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“Interim Measures” in Arbitration: Requiring Pre-Hearing Security for Payment of an Eventual Final Award

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Can an arbitrator require an arbitrating party to post collateral prior to a hearing on the merits of the substantive claim(s) as security with respect to payment of a possible final award against that party? And can such an interim award then be confirmed and enforced by a Federal court? “Yes” and “yes”. First, absent an agreed prohibition, it is usually within an arbitrator’s authority to take steps to insure that an eventual merits award will not be rendered meaningless, and requiring the posting of security to insure the payment of such an award is an unremarkable, if not well known, form of interim relief that an arbitrator can grant. Furthermore, an interim award of this sort is considered final for purposes of judicial review, including confirmation.

While the use of pre-judgment restraint or attachment of a party’s assets, provided statutory conditions are satisfied, is part of mainstream American judicial practice, requiring the pre-judgment posting with the court of funds to assure the eventual payment of a judgment and/or litigation costs is typical of English judicial practice, but not American. Such a measure is therefore probably

less well known among American arbitration practitioners.

Nowadays, the rules of the principal arbitration-administering organizations typically provide for arbitrator authority to award interlocutory relief -- termed “interim measures” -- of various kinds for purposes of, among other things, (a) preserving the status quo, (b) enjoining parallel proceedings, or (c) ensuring the effectiveness of an eventual arbitral award. See, e.g., American Arbitration Association (“AAA”) Commercial Arbitration Rules R-37; ICDR Arbitration Rules Art. 24, *cf.* Art. 6 (Emergency Measures of Protection); ICC Arbitration Rules Art. 28, *cf*. Art. 29 (Emergency Arbitrator) & Appx V (Emergency Arbitrator Rules); London Court of International (“LCIA”) Arbitration Rules (2014) Art. 25, *cf*. Art. 9(B) (Emergency Arbitrator); Singapore International Arbitration Centre (“SIAC”) Rules (2016) R-30, cf. Schedule 1 (Emergency Arbitrator). These rules give the arbitrator broad authority in his/her discretion to grant interim or conservatory relief. They also authorize the arbitrator to order that the applicant for such interim measures provide security against injury to the party that is ordered to comply with the requested interim award.

Perhaps unsurprisingly, among the arbitration-administering organization rules identified above, only the LCIA Arbitration Rules, reflecting common English judicial practice, specify that available interim measures include orders to “provide security for all or part of the amount in dispute,” LCIA Art. 25.1(i), and to “provide or procure security for Legal Costs and Arbitration Costs . . ,” *id*. Art. 25.2.

In *Nat'l Union Fire Ins. Co. of Pittsburgh v. Source One Staffing LLC*, 2017 U.S. Dist. LEXIS 75056 (S.D.N.Y. May 17, 2017), the Court confirmed an interim measure award that required respondent Source One to deposit over $3.3 million in pre-hearing security vis-à-vis a possible eventual final merits award against it. National Union had claimed that Source One had failed to pay insurance premiums for the period 2004-2009, and Source One had counterclaimed that a third-party administrator hired by National Union had mishandled certain of Source One's compensation claims. *Id.* at *1. The arbitration panel ordered the noted interim relief; Source One petitioned the Court to vacate the resulting interim arbitration award; and National Union cross-moved to confirm it.

Source One argued, among other things, that the arbitrator had refused to hear material evidence concerning the application for the interim measure. *See*, 9 U.S.C. § 10(a)(3). *Id*. at *2. But the Court found that there had been no denial of fundamental fairness in the proceeding, pointing out that the nature of a request for pre-hearing security requires that it be heard "on a limited record at an early stage of an arbitration . . . and may be ordered 'before a full hearing on all defenses.'" *Id*. at *7. However, the arbitral panel had ordered that discovery on the merits proceed while the motion for pre-hearing security was litigated, *id.* at *5-*6, and had afforded Source One "an adequate opportunity to present its evidence and argument." Indeed, Source One admitted that it had been "able to present the essence of its argument on the merits through its expert's opinion." *Id*. at *6.

Ultimately, the Court found that, given Source One's undisputed financial difficulties, "the arbitration panel acted well within its authority to take steps to ensure that any final award against it would not be rendered meaningless." *Id*. at *4, *citing On Time Staffing LLC. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 784 F.Supp.2d 450, 455 (S.D.N.Y. 2011); *British Ins. Co. of Cayman v. Water St. Ins. Co.*, 93 F.Supp.2d 506, 516 (S.D.N.Y. 2000). (The Court's opinion on that specific point could be characterized as *dictum*, considering that the terms of the agreement in question "expressly authorized the panel to require Source One to post pre-hearing security." *Id*. at *4. However, it is consistent with the bases for other similar decisions.)

Furthermore, the *Source One c*ourt noted that the interim measure award in question is "considered 'final' for purposes of judicial review. . . ." *Id*. at *4n.1, citing *Banco de Seguros del Estado v. Mut. Marine Offices, Inc.*, 230 F.Supp.2d 362, 369 (S.D.N.Y. 2002); *British Ins. Co. of Cayman v. Water St. Ins. Co.*, 93 F.Supp.2d 506, 514 (S.D.N.Y. 2000). The Second Circuit had previously affirmed a lower court decision holding, analogously, that "an arbitral award requiring the establishment of an escrow account pending final determination of the merits" was ripe for confirmation as a final decision. See *Sperry Int'l Trade, Inc. v. Israel*, 689 F.2d 301, 304n.3 (2d Cir. 1982).

So too, the Seventh and Ninth Circuits have held that an arbitral order requiring "the posting of security to protect the possible final award" is subject to judicial review as a "final" award. *See, e.g., Yasuda Fire & Marine Ins. Co. of Europe v. Continental Casualty*

Co., 37 F.3d 345, 347-48 (7th Cir. 1994); *Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1023 (9th Cir. 1991).

In *On Time Staffing, LLC. v. Nat'l Union Fire Ins. Co.*, 784 F.Supp.2d 450 (S.D.N.Y. 2011), the insured's petition to vacate an interim award that required it to deposit pre-hearing security was denied. The Court found that the arbitral panel had authority to order such an interim measure, and that the panel was not required to conduct a full evidentiary hearing before making that order. National Union had sought pre-hearing security "because this insured [Source One] was in default on its payment obligations and never disputed National Union's payment invoice with 'written particulars,'" and the insured was therefore required under the applicable agreement to provide "additional collateral." *Id*. at 452. The panel had issued its interim order after argument, including oral argument, *see id*. at 452-53, and respondent On Time had then moved unsuccessfully in the arbitration to vacate that award based in part on its contention that the Panel was not authorized to award pre-hearing security under the applicable agreement, *id.* at 453. On Time then petitioned the Court to vacate the interim award, arguing that ordering the provision of pre-hearing security was beyond the scope of the arbitrator's powers, *see* FAA § 10(a)(4), 9 U.S.C. § 10(a)(4).

The Court opined that where an arbitration clause is broad, "arbitrators have the discretion to order remedies they determine appropriate." 784 F.Supp.2d at 454. The Court then found that the arbitration clause in question was indeed broad, indicating a broad

grant of authority to the arbitration panel. *Id*. The Court furthermore opined that, absent arbitration clause language expressly to the contrary, an arbitral panel has the *inherent authority* prior to the rendering of its final decision "to preserve the integrity of the arbitration process to which the parties have agreed by, if warranted, requiring the posting of pre-hearing security." *Id*. at 455.

> "Otherwise, an arbitration panel with a well-founded concern that a party was financially unable to satisfy an eventual award would have no recourse to protect itself against the risk that its significant expenditures of time and effort would be for naught." *Id*.

In *British Ins. Co. v. Water St. Ins. Co.*, 93 F.Supp.2d 506 (S.D.N.Y. 2000), the defendant's "history of maneuvers" sufficiently raised a concern that the arbitral panel's final award might be rendered meaningless and justified a pre-hearing security interim award, which was subsequently confirmed by the District Court. The Court also indicated that the amount in controversy in the arbitration was a permissible amount to be required as security.

In short, (i) an arbitration party having a provably justifiable concern about the ability or willingness of an adverse party to pay an eventual merits award, or (ii) any arbitration party having a provably justifiable concern about the ability or willingness of another party to pay either its share of costs or an award of costs, ought to consider seeking this interim measure early in proceedings. The resulting interim award will be amenable to confirmation and enforcement by a court with proper jurisdiction. (Whether the arbitrator would also impose a proportional sanction within the arbitral proceeding for a party's failure to comply with such an

interim measure award is probably within the arbitrator's discretion, subject to the rules of the applicable administering organization and the terms of the arbitration agreement.)

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