Kluwer Arbitration Blog

The Problem with Emergency Arbitration: Al Raha Group v. PKL Services

Jared Hubbard, Malgorzata Mrozek (Fitch Law Partners) · Friday, December 27th, 2019

Recently, the U.S. District Court for the Northern District of Georgia (the "District Court") put the problem with emergency arbitration front and center: it refused to confirm and enforce an emergency interim arbitration award (the "Emergency Award") awarded by an emergency arbitrator (the "Emergency Arbitrator") under Article 6 of the American Arbitration Association's International Center for Dispute Resolution International Arbitration Rules ("ICDR Rules"). Instead, the District Court held that because the Emergency Award was not a final award, the District Court lacked subject matter jurisdiction and dismissed the case. *Al Raha Grp. For Tech. Servs. v. PKL Servs. Inc.*, No. 1:18-cv-04194 (N.D. Ga. Sept. 6, 2019). To add insult to injury, the merits arbitration was stayed for almost a year while the District Court considered whether to enforce the Emergency Award. In this case, emergency arbitration failed to protect the parties and resulted in a year-long delay in the arbitral proceedings. With results like these, it raises the question of whether emergency arbitration is worthwhile for both parties to include in their contracts and for arbitral institutions to include in their rules.

The *Al Raha* Case: Emergency Awards Cannot be Enforced

Al Raha Group for Technical Services ("Al Raha"), a Saudi corporation, entered into a subcontract with PKL Services, Inc., ("PKL"), a U.S. corporation. A dispute arose between the parties when PKL attempted to terminate the subcontract between PKL and Al Raha. Al Raha filed a demand for arbitration and statement of claim. Simultaneously, Al Raha also filed an application for emergency injunctive relief under the ICDR Rules seeking to prevent PKL from terminating the subcontract. The Emergency Arbitrator was appointed; and after a telephonic hearing and written submissions by the parties, the Emergency Arbitrator issued the Emergency Award on August 27, 2018 prohibiting PKL from terminating the subcontract until the three-member arbitral panel was appointed.

PKL, nonetheless, moved forward with a replacement subcontractor while filing a motion under the ICDR Rules to vacate or modify the Emergency Award. In response, Al Raha filed a Motion for Preliminary Injunction with the District Court seeking to

confirm the Emergency Award and prohibiting PKL from terminating the subcontract.

In support of its motion for preliminary injunction, Al Raha asserted that the District Court had jurisdiction pursuant to the Federal Arbitration Act ("FAA") and the New York Convention. 9 U.S.C. § 201 et seq. Al Raha acknowledged that the Eleventh Circuit had not definitely addressed whether federal district courts have jurisdiction over interim arbitration awards, but that other circuits and district courts have concluded that district courts have jurisdiction in such cases.

PKL countered, arguing that the District Court lacked subject matter jurisdiction over the petition because the Emergency Award was not final – no determination had been made on the merits of any of the issues presented. Further, PKL pointed to the ICDR Rules, which—similarly to most institutional rules on emergency arbitration—state that once a tribunal is constituted, it may reconsider, modify, or vacate an emergency award.

Al Raha filed its Motion for Preliminary Injunction on September 10, 2018. PKL, in turn, filed its Opposition to the Preliminary Injunction on September 14, 2018, with a Reply by Al Raha filed a few days later. The three-member arbitral panel was appointed on October 8, 2018, but stayed all arbitral proceedings pending the resolution of the motions before the District Court. The District Court, however, did not rule until September 6, 2019. The parties thus waited in limbo for almost a year after the motion was filed for the District Court's ruling; all the while PKL refused to comply with the Emergency Award.

Ultimately, the District Court sided with PKL, finding that it lacked subject matter jurisdiction because the Emergency Award was "a placeholder that did not purport to resolve finally any of the issues submitted to arbitration." *Al Raha*, No. 1:18-cv-04194 at *3. The Emergency Arbitrator herself made clear, the District Court said, that the Emergency Award was not a final award by stating that she was preventing the termination of the contract "pending constitution of the full arbitral tribunal that will be appointed to hear the case on the merits." *Id*. The District Court emphasized that "although district courts have original jurisdiction over any action or proceeding falling under the [New York] Convention, they lack authority to confirm arbitral awards that are not final." *Id*. at * 2 (internal citations omitted). "An interim ruling from an arbitrator is not a final award if it does not purport to resolve finally the issues submitted to the arbitrators. . . . An interim ruling may be considered sufficiently final if it finally and definitely disposes of a separate and independent claim even if it does not dispose of all the claims that were submitted to arbitration." *Id.* (internal citations omitted). Ultimately, the District Court found that the Emergency Award did not resolve any of the issues submitted to arbitration, but merely sought to preserve the status quo pending arbitral proceedings, and therefore was not a final award which could confer subject matter jurisdiction on the District Court.

The Broader Perspective on Enforcement of Interim Awards in USA

While *Al Raha* is the first case to deny enforcement of an emergency award, it is not the first case to address emergency arbitration or interim awards in the USA.

In *Yahoo! Inc. v. Microsoft Corp.*, the U.S. District Court for the Southern District of New York addressed an emergency arbitrator's order in a slightly different context—there the losing party was seeking to vacate the award by arguing that the emergency arbitrator exceeded his authority by issuing an award that was "irreversible" and thus "final." 983 F.Supp.2d 310 (S.D.N.Y. 2013). In this case, however, the court determined that the emergency arbitrator had the authority under the specific contract provisions in the case to enter a "final" award. In the contract, the parties had specified that the emergency arbitrator could compel and award specific performance and provide for "non-monetary relief necessary to restore the status quo" between the parties. The court determined that under the specific agreement, "the Arbitrator acted within his authority in granting an injunction . . . even though the equitable relief that was granted is, in essence, final." *Id.* at 317.

Similar to the *Yahoo!* case, in *Chinmax Medical Systems Inc. v. Alere San Diego, Inc.*, the U.S. District Court for the Southern District of California refused to vacate an emergency arbitration award, although the basis for the court's refusal to vacate in *Chinmax* was that the emergency award was not final because it could be reviewed by the full arbitral panel under the ICDR Rules. 2011 WL 2135350 (S.D. Cal. 2011).

Circuit Courts reviewing interim awards issued by the arbitral tribunal, however, have frequently viewed such interim awards as final and enforceable by courts. The Ninth Circuit has stated that "temporary equitable orders calculated to preserve assets or performance needed to make a potential final award meaningful . . . are final orders that can be reviewed for confirmation and enforcement by district courts under the FAA." *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1023 (9th Cir. 1991). The Sixth Circuit has also upheld an interim order where one of the parties was "required to perform the contract during the pendency of the arbitration proceedings," finding that this "issue is a separate, discrete, independent, severable issue" from consideration of the merits of the claim. *Island Creek Coal Sales Co. v. City of Gainesville, Fla.*, 729 F.2d 1046, 1049 (6th Cir. 1984), *abrogated on other grounds by Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193 (2000).

In sum, courts considering emergency awards have refused to vacate them (on the merits in *Yahoo!* and on jurisdictional grounds in *Chinmax*). And courts have generally enforced interim awards rendered by the full arbitral tribunal where they may be viewed as preserving assets or performance and may be seen as severable from the award on the merits of the case. But as the *Al Raha* case (and to a lesser extent the *Chinmax* case) shows, enforcing an emergency award may not be possible under rules—such as the ICDR, ICC, SIAC, or HKIAC Rules—that allow for the full arbitral tribunal to revisit any decision made by the emergency arbitrator.

The Impact of Non-Enforcement of Emergency Arbitral Awards

Despite these enforcement issues, it is likely that most parties will continue to voluntarily comply with emergency arbitral awards. That is because the full arbitral tribunal is unlikely to look kindly upon a party's refusal to comply with emergency arbitrator orders. So, a party refusing to comply may strongly prejudice its case on the merits.

But there are some cases—particularly involving intellectual property disputes—where the preliminary injunction is the central issue. If there is a non-disclosure agreement that the other party is threatening to breach, damages awarded months or years later by a final arbitral award may be wholly insufficient to compensate for the public release of confidential documents or trade secrets. Ultimately, in cases where there is a need to depend on enforcement of a preliminary injunction, parties should continue to include the ability to seek injunctive relief before national courts—and cannot for the time being rely upon institutional rules to achieve similar objectives.

Ultimately, part of this problem may be solved by carefully drafting emergency arbitration provisions to allow for an emergency arbitrator to issue a "final" award on certain issues, even if such relief is only temporary. Under Article 6 of the ICDR Rules, the emergency arbitrator "may modify or vacate the interim award or order" at any time, and once the arbitral tribunal is constituted, "the tribunal may reconsider, modify, or vacate the interim award or order of emergency relief issued by the emergency arbitrator." By definition, then, the ICDR Rules contemplate that the emergency relief is not final and may be modified or changed at any time. If, however, the emergency arbitrator's award were described in the rules as a "final award effective until 2 business days following the first conference of the constituted arbitral tribunal," then that would provide a specific time period for which the emergency arbitrator's award would be effective for, and allow the arbitral tribunal to continue the emergency award as an interim award—either for a specific time or for the duration of the arbitration—following its first procedural conference with the parties.

For now, however, given the court decisions coming out refusing to enforce emergency awards, parties should be very careful about relying on emergency arbitral proceedings to protect their rights. One way to solve the issue is to adopt specific contractual language—as in the *Yahoo!* case—allowing emergency arbitrators to issue "final" awards maintaining the status quo between the parties pending the resolution of the disputes by the full arbitral tribunal.

---

ability to explore relationships of 13,500+ arbitration practitioners and experts for potential conflicts of interest.

Learn how **Kluwer Arbitration Practice Plus** can support you.

This entry was posted on Friday, December 27th, 2019 at 9:04 am and is filed under Emergency Arbitrator, ICDR, United States, United States Courts
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.