Westshore Design Engineers, PC*, where the U.S. District Court for the Northern District of New York examined language in an "Agreement to Arbitrate Claims" relating to an employment relationship.[31] The agreement stated that it was to be construed "as broadly as possible" and required that the parties arbitrate "all disputes, claims or controversies of any kind between them, including but not limited to all disputes arising out of Employee's employment with Employer and/or termination of employment, to the fullest extent allowed by law [except as otherwise provided in the agreement]."[32] The agreement also identified claims that were not arbitrable, stating that "'the Agreement [to arbitrate] does not cover . . . claims brought by either party for injunctive relief' and that any such claims 'may be presented in the appropriate forum.'"[33] The agreement further provided that "'[i]n addition,'. . . 'either party may apply to a court for any provisional remedy, including a temporary restraining order or preliminary injunction.'"[34]

The employee subsequently gave notice and informed his employer he was starting a competing business in violation of his non-compete obligations, causing the employer to preemptively terminate the employment

29. Mr. Rooter LLC, 2017 WL 5240886, at *2.
30. *Id.*
31. Plump Eng'g, Inc. v. Westshore Design Eng'r, PC, 2018 WL 3730168 (N.D.N.Y. Aug. 6, 2018).
32. *Id.* at *2.
33. *Id.*
34. *Id.*

and seek injunctive relief through the court system to enjoin the prohibited activity.[35] The employee moved to compel arbitration.[36]

In construing the agreement "as broadly as possible" and "in accord with the parties' intent," and considering the "presumption in favor of arbitration," the court found that the employer's *substantive* claims must be arbitrated.[37] The court also found, however, that the *remedy* of injunctive relief was not subject to arbitration. Accordingly, the court compelled arbitration of all substantive claims between the parties, noting that the arbitrator may award whatever non-injunctive relief, if any, he or she saw fit, and the court stayed the employer's claims for injunctive relief pending the outcome of arbitration.[38]

At the other end of the spectrum, the U.S. District Court for the District of Columbia had an opportunity to opine on an arbitration agreement that was entirely silent on the issue of injunctive relief. In *TK Services, Inc. v. RWD Consulting, LLC*, the plaintiff argued that the court should consider the merits of his motion for a preliminary injunction because the arbitration clause neither addressed injunctive or other equitable relief nor stated that arbitration was the sole and exclusive forum for interim injunctive relief.[39] The court rejected this argument, finding that "the fact that claims for injunctive relief are not specifically mentioned does not lead to the conclusion that they were carved out; the plain reading of the provision suggests that any carve-out had to be explicit.[40] Bolstering its conclusion was the "fact that an exception for injunctive relief was not necessary because the rules of the arbitral forum provide for interim and injunctive relief."[41]

In light of the case law, the following drafting rules should be observed when drafting an arbitration agreement: (1) any carve-out from arbitration must be explicit and should apply to all *claims in which injunctive relief is sought* (i.e., not just to the *remedy* of injunctive relief), and (2) any dispute whether the carve-out applies must be resolved by the court and not the arbitrator, notwithstanding any contrary provision of the arbitration agreement or the rules of the chosen arbitral institution.

## III. Where Claims for Injunctive Relief Are Subject to Arbitration, but Interim Relief Is Necessary to Protect the Integrity of the Arbitration Proceeding

Even where there is no carve-out for injunctive relief, courts have long-recognized that "the congressional desire to enforce arbitration agreements would frequently be frustrated if the courts were precluded from

35. *Id.*
36. *Id.*
37. *Id.* at *4.
38. *Id.*
39. TK Servs., Inc. v. RWD Consulting, LLC, 263 F. Supp. 64, 71 (D.D.C. 2017).
40. *Id.*
41. *Id.*

issuing preliminary injunctive relief to preserve the status quo pending arbitration and, *ipso facto*, the meaningfulness of the arbitration process."[42] Courts often will step in, therefore, to preserve the status quo "where the withholding of injunctive relief would render the process of arbitration meaningless or a hollow formality because an arbitral award, at the time it was rendered, could not return the parties substantially to the status quo ante."[43] As a result, even where a contract has a broad arbitration clause a district court may grant injunctive relief to preserve the status quo pending arbitration.[44] This is sometimes referred to as injunctive relief in aid of arbitration.

A court-ordered injunction in aid of arbitration is issued at the court's discretion, and it may remain in place pending the outcome of arbitration or may be narrowly tailored to consider emergency measures that may be available in arbitration. One such example is in *Sauer-Getriebe KG v. White Hydraulics, Inc.*, which involved a dispute between a motor manufacturer and an exclusive distributor under a distribution agreement that granted the distributor certain rights to acquire the manufacturer's trade secrets and patent rights.[45] The parties' agreement provided for arbitration before the ICC of Court of Arbitration *before* it adopted its emergency rules. There, the Seventh

42. *See*, *e.g.*, Teradyne v. Mostek Corp., 797 F.2d 43, 51 (1st Cir. 1986).

43. *Id.* (preliminary injunction designed to freeze the status quo pending arbitration was an appropriate form of relief when it was shown that the defendant was likely to be insolvent at the time of judgment); Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co., 749 F.2d 124, 125 (2d Cir. 1984) (That a dispute is to be arbitrated does not absolve the court of its obligation to consider the merits of a requested preliminary injunction; the proper course is to determine whether the dispute is "a proper case" for an injunction.); Ortho Pharm. Corp. v. Amgen, Inc., 882 F.2d 806, 811–12 (3d Cir. 1989) (noting that the court does not construe an arbitration agreement as a "waiver" by either party of the right to seek preliminary injunctive relief necessary to prevent one party from unilaterally eviscerating the significance of the agreed-upon procedures); Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 377 (4th Cir. 2012) (explaining that the district court has the authority to grant a preliminary injunction and that the "hollow-formality test" should be used to assess whether the claimant's injunction request should be entertained); Janvey v. Alguire, 647 F.3d 585, 592 (5th Cir. 2011) (district court can grant preliminary relief before deciding whether to compel arbitration); Performance Unlimited v. Questar Publishers, 52 F.3d 1373, 1377–80 (6th Cir. 1995) (holding that, in a dispute subject to mandatory arbitration under the FAA, a district court has subject matter jurisdiction under § 3 of the Act to grant preliminary injunctive relief provided that the party seeking the relief satisfies the four criteria that are prerequisites to the grant of such relief); Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 352 (7th Cir. 1983) (remanding case to district court with directions to enjoin manufacturer from repudiating distribution agreement and from transferring claimed contractual rights to a third party until arbitration was completed); Toyo Tire Holdings of Ams., Inc. v. Cont'l Tire N. Am., Inc., 609 F.3d 975, 982 (9th Cir. 2010) (holding that the district court abused its discretion in "finding as a matter of law that it lacked the power to grant injunctive relief"). *But see* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey, 726 F.2d 1286, 1292 (8th Cir. 1984) (holding that because "the judicial inquiry requisite to determine the propriety of injunctive relief necessarily would inject the court into the merits of issues more appropriately left to the arbitrator, a "district court errs in granting injunctive relief" in the absence of "qualifying contractual language" providing for or contemplating the injunctive relief sought).

44. *See*, *e.g.*, Baldwin Tech. Co. v. Printers' Serv., Inc., 2016 WL354914, at *3 n.4 (S.D.N.Y. Jan. 27, 2016) (quoting Remy Amerique Inc. v. Touzet Distrib., S.A.R.L., 816 F. Supp. 213, 218 (S.D.N.Y. 1993)).

45. Sauer-Getriebe KG, 715 F.2d at 352.

Circuit held that the district court erred in denying the distributor's motion for a preliminary injunction, and it directed the district court to enjoin the manufacturer from repudiating the contract and from transferring any of the distributor's claimed contractual rights to a third party until completion of the arbitration and termination of the lawsuit.[46]

An example of a narrowly tailored remedy taking into account the availability of emergency relief through arbitration appears in *Pre-Paid Legal Services, Inc. v. Kidd*, which involved claims of misappropriation of trade secrets and a request for injunctive relief.[47] On the day that the action was filed, the court entered a temporary restraining order (TRO) enjoining the defendant (Kidd) from:

> 1) contacting any person or organization he knows or suspects to be a Pre-Paid associate and, directly or indirectly, soliciting or encouraging the associate to join [Kidd] in a new company or organization, or to leave Pre-Paid for the eventual purpose of joining another company, 2) disparaging Pre-Paid in an attempt to solicit Pre-Paid associates, and 3) using trade secret information of Pre-Paid for any other purpose.[48]

The defendant removed the case to federal court and filed a motion to stay pending arbitration, asking the district court to enforce the arbitration provisions contained in the parties' agreements and to stay the action until a motion for preliminary injunction could be heard.[49] The court granted Pre-Paid's request to extend the TRO until such time as it ruled on the request to stay the action pending arbitration.[50]

In granting the motion to stay arbitration and to extend the TRO, the court recognized:

> Under Tenth Circuit precedent, this Court clearly has the authority to issue injunctive relief preserving the status quo pending the initiation of arbitration. The most appropriate avenue for the extended injunctive relief sought herein by Pre-Paid would appear to be a further extension of the TRO set to expire on this Court's ruling on the motion to stay pending arbitration. Such an extension would preserve the status quo while the emergency measures of protection subsumed within the TRO are addressed in the arbitration setting.[51]

The U.S. District Court for the Eastern District of Michigan imposed a similar remedy in *Blue Cross Blue Shield of Mich. v. MedImpact Healthcare Systems, Inc.*[52] There, Blue Cross Blue Shield of Michigan (Blue Cross) filed a lawsuit seeking injunctive relief, specific performance, and declaratory relief

46. *Id.*

47. 2011 WL 5079538, at *6 (E.D. Okla. Oct. 26, 2011) (order granting defendant's motion to stay pending arbitration and extending the expiration date of the TRO to a date certain "or until an emergency arbitrator hears and determines an application for emergency measures relating to preserving the status quo as set forth under the TRO, whichever date first occurs").

48. *Id.* at *1.

49. *Id.*

50. *Id.*

51. *Id.* at *2 (citations omitted).

52. Blue Cross Blue Shield of Mich. v. MedImpact Healthcare Sys., Inc., 2010 WL 2595340 (E.D. Mich. June 24, 2010).

requiring that MedImpact continue providing pharmacy benefit managing services under an agreement between the parties.[53] The court granted Blue Cross's motion for preliminary injunction, requiring that MedImpact continue to provide certain services "until such time as an arbitrator enters an alternative order regarding temporary injunctive or final relief."[54] The court's order also directed Blue Cross to immediately demand arbitration under the agreement, and that the parties "initially proceed under the Optional Rules for Emergency Measures of Protection of the Commercial Arbitration Rules of the American Arbitration Association and then expeditiously pursue a final resolution of the issue in arbitration."[55]

The concept of designing a narrowly tailored remedy that preserves the status quo while leaving undecided claims that are subject to arbitration is illustrated in *Benihana, Inc. v. Benihana of Tokyo, LLC*, which involved an agreement pursuant to which Benihana, Inc. (Benihana America) granted Benihana of Tokyo (Benihana Tokyo) the right to operate Benihana restaurants in Hawaii.[56] Benihana Tokyo allegedly exceeded the scope of the license by selling hamburgers and other unauthorized menu items. After extended cure periods, Benihana America sought to terminate the license and successfully petitioned the district court for injunctive relief to enjoin Benihana Tokyo from (1) selling hamburgers or other unauthorized food items on the premises of, or in any manner in connection with, the Benihana restaurant it operates in Hawaii; (2) using or publishing advertisements, publicity, signs, decorations, furnishings, equipment, or other matter employing in any way whatsoever the words "Benihana of Tokyo" or the Benihana "flower" symbol that have not been approved in accordance with the parties' license agreement; and (3) arguing to the arbitration panel that it be permitted to cure any defaults if the arbitrators ruled that Benihana Tokyo breached the license agreement.[57] On appeal, the Second Circuit upheld the injunction against the sale of unauthorized menu items and misuse of the Benihana trademarks, but it found that the district court abused its discretion in enjoining Benihana Tokyo from arguing to the arbitrator for an extended cure period, stating that "the district court, rather than independently assessing the merits, should have confined itself to preserving the status quo pending arbitration. Restricting the relief Benihana of Tokyo could seek in arbitration undermined rather than aided the arbitral process."[58]

Courts also have denied injunctive relief where it was otherwise available through arbitration on grounds that the availability of such relief in arbitration negated the element of irreparable harm. This was the result in *Gold v. Maurer*, where the court declined to issue a TRO because the plaintiff failed

53. *Id.* at *1.
54. *Id.*
55. *Id.*
56. Benihana, Inc. v. Benihana of Tokyo, LLC, 784 F.3d 887 (2d Cir. 2015).
57. *Id.* at 893–94.
58. *Id.* at 902.

to seek the appointment of an emergency arbitrator after filing a demand for arbitration with the AAA.[59] The plaintiffs argued they would suffer irreparable harm without judicial intervention, but the court disagreed, holding partly that proper invocation of AAA's emergency relief rule (Rule 38) was a factor when considering irreparable harm.[60] Specifically, the process of selecting an arbitrator "could have begun even earlier had Plaintiffs pursued an emergency arbitrator appointment pursuant to Rule 38. As a result, there is . . . no clear likelihood that the specific harm that the injunction is meant to preclude . . . will actually come to pass."[61]

A party's failure to request emergency relief in arbitration led to a similar result in *Smart Technologies ULC v. Rapt Touch Ireland Ltd.*[62] There, the U.S. District Court for the Northern District of California denied an application for a TRO where the underlying breach of contract action was subject to arbitration, notwithstanding that the contract allowed the parties to seek emergency relief from a court in certain limited circumstances. According to the court:

> With the parties having agreed that their underlying dispute should be arbitrated, [the plaintiff] has offered no explanation for why a federal court (rather than an arbitrator) should adjudicate the request for emergency relief. Indeed, the only justification [the plaintiff's] lawyer gave at the hearing for asking a federal court rather than an arbitrator to dive into this dispute at the preliminary stage was his belief that that a federal court would be more likely to issue a TRO automatically. Even if that were true (and it certainly shouldn't be), it would not be a good reason for a federal court to get involved in a dispute whose merits both parties agree should be arbitrated.[63]

Important to the court's decision was the fact that the arbitration rules allowed [the plaintiff] to request emergency relief from an arbitrator as well as from the court. The court recognized that, under the arbitration rules, "an emergency arbitrator would be assigned within a day, and a schedule would be set for considering the application for relief within a handful of days." The court further recognized that "[t]he [arbitration] rules also allow for procedures (such as giving notice to the opposing party by email, and the use of video conferencing instead of in-person hearings) that are not necessarily available in court."[64]

When seeking injunctive relief in aid of arbitration, therefore, a party should consider the availability the interim relief in arbitration and be prepared to explain to the court why such relief is insufficient or inappropriate.

59. Gold v. Maurer, 251 F. Supp. 3d 127, 135–37 (D.D.C. 2017).
60. *Id.* at 135–36.
61. *Id.*
62. Smart Techs. ULC v. Rapt Touch Ireland Ltd., 197 F. Supp. 3d 1204 (N.D. Cal. 2016).
63. *Id.* at 1205.
64. *Id.*

## IV. Enforceability of Interim Arbitration Awards

The court's authority and willingness to review and enforce final arbitration awards (FAA) issued under traditional arbitration rules is well-established.[65] However, enforcement of an arbitration award under the FAA or the New York Convention requires that the award in question be "final" in order to be eligible for judicial confirmation.[66] Nonetheless, interim awards for injunctive relief have been held judicially enforceable as final dispositive orders on issues concerning the parties' obligations pending the outcome of the arbitration proceeding.

In a 2017 unpublished decision, the U.S. District Court for the Northern District of Oklahoma noted a body of case law in which the courts have considered interim arbitral awards final and thus subject to judicial review.[67] There, the defendant, a business that manufactured, marketed, and sold endodontic products for the dental industry sought to enforce a non-compete agreement against a former consultant.[68] The U.S. District Court for the Northern District of Oklahoma compelled all claims to arbitration and stayed the lawsuit pending arbitration.[69] The defendant moved for a preliminary injunction in arbitration, which the arbitrator granted prohibiting plaintiff from competing with defendant, revealing any of defendant's confidential information, or intentionally taking action inconsistent with defendant's best interests.[70] In the ruling, the arbitrator stated that a final evidentiary hearing would take place later that year, that the ruling was tentative and based on the record presented thus far, and that all conclusions were subject to revision after the final, evidentiary hearing.[71]

The defendant moved to confirm the arbitrator's ruling, which plaintiff opposed on a number of grounds, including that, because the arbitrator characterized the ruling as "tentative" and "subject to revision," it was not ripe for judicial review.[72] In rejecting this argument, the court considered a "non-binding but persuasive body of case law in which district and circuit courts have considered interim arbitral awards final and thus subject to

65. *See, e.g.*, Island Creek Coal Sales Co. v. City of Gainesville, 729 F.2d 1046, 1049 (6th Cir. 1984); Yasuda Fire & Marine Ins. Co. of Europe v. Cont. Cas. Co., 37 F.3d 345, 347–48 (7th Cir. 1994); Pacific Reins. Mgmt. Corp. v. Ohio Reins. Corp., 935 F.2d 1019, 1022 (9th Cir. 1991); Nat'l R.R. Passenger Corp. v. ExpressTrak, LLC, 2003 WL 26132936, at *3–4 (D.D.C. May 1, 2003); Matter of Polydefkis Corp. v. Transcon Fertiliser Co., 1996 WL 683629, at *2 (E.D. Pa. Nov. 26, 1996); W. Tech. Serv. Int'l., Inc. v. Caucho Indus., S.A., 2010 WL 150162, at *3 (N.D. Tex. Jan. 15, 2010); Schultz v. AT&T Wireless Serv., Inc., 376 F. Supp. 2d 685, 690 (N.D. W.Va. 2005).

66. Hall Steel Co. v. Metalloyd Ltd., 492 F. Supp. 2d 715, 717 (E.D. Mich. 2007) (citing Hart Surgical, Inc. v. Ultracision, Inc., 244 F.3d 231, 233 (1st Cir. 2001)); Publicis Commc'n v. True North Commc'ns, Inc., 206 F.3d 725, 728–29 (7th Cir. 2000); Michaels v. Mariforum Shipping, S.A., 624 F.3d 411, 414–15 (2d Cir. 1980).

67. Johnson v. Dentsply Sirona, Inc., 2017 WL 4295420, at *1 (N.D. Ok. Sept. 27, 2017).

68. *Id.* at *1.

69. *Id.* at *2.

70. *Id.* at *3.

71. *Id.*

72. *Id.* at *4–6.

judicial review."[73] The court also noted this was "not the type of "relatively inconsequential 'procedural decision' or 'preliminary ruling' of which judicial review, in the interest of retaining the efficiency that is the raison d'être of our arbitration system, is disfavored."[74] The court confirmed the arbitrator's ruling on the basis that it "finally and definitely enjoins plaintiff from breaching the [agreement's] confidentiality and non-compete provisions during the pendency of the arbitration," further stating that "if the Ruling is not enforced, a subsequent award of injunctive relief to defendant may be rendered meaningless."[75]

In a 2013 decision, *Yahoo, Inc. v. Microsoft Corp.*, the U.S. District Court for the Southern District of New York confirmed an arbitrator's ruling that required a party to a contract to perform its obligations during the pendency of arbitration. In this case, Microsoft sought to enjoin Yahoo from breaching a "Search and Advertising Services and Sales Agreement" entered into as part of a joint venture designed to help Yahoo and Microsoft compete against Google's Internet search engine.[76] The agreement required Yahoo to transition its Internet search results from its "Panama" platform to Microsoft's "Bing" platform on a region-by-region basis over a specified timeline.[77] Just before the time to transition in Taiwan and Hong Kong, Yahoo indicated it would not move forward.[78] Ultimately, Microsoft initiated an emergency arbitration in accordance with the rules of the AAA.[79]

After extensive briefing and a two-day evidentiary hearing, the Emergency Arbitrator issued a seventeen-page reasoned decision, concluding that Yahoo's unilateral refusal to proceed with the transition in Taiwan and Hong Kong was a breach of the parties' agreement.[80] He also concluded that the evidence established the existence of an emergency within the meaning of the AAA's Emergency Rules, as well as that Yahoo's prolonged delay or refusal to complete the transition in Taiwan and Hong Kong would cause severe and irreparable damage to Microsoft.[81] The Emergency Arbitrator ordered Yahoo to "use all efforts" to complete the Taiwan and Hong Kong transitions by a date certain, pending a full-scale arbitration by a three-member panel.[82]

Yahoo filed a petition to vacate the arbitration award in the U.S. District Court for the Southern District of New York, and Microsoft moved to confirm the award.[83] The district court denied Yahoo's petition and granted Microsoft's cross-petition to confirm, finding that Yahoo had not carried

73. *Id.* at *6.
74. *Id.*
75. *Id.* at *7.
76. Yahoo, Inc. v. Microsoft Corp., 983 F. Supp. 2d 310 (S.D.N.Y. 2013).
77. *Id.* at 313.
78. *Id.*
79. *Id.* at 314.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 312.

its heavy burden of showing that the Emergency Arbitrator exceeded his authority, and further holding that the arbitral award was ripe and could be confirmed.[84]

Yahoo appealed the district court's decision and filed motions to stay enforcement of the arbitral award pending appeal.[85] The district court denied Yahoo's motion to stay, holding that "the stay Yahoo has requested would entirely deny Microsoft the emergency relief, which was granted to Microsoft by the Emergency Arbitrator and which was confirmed by the [District Court]."[86]

A similar result was reached in *Blue Cross Blue Shield of Michigan v. MedImpact Healthcare Systems, Inc.* where, after successfully seeking a preliminary injunction from the district court, Blue Cross sought and obtained confirmation of an order for interim emergency measures issued by the arbitration tribunal.[87] In confirming the order, the district court acknowledged that "arbitration awards are subject to confirmation or vacatur in federal district courts only when the arbitrator's decision is final, and not interlocutory, but explained that "under certain circumstances, interim awards can qualify as "final" and be eligible for confirmation."[88] According to the court:

> An "interim" award may be sufficiently final to warrant review in federal district court when it "finally and definitely disposes of a separate independent claim. . ." In this case, [Blue Cross Blue Shield] seeks confirmation of the interim award as a final determination on the issue of preliminary injunctive relief while MedImpact maintains that the order is not final and remains subject to modification by the arbitrators.
>
> Analyzing the same issue about confirmation of interim awards of preliminary injunctive relief, the Sixth Circuit affirmed a district court's observation that "[t]he interim award disposes of one self-contained issue, namely, whether [a party] is required to perform the contract during the pendency of the arbitration proceedings. Th[is] issue is a separate, discrete, independent, severable issue." Similarly, another judge in the district observed that interim awards tend to be viewed as resolving "separate independent" claims subject to confirmation when they involve "the sort of prejudgment relief that a court might award to preserve the status quo during the ensuing proceedings, or to otherwise ensure that the arbitrator's final award on the merits is capable of meaningful enforcement." The interim award of injunctive relief in this case falls squarely within these descriptions of interim awards subject to confirmation.[89]

Interim arbitral awards that finally dispose of claims relating to the parties' actions during the pendency of arbitration, therefore, haven been considered "final" and thus ripe for confirmation.

84. *Id.* at 319.
85. *Id.*
86. Yahoo! Inc. v. Microsoft Corp., No. 13-CV-7237, Order Denying Application to Stay Pending Appeal, at *2 (S.D.N.Y. Oct. 23, 2013).
87. Blue Cross Blue Shield of Mich. v. MedImpact Healthcare Sys., Inc., 2010 WL 2595340 (E.D. Mich. June 24, 2010).
88. *Id.* at *2.
89. *Id.* (citations omitted).

## V. Conclusion

While the availability of emergency relief in arbitration has not changed the law concerning arbitrability, it has changed the way courts view applications for injunctive relief in aid of arbitration and how remedies are fashioned to take into account the availability of emergency measures. Nonetheless, strategic advantages may exist to seeking injunctive relief from a court. For example, judicial relief may be necessary if the arbitration provision strips the arbitrator of certain powers (such as enjoining termination of a franchise agreement), or it may be preferable if providing advance notice to the other party could have an undesired result. In these situations, however, the franchisor should inform the court of the arbitration provision and why judicial intervention is needed. Nonetheless, unless there is a plausible argument against arbitrability, or a compelling reason not to seek relief through emergency measures, the parties should be prepared to seek relief in arbitration to avoid judicial irritation and increased costs.