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US: Injunctions in aid of international arbitration in federal courts

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Joseph Profaizer and **Daniel Prince**, partner and associate at Paul Hastings in Washington, DC, and Los Angeles, consider the availability of injunctive relief in aid of international arbitration in the US federal courts, identifying an unfortunate jurisdictional divide.

Determining the proper division of jurisdictional responsibilities between national courts and international arbitral tribunals requires constant calibration by the courts, the tribunals and the parties themselves. National courts play a crucial role in the international arbitral process by, among other things, issuing interim injunctive or provisional relief where necessary to aid the arbitration, particularly before the constitution of the arbitral tribunal.

The majority of US federal circuit courts of appeals hold that there is no threshold jurisdictional bar to a US district court's issuance of injunctive relief in aid of arbitration. However, a minority of US federal circuit courts, including district courts in those circuits, apply a jurisdictional hurdle that could improperly impede parties from an injunction in aid of arbitration, even where the situation warrants that remedy.

This unfortunate jurisdictional divide may negatively impact the ability of a party that may otherwise qualify for injunctive relief under US law to obtain that relief. This reality should inform a party's choice of the US federal court in which it seeks to obtain injunctive relief in aid of arbitration.

The New York Convention and the US Federal Arbitration Act

The New York Convention does not directly address the availability of injunctive relief, including whether or to what extent injunctions may be sought from a national court or an international arbitral tribunal. Likewise, in the United States, the Federal Arbitration Act – which implements the Convention and applies to both domestic and international arbitrations – does not directly address this issue.

Both the convention and the FAA compel the resolution of disputes by arbitration where the parties have so agreed. These legal instruments fortify the arbitration process by guarding the source of their authority, namely, the parties' mutual consent to arbitrate.

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The dispositive nature of consent

Given the consent-based nature of the principles behind the convention and the FAA, and their silence regarding injunctive relief in aid of arbitration, US courts have grappled with a district court's proper authority to issue injunctive relief where the dispute has been determined to be arbitrable and the arbitration may even have commenced.

Evidence of the parties' consent to court-ordered injunctive relief in aid of arbitration may arise in a variety of forms. Most notably, the parties may expressly consent to it in the arbitration agreement.

Alternatively, consent may arise from the arbitration rules that the parties have incorporated into their agreement. Arbitration rules fall into two categories: rules that expressly permit federal courts to issue injunctive relief, and rules that provide that injunctive relief shall not be deemed incompatible with the agreement to arbitrate.

The applicable arbitration rules may, of course, be dispositive on the issue of consent. For example, in Sauer-Getriebe KG v White Hydraulics the Seventh Circuit found that the US district court possessed the authority to grant a request for injunctive relief pursuant to its equitable power and the ICC's arbitration rules, which expressly permitted either party to seek interim injunctive relief pending arbitration.

The need for court assistance in aid of arbitration

As discussed below, the majority of US circuit courts agree that a party is eligible for an injunction in aid of arbitration where the parties have expressly or implicitly agreed to this in their arbitration agreement. However, even where the parties have not expressly agreed to permit such relief, injunctive relief may still be necessary and consistent with the court's inherent equitable powers.

For example, pending the constitution of the arbitral tribunal, a party's rights could be jeopardised if one party engages in "foot-dragging" during the constitution of the tribunal. Even where this does not take place, the constitution of a tribunal may take time. The majority of US courts have also recognised that, in these circumstances, arbitration may be rendered meaningless if parties cannot obtain interim relief to maintain the status quo. This rationale — the necessity to protect the efficacy of the arbitral process — also supports a US district court's issuance of an injunction pending the arbitral tribunal's opportunity to consider the interim relief.

A number of US district courts have been misguided in their consideration of injunctive relief, particularly where parties have sought injunctive relief to avoid the arbitration process by asking the district court to resolve the merits of the dispute. In those circumstances, whether the convention and the FAA permit a US federal court to issue interim injunctive relief should depend on whether such relief would aid or thwart the ongoing arbitration.

Consequently, under current US law, so long as the other factors for injunctive relief have been met, US district courts should be permitted to exercise their equitable powers in aid of

arbitration even where the parties have not expressly consented to injunctive relief in their arbitration agreements, and deny requests for injunctive relief when it is sought to thwart or bypass the parties' agreement to arbitrate.

The majority of US circuits support injunctions in aid of arbitration

The vast majority of US federal courts of appeal — the First, Second, Third, Fourth, Sixth, Seventh, Ninth and Tenth Circuits — now hold that, where the parties have agreed to resolve their disputes in arbitration, a US district court possesses the inherent authority to grant interim injunctive relief in aid of arbitration.

In these circuits, a US district court possesses the authority to grant interim injunctive relief in aid of arbitration, even in the absence of clear contractual language, provided that the movant satisfies what most US courts regard as the four traditional factors required for a party to obtain injunctive relief. These factors are likelihood of success on the merits, irreparable harm in the absence of such relief, balance of hardships tipping in the movant's favour and consistency with public interest.

As the cases below reflect, the majority of US circuit courts hold that US district courts may exercise their inherent powers when necessary to preserve the status quo until an arbitral tribunal is constituted and prepared to adjudicate the dispute so long as the one of the parties is not using the mechanism to avoid a determination by the arbitral tribunal. Otherwise, one party could irreversibly alter the status quo and render the arbitration a hollow formality.

First Circuit

In Puerto Rico Hospital Supply v Boston Scientific, the First Circuit, citing the ICC Rules of Arbitration, held that "A district court has jurisdiction to issue preliminary injunctions to preserve the status quo pending arbitration." Most recently, in Next Step Medical v Johnson & Johnson International, the First Circuit recognised that "a district court retains power to grant an interim preliminary injunction, where otherwise justified, for the interval needed to resort to the arbitrator — that is, for the period between the time the district court orders arbitration and the time the arbitrator is set up and able to offer interim relief itself."

Second Circuit

The Second Circuit has consistently recognised the inherent authority of a US district court to provide injunctive relief in aid of arbitration. In 1984, the Second Circuit observed in Roso-Lino Beverage Distributors v Coca-Cola Bottling that the "fact that a dispute is to be arbitrated […] does not absolve the court of its obligation to consider the merits of a requested preliminary injunction."

Similarly, in Blumenthal v Merrill Lynch, Pierce, Fenner & Smith, the Second Circuit affirmed its position, reasoning that "Arbitration can become a 'hollow formality' if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute[…] A district court must ensure that the parties get what they

bargained for — a meaningful arbitration of the dispute." Likewise, in Borden v Meiji Milk Products, the Second Circuit considered interim injunctive relief pursuant to its view that the convention "does not oust the court of jurisdiction to issue an injunction in aid of arbitration."

Third Circuit

In Ortho Pharmaceutical v Amgen, the Third Circuit held that a "district court has subject matter jurisdiction to entertain a motion for preliminary injunctive relief in a dispute that the parties agree is arbitrable." The Third Circuit ruled that a district court has jurisdiction to issue injunctive relief pending arbitration if the movant satisfies the four traditional injunctive relief factors.

Fourth Circuit

In Merrill Lynch, Pierce, Fenner & Smith v Bradley, the Fourth Circuit reasoned that Congress would not have "enacted a statute intended to have the sweeping effect of stripping the federal judiciary of its equitable powers in all arbitrable commercial disputes without undertaking a comprehensive discussion and evaluation of the statute's effect."

Sixth Circuit

Similarly, the Sixth Circuit, in Performance Unlimited v Questar Publishers, concluded "that a grant of preliminary injunctive relief pending arbitration is particularly appropriate and furthers the Congressional purpose behind the Federal Arbitration Act, where the withholding of injunctive relief would render the process of arbitration meaningless or a hollow formality."

Seventh Circuit

In Sauer-Getriebe KG v White Hydraulics, the Seventh Circuit found that the district court possessed the authority and discretion to grant a request for injunctive relief pursuant to its equitable power and the ICC arbitration rules, which expressly permitted either party to seek interim injunctive relief pending arbitration.

Ninth Circuit

In Toyo Tire Holdings of Americas v Continental Tire North America, the Ninth Circuit reconciled seemingly contrary authority (Simulav Autoliv and PMS Distributing v Huber & Suhner) and, in 2010, expressly held that a district court possessed the inherent power to grant interim injunctive relief pending a decision by the arbitral tribunal if such order would preserve the status quo, provided the injunctive relief requirements are satisfied and so long as the parties were not seeking to avoid their agreement to arbitrate.

Tenth Circuit

Likewise, in Merrill Lynch, Pierce, Fenner & Smith v Dutton, the Tenth Circuit affirmed the district court's grant of interim injunctive relief to preserve the status quo until the arbitration

tribunal could consider the issue.

A significant minority of US Circuits impede injunctions in aid of arbitration

Eighth Circuit

The Eighth Circuit emphasises the parties' express consent to interim injunctive relief. In the Eighth Circuit, this heightened emphasis on consent is evidenced by the parties' agreement to resolve the underlying dispute in arbitration, and the existence of "qualifying contractual language" in the agreement, if such language provides the court with clear grounds to grant relief without addressing the merits of the underlying arbitrable dispute. The Eighth Circuit's analysis is guided by the parties' consent and not the traditional injunctive relief factors.

For example, in Merrill Lynch, Pierce, Fenner & Smith v Hovey, the Eighth Circuit held that, where the FAA applies, a court errs in granting injunctive relief unless a party alleges "qualifying contractual language." In Peabody Coalsales v Tampa Electric, the court defined "qualifying contractual language" as "language which provides the court with clear grounds to grant relief without addressing the merits of the underlying arbitrable dispute." Following these opinions, the circuit's appellate and district courts have refused to consider interim injunctive relief where the parties merely contemplated interim relief without expressly entitling either party to such relief pending the arbitration, such as a clause providing for continued performance of an agreement pending the dispute resolution process.

Fifth Circuit

Divining any rule out of the Fifth Circuit is difficult. In RGI v Tucker & Associates and Janvey v Alguire, the Fifth Circuit issued narrow holdings that avoided clear alignment with either the majority or the Eighth Circuit. In addition, the Fifth Circuit has not addressed the question of a district court's authority to issue interim relief when the parties' contract is silent on the matter. In the absence of clear circuit court authority, district courts in the Fifth Circuit have generally gravitated toward the majority rule, applying the four traditional injunctive relief factors without explicitly analysing their authority to do so in the absence of contractual language.

Eleventh Circuit

The Eleventh Circuit has not ruled on the authority of a district court to issue interim injunctive relief in aid of arbitration when the parties' arbitration agreement is silent regarding the availability of that relief. The absence of clear guidance from the Eleventh Circuit has resulted in a lack of uniformity among the district courts in the Eleventh Circuit concerning their inherent power to grant injunctive relief.

For instance, in American Express Financial Advisors v Makarewicz, the Eleventh Circuit upheld the district court's inherent power to consider a request for interim injunctive relief where the parties expressly contemplated injunctive relief. Federal district courts in the Eleventh Circuit, however, disagree on the extent of a district court's power where the

parties have not expressly agreed to injunctive relief in their arbitration agreement or the arbitration rules themselves.

DC Circuit

The US Court of Appeals for the District of Columbia has not yet addressed the issue of injunctive relief in aid of arbitration. Given this vacuum, the decisions of the district courts in the DC Circuit at this time reflect a fragmented jurisprudence.

The fifth factor?

Although the traditional injunction analysis in US federal courts is generally based upon an evaluation of four factors, a latent "fifth factor" may exist in certain US courts in cases involving potential or pending arbitration.

Until the law in the identified minority of US jurisdictions is clarified or more closely aligned with the majority — which will only be a matter of time — this latent jurisdictional factor may materially affect the parties' negotiation of an arbitration agreement or the US district court in which a party requests injunctive relief in aid of arbitration. A party potentially in need of injunctive relief in US district courts should plan accordingly.

For more detailed analysis and specific citations, see Joseph Profaizer and Daniel Prince's article, 'Obtaining Injunctions in Aid of Arbitration in United States Federal Courts: Addressing a Potential Threshold Jurisdictional Bar', in Mealey's International Arbitration Report, October 2011.

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