

## ARTICLES

# This is AAA, What's Your Emergency?

By Lisa Romeo – January 2, 2024

It's been 10 years since the American Arbitration Association (AAA) formally added the rule for the Emergency Measures of Protection to the AAA's Commercial Rules. The rule was added to the AAA Construction Rules in 2015 and to the International Center for Dispute Resolution's (the international division of the AAA) International Dispute Resolution Procedures in 2014. Previously, the Emergency Measures of Protection had been offered as a separate supplement to the main rules and required that they be referenced in the parties' contract or agreed to after the dispute had arisen, to be invoked. The newer rule applies to contract signed after the effective date of the rule's incorporation into the applicable rules set.

The rule provides a framework for a party to request immediate relief before the full arbitrator appointment process. Emergency relief is most commonly petitioned concurrently with the arbitration demand and it may be compared to applications for injunctive relief or a temporary restraining order in court.

AAA has seen the use of emergency measures in its commercial cases grow slowly over the years, yet requests only are filed on about one percent of the AAA's business to business cases.

	2018	2019	2020	2021	2022
Filed	60	94	111	106	106
Total Cases Filed	8983	9737	9538	9196	10273
Percentage of Total	0.7%	1.0%	1.2%	1.2%	1.0%

The Commercial Emergency Measures rule provides that the AAA case manager will directly appoint an emergency arbitrator within one business day of AAA's notice of the request for emergency relief. Additionally, the arbitrator will establish a schedule (typically by holding a preliminary hearing) for the resolution of the emergency request within two days of their appointment.

The rule also sets the standard the arbitrator must consider in reviewing the request:

If . . . the emergency arbitrator is satisfied that the party seeking the emergency relief 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 under applicable law, the emergency arbitrator may enter an interim order or award granting the relief and stating the reason therefore.

The emergency arbitrator also has the authority to allocate the costs of the motion among the parties or may decide to defer that decision to the merits arbitrator or panel.

A party's application to amend or reconsider the interim decision must be based on changed circumstances. Additionally, such an application is made before the emergency arbitrator only until the non-emergency, merits arbitrator, or panel are appointed for the balance of the case; after that, an application to amend or reconsider must be submitted to that panel or arbitrator.

Once the emergency arbitrator renders their decision, the emergency arbitrator is essentially *functus officio* and, other than under the circumstances noted above, has no authority to modify their decision. The emergency arbitrator is also may not serve as the merits arbitrator unless both parties agree to that service.

Over the last few years, AAA emergency arbitrators have decided motions filed under the emergency measures on issues that include:

- A request to enforce a confidentiality order in a settlement between the parties, after one party threatened court action which would have resulted in a filing divulging the terms of the settlement.
- A party requested an order for the respondent to produce the source code for software, alleging that the software was not performing as designed and that the respondent had ceased to service the software.
- A party requested an order to keep a cargo container from being moved, alleging that it was their property and that the other party was trying to move the container out of the state to fight locale.
- A claimant sought an order to prohibit the respondent from entering a cannabis grow facility and removing any cannabis plants from the facility as well as requiring the respondent to return plants taken without permission.
- In a franchise case the claimants requested that the emergency arbitrator enjoin respondents from:
  - diverting business from a current franchise to future business;
  - engaging in a competitive business;
  - interfering with the claimants' business relationships; and
  - copying the claimants' confidential information and using that information in competitive business.

Over the last five years, approximately 27 percent of the emergency requests for relief filed in AAA commercial cases have been fully granted, with another 15 percent partially granted. Over the same time period, about 30 percent of emergency relief requests were fully denied, and about 30 percent of the requests either settled or were withdrawn before the emergency arbitrator made a decision.

**American Bar Association, Litigation Section**  
**Alternative Dispute Resolution**

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	2018	2019	2020	2021	2022	AVG
Status	% of resolved					
Granted	29	25	33	24	25	27.2
Denied	26	30	24	35	35	30
Granted in Part	14	29	9	11	14	15.4
Settled	11	10	26	22	17	17.2
Withdrawn	16	22	9	9	9	13

The emergency measures do not apply under all AAA rules. For example, under the Employment Rules, emergency measures are “Optional” rules—they must be separately referenced in the parties’ contract or agreed to after the dispute has arisen. The Consumer Rules do not provide for emergency measures. Additionally, the emergency measures do not apply to Expedited or Fast-track Procedure cases (claims under \$100,000).

The Emergency Measures of Protection Rule is used in a smaller but growing number of cases. And, it has proven to be an effective instrument in the arbitration practitioner’s toolbox.