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Expert Analysis

Preliminary Injunctive Relief In Aid of International Arbitration

Effective international arbitration sometimes requires actions by courts to support the proper functioning of the arbitration process and to ensure that arbitral awards may be recovered. New York courts, both state and federal, can assist the arbitral process by granting preliminary relief, such as compelling arbitration, enjoining attempts to circumvent arbitration, attaching property in anticipation of an arbitral award, or preserving the status quo between parties. At the same time, New York courts balance the need to aid international arbitrations with a concomitant concern for protecting the rights of parties against whom preliminary relief is being sought.

Enforcing Valid Agreements

Before preliminary relief in aid of international arbitration may issue, New York courts must first ensure that a valid arbitration agreement governs the dispute. The court must establish that (1) the parties have entered into a binding arbitration agreement; and (2) the current dispute falls within the scope of that arbitration agreement (*Hartford Accident & Indem. Co v. Swiss Reinsurance Am. Corp.,* 246 F.3d 219, 226 (2d Cir. 2001)).

As arbitration is a matter of contract between parties, New York contract law governs the existence of a valid agreement to arbitrate. Further, the New York Convention, which governs the enforcement of international arbitration agreements and awards among contracting states (including the United States), mandates that the arbitration agreement must be "in writing" (New York Convention, supra note 15, art. II §2). Accordingly, New York courts have refused to find an agreement to arbitrate when there is no agreement in writing that satisfies New York contract law (e.g., *Kahn Lucas Lancaster v. Lark Int'l*, 186 F.3d 210, 213 (2d Cir. 1999)).[1]

The court must further confirm that the dispute is subject to the arbitration agreement. Following Supreme Court precedent, New York courts have adopted a presumption that disputes are subject to arbitration that may only be overcome "if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" (*Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l*, 198 F.3d 88, 99 (2d Cir. 1999)).

By **Julie Bédard**

Forms of Preliminary Relief

Once a New York court has assured itself that the parties have agreed to arbitrate the present dispute, the court may issue powerful preliminary relief measures to aid in an international arbitration venued in New York. Perhaps most commonly, New York courts will give effect to the expressed contractual agreement between the parties by compelling the parties to arbitrate (e.g., *Smith/Enron Cogeneration*, 198 F.3d at 99).

> New York courts balance the need to aid international arbitrations with a concomitant concern for protecting the rights of parties against whom preliminary relief is being sought.

On some occasions, one party will attempt to circumvent a legitimate international arbitration by using another country's courts to file duplicative claims or enjoin the pending arbitration. New York courts may use anti-suit injunctions to force that party to cease litigation that may undermine the arbitration. The court must establish that (1) the present parties are the same as in the arbitration; and (2) the resolution of the present issue before the court is dispositive of the action to be enjoined (*Paramedics Electromedicina Comercial v. GE Medical Sys. Info. Techs.*, 369 F.3d 645, 652 (2d Cir. 2004)). The court may then engage in a multifactor analysis that considers issues of comity, equity, and the court's jurisdiction (*China Trade & Devel. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987)).

Following this analysis, New York courts may issue anti-suit injunctions when the party against whom arbitration is sought attempted to sidestep the arbitration process or when duplicative proceedings threaten to undermine the arbitration (e.g., *Amaprop v. Indiabulls Fin. Servs.*, 2010 WL 1050988, at *6 (S.D.N.Y. Mar. 23, 2010)). Should the court determine that the parallel proceeding neither undermines nor threatens arbitration, however, the court will deny the anti-suit injunction (e.g., *Laif X Sprl v. Axtel, S.A. de C.V.*, 390 F.3d 194, 200 (2d Cir. 2004)). And in all instances, the court will narrowly tailor the anti-suit injunction to the parties and factual issues at hand (e.g., *Ibeto Petrochemical Indus. v. M/T Beffen*, 475 F.3d 56, 65 (2d Cir. 2007)).

Additionally, New York courts may attach an opposing party's assets in anticipation of an international arbitration when the award to which the applicant may be entitled may be rendered ineffectual without the attachment (e.g., *Daye Nonferrous Metals Co. v. Huangshi Nonferrous Metals Co.*, 1997 U.S. Dist. LEXIS 9961, at *6–9 (S.D.N.Y. July 7, 1997)) or where the party requesting the attachment can demonstrate that the other party engaged in fraudulent or deceptive behavior, or is near insolvency (e.g., *Alvenus Shipping Co. v. Delta Petroleum (U.S.A.)*, 876 F.Supp. 482, 484 (S.D.N.Y. 1994)).

Finally, New York courts may issue injunctions preserving the status quo and aiding international arbitration when the award in the arbitration may be rendered ineffectual in the absence of the injunction. The party requesting the arbitration must first demonstrate that it would likely succeed on the merits and that it would suffer irreparable harm in the absence of the injunction (e.g., *AIM Int'l Trading v. Valcucine*, 2002 U.S. Dist. LEXIS 10373, at *20–21 (S.D.N.Y. June 11, 2002)).[2]

Once the court has determined that an injunction is appropriate, the injunction can take several forms. For instance, the injunction may require a party to perform under the contract until the arbitration hearing (e.g., *AIM Int'l Trading*, 2002 U.S. Dist. LEXIS 10373, at *20–21). Or, the injunction may prevent a party from altering the structure of a company (e.g., *CanWest Global Commc'ns Corp. v. Mirkaei Tikshoret*, 804 N.Y.S.2d 549 (Sup. Ct. 2005)). In all instances, however, the moving party must themselves post security; should a party be wrongfully enjoined, the party can recover damages up to the amount of the security bond.

1. In some instances, nonsignatories may be forced to arbitrate, especially when they are a beneficiary to or have knowingly received direct benefits from the contract that contains the arbitration clause (e.g., *Borsack v. Chalk & Vermillion Fine Arts*, 974 F.Supp. 293, 302 (S.D.N.Y. 1997)).
2. A First Department decision held that the only factor is whether the award in the arbitration "may be rendered ineffectual" in the absence of the injunction, disclaiming the propriety of taking other considerations into account (*Kadish v. First Midwest Sec.*, 2014 WL 861862 (1st Dept. March 6, 2014)).

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