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**ARE THE NEW EMERGENCY RELIEF RULES IN
ARBITRATION THE DEATH KNELL FOR COURT-
ORDERED INJUNCTIONS PENDING ARBITRATION?**

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TABLE OF CONTENTS

A.	Rules of the AAA, JAMS, and CPR	2
1.	AAA Rules.....	2
2.	JAMS Rules.....	4
3.	CPR Rules.....	5
B.	Confirmation/Vacation of Emergency Relief Award: <i>Yahoo! v. Microsoft</i>	6
1.	The Arbitrator Issues an Injunction Compelling Performance of the Contract	6
2.	The District Court confirms the award as maintaining the status quo	7
C.	Court Injunctions to Preserve the Status Quo Pending Arbitration	8
1.	The General Rule.....	8
2.	<i>Benihana</i> : Limiting Preliminary Injunctions to Preserving the Status Quo	9
3.	<i>Benihana</i> 's Implications: Given the New Emergency Relief Rules, Courts Should No Longer Issue Preliminary Injunctions Pending Arbitration	11
D.	Strategy in Seeking Relief in Disputes Governed By Arbitration Clauses	12
1.	New Decisions Required	133
2.	Technical Considerations.....	13
3.	Respective Pros and Cons	14
4.	Enforceability.....	14
	CONCLUSION.....	15

The Federal Arbitration Act (the “Act”)¹ requires courts to stay any court action brought on claims governed by an arbitration clause.² Since the mid-1970’s, however, all the federal circuits have concluded that they have the power to issue preliminary injunctions pending arbitration 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.’”³

The rulings hinged on the absence of the right to preliminary injunctive relief in arbitration. Before October, 2013, the procedural rules of all the major arbitration providers required appointment of the arbitrator(s) through a set process that would take weeks to accomplish. Before that appointment, parties who needed injunctive relief to preserve the status quo could look only to the courts for relief.

That’s no longer the case. As of October 1 2013, the American Arbitration Association (“AAA”) adopted rules allowing parties to seek emergency relief from specially designated arbitrators. Following that the other two major commercial arbitration administrators –, JAMS, and the International Institute for Conflict Prevention and Resolution (“CPR”) – each adopted similar rules.

The rules will likely lead to significant changes in practice in applying for preliminary injunctive relief with the arbitration provider. Counsel will need to become as sophisticated in this procedure as counsel is in applying to courts for preliminary relief. In section A below, I review the rule changes, and discuss issues they raise in application.

The new rules also eliminate the bases for courts issuance of preliminary relief pending arbitration. This will lead to reversal of the 25 years of precedent that has allowed courts to issue that relief, and will limit the parties to seeking preliminary relief in arbitration. In section B, I review the bases on which courts have developed an

¹ 9 U.S.C. § 1 et seq.

² 9 U.S.C. § 3: If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

³ *Performance Unlimited v. Questar Publishers*, 52 F.3d 1373, 1380 (6th Cir. 1995), quoting *Bradley*, supra note 36, 756 F.2d at 1053, quoting *Lever Bros. v. Intern. Chemical Workers Union*, 554 F.2d 115, 123 (4th Cir.1976). For other circuits in accord, see *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986); *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 894-95 (2^d Cir. 2015); *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 812 (3^d Cir. 1989); *Merrill Lynch, Pierce, Fenner & Smith Inc., v. Bradley*, 756 F.2d 1048, 1052 (4th Cir. 1985); *Performance Unlimited v. Questar Publishers*, 52 F.3d 1373, 1380 (6th Cir. 1995); *Sauer-Getriebe KG vs. White Hydraulics, Inc.*, 715 F.2d 348, 351-52 (7th Cir. 1983), cert. denied 464 U.S. 1070 (1984). Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1292 (8th Cir. 1984) (refusing to consider injunction where arbitration clause did not authorize parties to petition courts for injunctive relief.)

exception to the Act to allow them to issue injunctions pending arbitration. And in Section C, I explain why the availability of the new interim relief rules in arbitration eliminate the bases on which courts have relied to create that exception.

A. Rules of the AAA, JAMS, and CPR

The three major arbitration administrators – AAA, JAMS, and CPR – each have new rules providing for injunctive relief before the appointment of the arbitrator(s) in the ordinary course. For each administrator, I examine the rules that apply before and after the appointment of the arbitrator(s) in the ordinary course.

1. AAA Rules

Before October 1, 2013, AAA had as part of its Commercial Rules what it termed Optional Rules for Emergency Measures of Protection (the “Optional Rules”). The Optional Rules applied only if the parties specifically adopted them in their arbitration clause or otherwise agreed to use them.⁴ If the parties did so, then, before appointment of the arbitration panel, either party could request injunctive relief under the Optional Rules from a specially-appointed arbitrator.

Effective October 1, 2013, the AAA amended its Commercial Rules so that the Emergency Measures of Protection apply to all arbitration clauses entered into on or after October 1, 2013.⁵ The procedure is basically as was provided in the prior Optional Rules.⁶

Under the new rule, either party may apply for emergency relief with the AAA setting forth the relief sought, why the relief is required on an emergency basis, and why the party is entitled to the relief. The applicant must certify that it has notified the other parties of the filing, or explain the good faith steps taken to provide notice.⁷ The AAA then appoints an emergency arbitrator, who immediately reports any partiality disclosures. The parties have one business day to object to the arbitrator.⁸

The emergency arbitrator then has no longer than two days to establish a schedule for both parties to be heard, which could include telephonic hearings or

⁴ Optional Rule (“O”) 1.

⁵ R-38(a).

⁶ Among the differences are that the new rules allow for a video conference and provide clear authority for the arbitrator to rule on his or her jurisdiction (R-38(d)); and they specify “immediate or irreparable loss or damage” as the standard (R-38(e)).

⁷ R-38(b).

⁸ R-38(c).

written admissions in lieu of a formal hearing.⁹ Following the hearing, the emergency arbitrator may enter an award granting the emergency relief if the applicant has shown that “immediate and irreparable loss or damage shall result in the absence of emergency relief, and that such party is entitled to such relief...”¹⁰ The emergency arbitrator may condition the relief on the applicant’s providing security.¹¹ The emergency arbitrator retains jurisdiction to hear matters related to the interim relief until the regular panel is appointed, after which the panel has jurisdiction over the matter.¹²

The AAA did not keep statistics on the number of times the pre-October 1, 2013 Optional Rules had been invoked. Since adoption of the new rules, parties have invoked the emergency procedures twelve times.¹³ (The parallel emergency relief rules of the AAA’s International Center for Dispute Resolution (ICDR) have been invoked 56 times.)¹⁴

The AAA’s rules also authorize arbitrators appointed in the ordinary course to issue interim measures, at any time, “including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.”¹⁵ Arbitrators may also grant “any remedy or relief that the arbitrator deems just and

⁹ R-38(d).

¹⁰ R-38(e).

¹¹ R-38(g).

¹² R-38(f).

¹³ Information from Ryan Boyle, AAA Vice President – Statistics and In–House Research, provided on June 15, 2015, E-mail from Christian P. Alberti, AVP/Director of ICDR, dated April 11, 2016. Boyle reported four cases through June 2015, and I wasn’t able to get an update by the time of this paper. Eight of the cases that invoked the rules were in the ICDR. Of the four cases with the AAA,

- Emergency arbitrator was appointed, issued a ruling and case was closed.
- Emergency arbitrator was appointed, issued a ruling and then Respondent went into bankruptcy.
- Emergency arbitrator was appointed, issued a ruling and then the parties agreed to mediate.
- Emergency arbitrator was appointed, issued a ruling and then the parties submitted a joint stipulation of dismissal.

Of the eight cases that invoked the AAA rules before the ICDR, the results were:

- 0 cases in which the Applicant won (partially or in full)
- 3 cases in which the Applicant lost
- 4 cases have been settled
- 1 cases have been withdrawn

¹⁴ E-mail from Christian P. Alberti, AVP/Director of ICDR, dated April 11, 2016. The results were

- Applicant won (partially or in full) in 29 cases
- Applicant lost in 14 cases
- Parties settled in 9 cases
- Parties withdrew in 4 cases

¹⁵ R-37.

equitable,” including specific performance.¹⁶ Finally, arbitrators may enter sanctions for failure to comply with their order.¹⁷

2. JAMS Rules

JAMS adopted rules that it refers to as emergency relief procedures applicable to arbitrations filed and served after July 1, 2014.¹⁸ The applicant notifies JAMS of the relief sought and the supporting reasons, and must notify the other parties or explain the attempts made to do so.¹⁹ Within 24 hours, JAMS will appoint an emergency arbitrator, who makes full partiality disclosures.²⁰ Parties have 24 hours to challenge the arbitrator, and JAMS decides all challenges promptly.²¹

Within two business days of the appointment, the arbitrator sets a schedule to consider the request.²² Following the hearing, the arbitrator decides whether the applicant “has shown that immediate and irreparable loss or damage will result in the absence of emergency relief and whether the requesting Party is entitled to such relief.”²³

The emergency arbitrator retains jurisdiction over the matter until the parties appoint their permanent arbitrator(s).²⁴ The emergency arbitrator may require the applicant to post security as a condition to obtaining relief.²⁵

JAMS reports that the emergency relief procedures have been invoked twelve times since establishment of the rule.²⁶

¹⁶ R-47.

¹⁷ R-58.

¹⁸ Rule 2(c). Parties are allowed in their arbitration clause to opt out of the rules.

¹⁹ Rule 2(c)(i).

²⁰ Rule 2(c)(ii).

²¹ *Id.*

²² Rule 2(c)(iii).

²³ Rule 2(c)(iv).

²⁴ Rule 2(c)(v).

²⁵ Rule 2(c)(vi).

²⁶ Information from Kimberly Taylor, JAMS Senior Vice-President and Chief Operating Officer, provided on April 11, 2016. JAMS had general information on nine of the matters. 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.

Once the ordinary-course arbitrator(s) are appointed, they assume jurisdiction over the emergency relief. They may also grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific performance or any other equitable or legal remedy.²⁷ Further, they may sanction a party for failing to comply with the Rules or an order of the Arbitrator.²⁸

3. CPR Rules

Effective July 1, 2013,²⁹ CPR's administered arbitration rules establish procedures that allow parties, before a tribunal is constituted, to request appointment of a special arbitrator for interim measures of protection.³⁰ The applicant must apply for relief to CPR, provide supporting evidence and law, and either certify that other parties have been notified or describe the steps taken to provide notice.³¹ The parties can agree on the special arbitrator or CPR will appoint one within one business day of receiving the application.³² The special arbitrator makes partiality disclosures, and the parties have one day to object. CPR rules on all objections.³³

The special arbitrator determines the procedure, which can include hearings in person, by telephone, or otherwise, and conducts the hearing expeditiously.³⁴ The special arbitrator "may grant any interim measures as he or she deems necessary, including but not limited to measures for the preservation of assets, the conservation of goods, or the sale of perishable goods."³⁵ The special arbitrator may require the

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- 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.
 - An emergency arbitrator was appointed and issued a ruling. The parties then appointed a new arbitrator and it is proceeding.
 - 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 is proceeding.

The information did not identify whether any of the cases involved franchising.

²⁷ Rule 24(c).

²⁸ Rule 29.

²⁹ Before this date, CPR offered rules only for non-administered arbitrations.

³⁰ Rule 14.2.

³¹ Rule 14.3.

³² Rule 14.4.

³³ Rule 14.6.

³⁴ Rule 14.8.

³⁵ Rule 14.9.

applicant to provide security as a condition to securing the interim measure, and may also provide a payment in case of non-compliance with the interim measure.³⁶ The special arbitrator may state in the opinion whether the interim measure is final for purposes of any related judicial proceeding.³⁷ Finally, the special arbitrator may apportion the cost of the arbitration and the parties' reasonable attorneys' fees.³⁸

Once the tribunal is appointed, it assumes jurisdiction over the interim measure.³⁹ The tribunal's powers to award interim measures are similar in scope to the special arbitrator's powers, but do not have time restraints.⁴⁰

B. Confirmation/Vacation of Emergency Relief Award: Yahoo! v. Microsoft

I have found only one federal court case that ruled on confirmation or vacation of an emergency arbitration award, *Yahoo, Inc. v. Microsoft Corp.*⁴¹ There the arbitrator issued an injunction compelling performance of a contract, and the court confirmed the award. The case discusses a number of issues that will likely be contested in similar proceedings, and I review them below. I'll return to these issues in Section (C)(3) below.

1. The Arbitrator Issues an Injunction Compelling Performance of the Contract.

In *Yahoo!*, Yahoo was combining its search engine worldwide with Microsoft's Bing search engine. The transition proceeded in stages through 14 geographic areas. Concerned with developments at Microsoft, Yahoo stopped converting the final two of the areas.

The parties' contract had an arbitration clause. The contract preceded the effective date of the emergency rules discussed above, but did incorporate the AAA's Optional Rules, which provided for emergency relief. The arbitration clause gave the emergency arbitrator broad power to award "specific performance (in addition to any other remedies and including in connection with claims for interim, injunctive or emergency relief)."⁴²

³⁶ Rule 14.10.

³⁷ *Id.*

³⁸ Rule 14.11.

³⁹ Rule 14.14.

⁴⁰ Rule 13.1.

⁴¹ 983 f.Supp.2d 310 (S.D.N.Y. 2013)

⁴² *Id.* at 316.

Microsoft commenced an emergency arbitration to compel Yahoo to finish the conversion. The arbitrator granted the emergency relief, stating that “Yahoo is ‘restrained and enjoined from continuing any pause in transitioning; and is ‘commanded to use all efforts’ to complete the transition [in 28 days].”⁴³

2. The District Court confirms the award as maintaining the status quo.

The day following the award, Yahoo moved in the Southern District of New York to vacate the award, and the next day Microsoft moved to confirm it.

Yahoo raised four objections. The first was that the arbitrator exceeded his powers because he awarded final, not interim, relief by compelling performance of the contract. The Court disposed of this objection by noting that the arbitration clause explicitly authorized specific performance.⁴⁴

Yahoo’s second objection was that there was no irreparable harm. The Court disposed of this by noting there was some evidence supporting the finding, and deferred to the arbitrator’s evaluation of the evidence.

Yahoo’s third objection was that the arbitrator failed to make findings sufficient to show that Microsoft was entitled to injunctive relief under the Second Circuit’s preliminary injunction standard. The Court disposed of this objection by noting that Yahoo failed to establish manifest disregard of the Second Circuit’s test for preliminary injunctions.

Yahoo’s final objection was that the Court lacked jurisdiction to confirm the award because the Court had jurisdiction to confirm only final, not interim, awards. The Court had two responses. The first was that the award was actually final because it compels performance of the contract. The second was that, regardless of that distinction, the award would be meaningless if the prevailing party could not have it confirmed.⁴⁵

⁴³ *Id.* at 315.

⁴⁴ Rather than leave it at this, however, the Court added that the contract authorized the arbitrator to grant relief “necessary to restore the status quo.” The Court quoted the arbitrator’s reasoning that “the injunction imposed hereby merely restores the parties to the activities they were ready to proceed with before [Yahoo’s unilateral pause].” *Id.* at 317. This reasoning hopefully confuses the concept of preserving the status quo. The arbitrator’s interim award is clearly a mandatory injunction ordering the equivalent of specific performance. Given that the arbitration clause authorized this remedy, however, that fact alone suffices to show that the arbitrator did not exceed his powers.

⁴⁵ For this proposition, the Court cited two cases that reviewed interim awards in arbitration that were under the arbitration rules’ traditional rules regarding interim relief, but were not under the emergency relief rules. They nonetheless were in the nature of preliminary injunctions, final as to the independent claim for preliminary relief requested, and thus were deemed reviewable. *Southern Seas Nav. Ltd. v. Petroleos Mexicanos*, 606 F. Supp. 692, 694 (S.D.N.Y.1985) (Weinfeld, J.)(injunction removing lien on vessel so it could be sold); and *Sperry Int’l Trade v. Gov’t of Israel*, 532 F. Supp. 901, 909 (S.D.N.Y. 1982), *aff’d* 689 F.2d 301 (2d Cir. 1982) (injunction prohibiting drawing down on irrevocable letter of credit). The reviewability of interim awards in the nature of preliminary injunctions is well-accepted. *See, e.g., Island Creek Coal Sales Co. v. City of Gainesville, Fla.*, 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);

Based on this reasoning, the Court confirmed the award, and denied Yahoo's motion to vacate.

C. Court Injunctions to Preserve the Status Quo Pending Arbitration

1. The General Rule

The general rule in federal courts has been to allow parties to seek injunctive relief pending arbitration.⁴⁶ The initial circuit court cases allowing the procedure focused on two issues. The first is whether the Federal Arbitration Act (the "Act")⁴⁷ deprives the courts of subject matter jurisdiction to enter preliminary injunctive relief.⁴⁸ To answer the question, the courts examined section 3 of the Act, which requires courts to stay trial of an action if the proceeding is brought under any issue governed by an arbitration agreement. Because that section does not explicitly bar preliminary injunctive relief, and refers only to staying trials, those courts concluded that they do have subject matter jurisdiction to consider preliminary injunctive relief.⁴⁹

The second issue the courts focused on is the Act's purpose, as to which these courts reasoned that to make arbitration meaningful, they need to be able to issue injunctive relief to preserve the status quo pending appointment of the arbitrator(s). As expressed by the Sixth Circuit in a case adopting the majority approach:

[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 because an arbitral award, at the

Pacific Reins. Mgmt. Corp. v. Ohio Reins. Corp., 935 F.2d 1019, 1023 (9th Cir. 1991); *Nat'l R.R. Passenger Corp. v. ExpressTrak, L.L.C.*, 2003 WL 26132936 (D.D.C.); *Matter of Polydefkis Corp. v. Transcon. Fertiliser co.*, 1996 WL 683629, *2 (E.D. Pa.); *W. Tech. Serv. Int'l, Inc. v. Caucho Industriales, S.A.*, 2010 WL 150162, *3 (N.D. Tex.); and *Schultz. V. AT&T Wireless Serv., Inc.*, 376 F.Supp.2d 685, 690 (N.D. W.Va. 2005).

⁴⁶ See *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986); *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 894-95 (2^d Cir. 2015); *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 812 (3^d Cir. 1989); *Merrill Lynch, Pierce, Fenner & Smith Inc., v. Bradley*, 756 F.2d 1048, 1052 (4th Cir. 1985); *Performance Unlimited v. Questar Publishers*, 52 F.3d 1373, 1380 (6th Cir. 1995); *Sauer-Getriebe KG vs. White Hydraulics, Inc.*, 715 F.2d 348, 351-52 (7th Cir. 1983), *cert. denied* 464 U.S. 1070 (1984). But see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1292 (8th Cir. 1984) (refusing to consider injunction where arbitration clause did not authorize parties to petition courts for injunctive relief.)

⁴⁷ 9 U.S.C. §§ 1 *et. seq.* (1976).

⁴⁸ *E.g.*, *Performance*, *supra* note 36, 52 P.3d at 1373, *citing Ortho Pharm.*, *supra* note 36, 882 F.2d at 806, 812 n. 6.

⁴⁹ *E.g. Performance*, *supra* note 36, 52 P.3d 1378-79, *discussing and citing Bradley*, *supra* note 36, 756 F.2d at 1052, *Lever Bros. Co. v. Int'l. Chem. Workers Union, Local 217*, 554 F. 2d 115, 123 (4th Cir. 1976), *Roso-Lino Bev. Dist. v. Coca-Cola Bottling Co. of New York*, 749 F.2d 124 (2^d Cir. 1984), and *Sauer*, *supra* note 36, 715 F.2d at 348.

time it was rendered “could not return the parties substantially to the status quo ante.”⁵⁰

The general rule stemming from these cases is that, if the petitioner meets the standards for granting the preliminary injunction, federal courts will issue preliminary injunctions pending arbitration to preserve the status quo.

2. **Benihana: Limiting Preliminary Injunctions to Preserving the Status Quo**

A recent Second Circuit case, *Benihana, Inc. v. Benihana of Tokyo, LLC*,⁵¹ probed the scope of preliminary injunctions pending arbitration, and held that courts may issue them only to preserve the status quo, and not to grant affirmative relief. The case is worth examining closely because, as will be discussed in the following section, its reasoning raises a number of questions regarding the viability of preliminary injunctions pending arbitration.

Benihana, Inc. (“Benihana America”) licensed Benihana of Tokyo, LLC (“Benihana Tokyo”) the right to operate a Benihana restaurant in Honolulu, Hawaii, subject to the standards of Benihana America.⁵² The license had an arbitration clause. Benihana Tokyo wanted to sell hamburgers at the Hawaiian restaurant, but hamburgers were not an approved menu item. Benihana America sent Benihana Tokyo a notice to stop selling hamburgers, and gave it 30 days to cure, which Benihana America extended twice.

Benihana Tokyo sought a preliminary injunction pending arbitration to extend the cure period on the ground that Benihana America had waived the right to enforce the menu restriction.⁵³ The District Court rejected the argument, and denied the motion. Benihana Tokyo then informed Benihana American that Benihana Tokyo would stop selling hamburgers in Honolulu. Benihana Tokyo, however, continued to sell hamburgers.⁵⁴

⁵⁰ *Performance*, *supra* note 36, 52. F. 3d at 1380, *quoting Bradley*, *supra* note 36, 756 F.2d at 1053, *quoting Lever Bros.* *supra* note 39, 554 F.2d at 123.

⁵¹ 784 F.3d 887 (2d Cir. 2015).

⁵² *Id.* at 890. The license was the result of a reorganization that the original Benihana went through, resulting in Benihana of America having the right to operate Benihana restaurants in the United States, Latin America, and the Caribbean, and Benihana Tokyo’s having the rights for all other territories. The one territorial exception was the restaurant in Hawaii, which Benihana of Tokyo had historically operated.

⁵³ *Id.* at 891-92. Benihana America had historically not objected to Benihana Tokyo’s serving hamburgers. New management purchased Benihana America in 2012, and one year later demanded that Benihana Tokyo stop selling hamburgers.

⁵⁴ *Id.* at 892.

After receiving another notice of breach, Benihana Tokyo filed an arbitration demand, requesting a declaration that it was not in default by selling hamburgers; or, if it was in default, then it should be given a short cure period. Benihana America, in turn, sent Benihana Tokyo a notice of termination. Benihana America also sought a preliminary injunction pending arbitration seeking to stop Benihana Tokyo (i) from selling hamburgers, (ii) from misusing marks, and (iii) from arguing to the arbitration panel that Benihana Tokyo should be permitted to cure any defaults. The District Court granted each request for relief. As to the third request, the District Court reasoned that there was no basis for a court or arbitrator to extend the cure period, and that Benihana America would be irreparably harmed if the arbitrator found otherwise.⁵⁵

The Second Circuit affirmed the ruling on hamburgers, but reversed as to enjoining Benihana Tokyo from arguing the substantive issue in arbitration. The Second Circuit's ruling on the sale of hamburgers was based on the standard 4-factor preliminary injunction test.⁵⁶ As to the element of relief prohibiting Benihana Tokyo from requesting the arbitrators to grant an extended cure period, the Second Circuit's first point was that the arbitrators had the power to decide arbitrability. Noting that the parties' arbitration clause was broad, the Court stressed that "any doubts concerning the scope of arbitrable issues [are] resolved in favor of arbitration."⁵⁷ Because the issue of arbitrability is for the arbitrators, the Court concluded, "any subsequent construction of the contract and of the parties' rights and obligations under it"⁵⁸ are for the arbitrators to decide.

The court's second point was that, pending arbitration, courts should seek to avoid any ruling on the merits: "Prohibiting a court's assessment of the merits until after the arbitral decision has been rendered is consistent with the structure of the Federal Arbitration Act... and the 'strong federal policy favoring arbitration....'"⁵⁹ Further, "[i]f a court determines the merits of the parties' arguments in advance of a pending arbitration, 'the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated.'"⁶⁰

The Court's third point was that deference is appropriate because arbitrators have fewer restraints than judges: "The benefit of having the arbitrator's decision is

⁵⁵ *Id.* at 892-93.

⁵⁶ Likelihood of success on the merits, likelihood of irreparable injury, balance of hardships and the public interest. *Id.* at 894-95.

⁵⁷ *Id.* at 898, quoting *Shaw Grp., Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115,120 (2d Cir. 2003).

⁵⁸ *Id.* at 899, quoting *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 832 (2d Cir. 1988).

⁵⁹ *Id.* at 900, quoting *Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001).

⁶⁰ *Id.* at 901, quoting *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960).

particularly important given that arbitrators are generally afforded greater flexibility in fashioning remedies than are courts.”⁶¹

Summing its view, the Court placed its ruling within the general rule regarding preserving the status quo: “Because the parties’ dispute had been submitted to arbitration, the district court, rather than independently assessing the merits, should have confined itself to preserving the status quo pending arbitration.”⁶²

3. Benihana’s Implications: Given the New Emergency Relief Rules, Courts Should No Longer Issue Preliminary Injunctions Pending Arbitration

The arbitration clause at issue in *Benihana* did not provide that the parties could petition the arbitration tribunal for preliminary relief. If a clause now does incorporate emergency rules, *Benihana’s* reasoning (as well as the general rulings over the past 40 years on injunctions pending arbitration) should compel courts to now refrain from issuing injunctions pending arbitration.

The primary change given the new emergency rules relates to irreparable harm. Before the emergency rules, a party could petition the court on the ground that it would be irreparably harmed if the court did not issue preliminary relief pending appointment of the arbitrator. Under those conditions, failing to issue injunctive relief could have rendered the arbitration “meaningless or a hollow formality” because the eventually-issued arbitral award “could not return the parties substantially to the status quo ante.”⁶³ But now, as discussed above, the three major arbitration administrators provide for emergency relief before the arbitrator is appointed in the ordinary course. Thus now, parties can obtain meaningful preliminary relief in arbitration. Given the availability of the remedy, there is no irreparable harm if the court does not issue the relief.

A similar issue relates to the court’s interfering with the arbitrator’s power to decide issues of arbitrability. The court may not have interfered when parties had no recourse to emergency relief in arbitration. But now that parties can obtain meaningful preliminary relief in arbitration, the presumption of deference to arbitrators should favor a new rule that defers to arbitrators to rule on the request for preliminary injunctive relief.

This conclusion is consistent with *Benihana’s* two other grounds for its decision. Its second ground was that courts should defer ruling on the merits of an action pending

⁶¹ *Id.* at 902.

⁶² *Id.*

⁶³ *Id.*, at 1380, (quoting *Bradley*, *supra* note 36, 756 F.3d at 1053, quoting *Lever Bros.*, *supra*, note 36, 554 F.2d at 123.

arbitration. The unstated premise of this principle is that ruling on an application for preliminary relief does not rule on the merits. But that is a fiction – the court needs to rule whether the applicant has a likelihood of prevailing on the merits. While such a ruling is not preclusive, it does send a strong presumptive message to the arbitrator as to how the local federal judge views the case on the merits. So, here again, deference would favor allowing the arbitrator to rule on the request for preliminary relief.

Benihana's third ground for its decision was that courts should favor deferring to arbitrators because “arbitrators are generally afforded greater flexibility in fashioning remedies than are courts.”⁶⁴ Given the new availability of rules for emergency relief, this principle supports deferring to arbitrators on any request for preliminary relief, even it is truly to preserve the status quo.

The same conclusion should apply even if the arbitration clause specifically provides that the parties may petition the court for preliminary relief pending arbitration. That carve-out does allow the court to decide arbitrability, but the court still cannot find irreparable harm because the arbitration tribunal can issue interim relief.

D. Strategy in Seeking Relief in Disputes Governed By Arbitration Clauses

The use of the emergency rules should grow as parties grow to understand them, and the use will be accelerate rapidly if federal courts start declining to issue preliminary relief pending arbitration if the parties have a clause incorporating rules from one of the three major commercial providers. This section addresses practice issues in using the rules.

There is not a lot of precedent to go on. I'm aware of only one published arbitration award in an emergency relief proceeding.⁶⁵ And, as discussed above, there is only one decision reviewing an emergency relief award for confirmation or vacation. There are a number of decisions, however, where courts ruled on interim relief awarded by arbitrators during the pendency of an arbitration, and not under the arbitration rules. I will draw from these in the following sections.

Each of the following discussions assumes the parties have an arbitration clause that triggers the new emergency relief rules.

⁶⁴ *Id.* at 35.

⁶⁵ *Open TLD, B.V. v. Internet Corp. for Assigned names and Numbers (ICANN)*, ICDR Case No. 01-15-0004-1379 (Aug. 24, 2015), <http://www.icann.org/en/system/files/files/emergency-award-24aug15-en.pdf>. See Peter Williamson, *Emergency Arbitration: Fast, Effective and Economical*, http://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/newsletter/mar2016/emergency_arbitration_fast_effective_and_economical.pdf (Dec. 2015) at 2.

1. New Decisions Required

A party needing emergency relief will need to decide whether to petition in court or the arbitration tribunal. If the party decides to petition the court, might the opposing party move to dismiss based on the reasoning discussed in section 3(C) above? Might the court *sua sponte* decide to defer to the arbitration tribunal? Likewise, if the party seeking relief files in court, the counterparty needs to decide whether to move to dismiss, or whether the counterparty may prefer to be in court.

2. Technical Considerations

In making these new decisions, practitioners need to consider a number of technical distinctions between injunctive relief in the courts and emergency relief in arbitration. One is that none of the providers' rules specifically allow for same-day *ex parte* relief where the claimant does not want to provide notice to the other party because it would put at risk the relief requested.⁶⁶ Thus, in the unusual situation where a party needs same-day relief, and notice to the other side would jeopardize the remedy, a party's only remedy may be petitioning the court *ex parte* for a temporary restraining order. In that instance, courts should apply the same traditional rule – that the arbitration would be a hollow formality if the court didn't issue relief.

Another technical distinction is that each set of rules provides a substantive guideline for whether the arbitrator should issue the preliminary relief. AAA and JAMS allow the arbitrator to issue emergency relief if “immediate and irreparable loss or damage” would result in the absence of the relief, and the party is entitled to such relief.⁶⁷ CPR's rule simply states that arbitrators can grant the interim relief they “deem necessary.”⁶⁸ These standards allow the arbitrator more leeway than a judge has, though the arbitrator could choose to strictly apply the applicable governing law's standard multi-part test for issuing a preliminary injunction.⁶⁹ The arbitrator's flexibility would seem to offer an applicant the benefit of arguing more from equity than the more-restrictive case law required in court.

⁶⁶ The rules all require the petitioner to either notify the other side or explain the attempts made. AAA R. 38(b); JAMS Rule 2(c)(i); CPR Rule 14.3. They do not set a procedure for temporary relief without notice. Further, the arbitrator selection process requires partiality disclosures and an opportunity for challenge. AAA R. 38(c); JAMS Rule 2(c)(ii); CPR Rules 14.4, 14.6. Thus the nature of the process may preclude even the possibility of granting same-day relief without notice.

⁶⁷ AAA R-38(e); JAMS Rule 2(c)(iv).

⁶⁸ Rule 14.9.

⁶⁹ In cases where parties seek in court to vacate interim relief based on manifest disregard of preliminary injunction requirements, courts have reviewed the award under the Circuit's multi-party test. *See, e.g., Yahoo!, supra* n. 41, 983 f.Supp.2d at 317. Nonetheless, there does not seem to be any reason that a court should not accept the simple standard in the respective arbitration rule.

3. Respective Pros and Cons

In addition to these technical distinctions, practitioners will have to weigh other respective pros and cons of court or arbitration. One is location. Frequently, arbitration clauses carve out the right to seek injunctive relief in a specified forum. That forum may give one party a hometown benefit of a sympathetic judge and lower cost. Arbitration offers the possibility of selecting an arbitrator not from the franchisor's city or picking someone who does not appear to have any hometown bias. Likewise, an arbitrator has more flexibility in not requiring parties to appear in the designated forum for a hearing, and can use telephonic or video testimony, depositions, or documents without needing to satisfy the rules of evidence.

The issue of evidence also needs to be considered on its own. Since the petitioner has the burden of proof, the petitioner may benefit from the flexibility that arbitration provides in terms of presenting testimony live, by telephone, affidavit, or otherwise. Because arbitration does not require application of any rules of evidence, both parties may be able to bring in matters that would not be admissible evidence in court, but may sway an arbitrator ruling on equitable relief.

Another issue to be considered is the quality of the decision maker. Parties who choose to petition a court face the luck of the draw as to which judge is assigned the matter. The arbitration providers appear to be selecting emergency arbitrators only from their most highly-qualified panels.

An additional consideration is that arbitration allows more flexibility in scheduling, and the proceedings can be structured to be less costly than rules-bound court proceedings. The contrary consideration on cost, though, is that in arbitration the parties need to cover administrative costs and the special arbitrator's fees.

And yet another consideration is confidentiality. Parties often agree to arbitration to keep their disputes private. A party needing interim relief now can seek that relief in arbitration. If the party would like the public exposure for strategic reasons, that could be a reason to file in court.

4. Enforceability

The final consideration is enforceability. A court has the power of contempt to enforce its orders, but an arbitrator does not. Thus there is the possibility that a party against whom emergency relief is entered could choose not to comply absent a court order confirming the award.

Nonetheless, each set of arbitration rules allows the arbitrator to issue sanctions for non-compliance. Given sanctions, and that the parties will remain in arbitration before the ordinary-course arbitrator who will assume jurisdiction over the interim relief, it seems likely that parties would obey the award, even absent the threat of a court's contempt power. The rules also allow the arbitrator to require the claimant to

post security, which protects the respondent. Because of all these factors, parties should comply with emergency relief entered against them

CONCLUSION

The arbitration providers' new emergency rules have created new opportunities for practitioners. The availability of emergency relief also undercuts the basis for the 40 years of precedent that federal courts may issue injunctions pending arbitration to prevent arbitration from becoming a hollow formality. Practitioners should be prepared now to confront and exploit these changes.

