



Reasonable Minds Differ: Circuit Split on Preliminary Injunctive Relief for Parties to Arbitration Agreements

In this Issue:

A. The Majority View	1
B. The Minority View	2
C. Arbitration Forums Provide a Measure of Preliminary Review	2
D. In Closing	3
Author Information	3
For More Information	4

This article compares the U.S. Court of Appeals' differing positions on whether injunctive relief is available to parties to contracts with arbitration provisions. It is the first in a series of comparative studies highlighting why choice of law and jurisdiction matters in commercial litigation.

Choice of law and venue may matter most for parties to arbitration agreements. It seems unusual a Federal circuit split highlighted by the Supreme Court more than 30 years ago is unresolved today, but the question remains: does the Federal Arbitration Act (the "Act") bar a district court from ordering preliminary injunctive relief when parties have agreed to arbitrate disputes? As explained below, the majority of Circuits have held such relief is generally available. The opposite is true in the Eighth Circuit, which hears appeals from federal district courts in Missouri, Arkansas, Iowa, Nebraska, Minnesota, North Dakota and South Dakota.¹

A. The Majority View

The First Circuit exemplifies the majority view and has held a "district court can grant injunctive relief in an arbitrable dispute pending arbitration, provided the prerequisites for injunctive relief are satisfied."² It reasons "the congressional desire to enforce arbitration agreements would frequently be frustrated if the courts were precluded from issuing preliminary injunctive relief to preserve the status quo pending arbitration and, ipso facto, the meaningfulness of the arbitration process."³

¹ The Eleventh Circuit and D.C. Circuit have not addressed the issue.

² *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986).

³ *Id.*



The Second,⁴ Third,⁵ Fourth,⁶ Sixth,⁷ and Ninth⁸ Circuits follow this majority view.

The Fifth Circuit has not squarely addressed the issue but has held a court may enter preliminary injunctive relief before it has determined whether the dispute is subject to mandatory arbitration.⁹ The Seventh Circuit has held a district court may enter preliminary injunctive relief in an arbitrable case, but the injunction may only last until the arbitration panel is able to address whether the injunction should remain.¹⁰ “Once assembled,” the Seventh Circuit has held, “an arbitration panel can enter whatever temporary injunctive relief it deems necessary to maintain the status quo.”¹¹ The Tenth Circuit has stated “a preliminary injunction preserving the status quo until the arbitration panel takes jurisdiction does not violate” the Act, but did so in a case where the contract contained a provision allowing for the entry of a temporary restraining order or preliminary injunction “to maintain the status quo pending the outcome of any arbitration proceeding which may be initiated.”¹² So it is not clear how the Tenth Circuit would resolve the issue where the contract is silent on the matter.

B. The Minority View

The Eighth Circuit is the only circuit to hold that the Act prevents courts from entering preliminary injunctive

⁴ *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1054 (2d Cir. 1990).

⁵ *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 812 (3d Cir. 1989).

⁶ *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1053 (4th Cir. 1985).

⁷ *Performance Unlimited Inc. v. Questar Publishers Inc.*, 52 F.3d 1373, 1380 (6th Cir. 1995).

⁸ *PMS Distrib. Co. v. Huber & Suhner, A.G.*, 863 F.2d 639, 642 (9th Cir. 1988).

⁹ *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011) (“The matter of arbitrability has not yet been decided, and the district court did not overreach when it decided the preliminary injunction motion.”).

¹⁰ *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 215 (7th Cir. 1993) (“[W]e do not go so far as to determine that that authority extends ad infinitum.”).

¹¹ *Id.*

¹² *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dutton*, 844 F.2d 726, 726–27, 728 (10th Cir. 1988).

relief in an arbitrable dispute.¹³ It makes a narrow exception, however, where the arbitration contract contains “qualifying contractual language”—language that “provides the court with clear grounds to grant relief without addressing the merits of the underlying arbitrable dispute”—but it is not an easy exception to satisfy.¹⁴ For example, a contract provision allowing a party to request injunctive relief does not authorize such relief, in the Eighth Circuit’s view.¹⁵ And yet, a provision stating that performance “shall be continued in full by the parties during the dispute resolution process” suffices to permit preliminary injunctive relief.¹⁶

C. Arbitration Forums Provide a Measure of Preliminary Review

Arbitration services have procedures for addressing emergency injunctive relief, but the process is slower as compared to Federal Court. The American Arbitration Association’s (AAA) [Commercial Arbitration Rules](#), for example, provide for “Emergency Measures of Protection.” Rule 38 permits a party “in need of emergency relief prior to the constitution of the panel” to seek such relief by notifying the AAA and the opposing party in writing of the need and basis for relief. The AAA then has one business day to appoint a single emergency arbitrator, who has only two business days from appointment to set a schedule to consider the request. He or she may enter emergency relief if convinced “immediate and irreparable loss or damage shall result” without relief and the moving party is “entitled” to the relief. Rule 37 separately authorizes the arbitrator to take “whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.” JAMS, another popular arbitration service, [has a similar procedure](#).

¹³ See, e.g., *Manion v. Nagin*, 255 F.3d 535, 538–39 (8th Cir. 2001); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1292 (8th Cir. 1984).

¹⁴ See *Manion*, 255 F.3d at 539.

¹⁵ See *Id.*

¹⁶ *Peabody Coalsales Co. v. Tampa Elec. Co.*, 36 F.3d 46, 47 (8th Cir. 1994).





D. In Closing

The pros and cons of arbitration need to be carefully analyzed. In addition, this e-alert highlights jurisdictional nuances to consider, including how Courts treat requests for injunctive relief, as discussed above. It is crucial to involve trusted and experienced counsel when making decisions related to arbitration, whether it be drafting an arbitration

provision, strategizing the potential for resolving disputes when arbitration is the selected venue, or litigating a full-blown arbitration.

If you have any questions or you would like more information about this topic or arbitration and litigation more generally, please contact the author or your Polsinelli attorney.

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