

Effectuating International Arbitration Through Judicial Preliminary Relief in New York

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I. Introduction

Effective international arbitration sometimes requires action by courts to support the functioning of the arbitration process and ensure that arbitral awards may be recovered. New York courts can assist in the arbitral process by granting preliminary relief, such as compelling arbitration, enjoining attempts to circumvent arbitration, attaching property in anticipation of an arbitral award and preserving the status quo between parties.

This article surveys court-granted preliminary relief jurisprudence in New York. Courts sitting in New York—both state and federal—possess a powerful toolkit of preliminary relief measures to assist in the arbitration process when the arbitration “may be rendered ineffectual” in the absence of court intervention. For instance, when a party uses litigation in an attempt to evade its obligation to arbitrate, courts may enjoin that litigation and compel the parties to arbitrate. Likewise, when a party’s potential arbitral award may be rendered ineffectual in the absence of judicial intervention, courts may attach another party’s assets to secure the potential award’s effectiveness. And, at least in some New York courts,¹ when a party threatens another party with irreparable injury before arbitration can commence, courts may enjoin the threatening party to preserve the status quo.

Although New York courts may fashion preliminary relief measures to aid in the arbitration process, they balance the need for preliminary relief with a concomitant concern for protecting the rights of parties against whom preliminary relief is being sought. New York courts may refuse to compel a party into arbitration when deemed unjustified if an insufficient showing is made concerning the existence of an arbitration agreement or on equitable grounds. They will tailor injunctions to the specific parties and issues covered by the arbitration. And both New York and federal law require the party requesting an injunction or attachment to post a security bond from which the other party may recover if the injunction or attachment was wrongfully granted.

While arbitrators may be empowered to grant interim relief, there are important reasons why parties may seek preliminary relief from courts rather than arbitrators. Court-granted preliminary relief is available before an arbitration tribunal has been constituted or where emergency arbitrators are unavailable or undesirable.² Courts may bind third parties to the arbitration agreement through the granting of provisional relief (so long as personal jurisdiction has been satisfied).³ Furthermore, provisional relief provided by courts, more so than arbitra-

trators, can be granted quickly, sometimes on an ex parte basis.⁴ And, certainly not least, court-ordered preliminary measures enjoy immediate effect, unlike their tribunal-granted analogues.⁵ Thus, while parties may often seek provisional measures from arbitral tribunals, there are circumstances where the parties may choose to, or have no alternative but to, seek such relief directly from courts. As a result, the importance of jurisprudence surrounding court-granted provisional measures in New York cannot be overstated.

II. The New York Convention and Federal Laws Are Silent on Judicial Preliminary Relief

There is no manifest source of the court’s power to grant preliminary relief in arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention” or “Convention”) and Federal Arbitration Act (the “FAA”). Nonetheless, such power should be (and generally has been) implied under both the New York Convention and the FAA. Additionally, the New York legislature has amended the New York Civil Practice Laws and Rules (the “CPLR”) to endow courts with the power to grant preliminary relief.

A. Preliminary Relief Under the New York Convention

The New York Convention governs the enforcement of international arbitration agreements and awards among Contracting States (including the United States).⁶ In particular, Article II(3) of the Convention states:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.⁷

The Convention, however, is otherwise silent on provisional relief. Nonetheless, most courts and commentators around the world have found that court-ordered preliminary relief is warranted under the New York Convention.⁸ Article II(3) of the Convention is properly interpreted to empower courts to grant provisional measures in circumstances where there is a valid arbitration agreement (and the other requirements for granting preliminary relief are satisfied).⁹ Of course, the corollary of this is that provi-

sional measures may not be granted in the absence of a valid arbitration.

Consistent with this interpretation, the Second Circuit in *Borden, Inc. v. Meiji Milk Products Co.* has recognized that “[f]ederal courts are charged with enforcing the Convention” and “entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court’s powers [in enforcing the Convention].”¹⁰ Indeed, the court in *Borden* found that providing courts with subject matter jurisdiction over provisional measures in aid of arbitration is “not precluded by the Convention but rather is consistent with its provisions and its spirit.”¹¹

The Second Circuit has read the FAA, which implements the Convention in the United States, to provide federal courts jurisdiction over actions to “compel, confirm, or vacate” an arbitral award.¹² Although the FAA does not explicitly endow federal courts with jurisdiction to grant preliminary relief, such a power has been implied. Thus, courts in the Second Circuit have held that they possess jurisdiction over requests for preliminary relief that effectuate the international arbitration process.¹³ Arbitral parties may seek preliminary relief even when the motion is not accompanied by a request to compel arbitration or confirm an award.¹⁴

B. Preliminary Relief Under the New York CPLR

Similarly, New York law affords state courts the ability to provide preliminary relief in support of international arbitration.¹⁵ Initially, in *Cooper v. Ateliers de la Motobecane, S.A.*, the New York Court of Appeals declined to attach property in aid of an international arbitration.¹⁶ In 2005, the New York legislature amended the applicable statute, CPLR 7502(c), to overrule *Cooper* and allow state courts to use all preliminary relief measures in aid of international arbitration.¹⁷

The text of CPLR 7502(c) provides that “the sole ground for the granting of the remedy”—that is, “an order of attachment or...a preliminary injunction in connection with an arbitration”—is “that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.”¹⁸ Courts in New York have split on how CPLR 7502(c) should be interpreted.

Federal courts sitting in New York and courts in New York’s Second and Third Departments require a party seeking either an injunction or an attachment in aid of an international arbitration to satisfy both CPLR 7502(c) and CPLR Article 63, under which the party must show that: (1) it will likely succeed on the merits in the arbitration; (2) it will suffer irreparable harm in the absence of preliminary relief; and (3) the balance of equities between the parties supports the preliminary relief.¹⁹ Recent decisions from the First Department, however, have held that the *only* relevant factor is whether the award in the

arbitration “may be rendered ineffectual” in the absence of the injunction, thereby disclaiming the propriety of taking other considerations, including CPLR Article 63, into account.²⁰

III. New York Courts Grant Preliminary Measures When Appropriate and Conditions Are Satisfied

A. Courts Will Enforce Valid Agreements to Arbitrate Under the New York Convention

New York courts have been especially concerned with parties to arbitration agreements attempting to escape from their arbitral obligations. To protect the international arbitration process, courts have enforced contractual agreements to arbitrate and enjoined parties’ attempts to circumvent arbitration.

1. Determining Whether an Agreement to Arbitrate the Dispute Exists

Courts are charged with “recogniz[ing] and enforc[ing] qualifying arbitration agreements between and among parties of [New York Convention] signatory states, without the traditional jurisdictional limits.”²¹ The New York Convention and the FAA, which codified the United States’ Convention obligations, empower courts to compel arbitration if a valid arbitration clause exists.²² If courts find a valid arbitration clause under the Convention, they have honored the parties’ binding obligations by compelling the parties to arbitrate and staying the litigation in New York unless the court found countervailing equitable considerations.²³

Nonetheless, as the Second Circuit has explained, it is axiomatic that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”²⁴ Accordingly, as a mandatory prerequisite to ordering of preliminary relief in aid of arbitration, New York courts must be satisfied there is a valid arbitration agreement.

To determine whether a dispute is subject to arbitration, New York courts have examined two issues: “whether there exists a valid agreement to arbitrate,” and “whether the particular disputes sought to be arbitrated fall within the scope of the arbitration agreement.”²⁵ The court must answer both questions in the affirmative before determining that a dispute is subject to arbitration.²⁶

Because “it is axiomatic that arbitration is a matter of contract,” ordinary state contract law governs the existence of a valid agreement to arbitrate.²⁷ Further, under the New York Convention, the parties must have entered into an “agreement in writing,” which “shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”²⁸

Accordingly, New York courts have refused to find an agreement to arbitrate when there is no agreement in writing that satisfies ordinary contract law. In *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, for instance, Kahn Lucas attempted to compel Lark to arbitrate based on purchase orders not signed by Lark.²⁹ Kahn Lucas provided these purchase orders after the parties' agreement.³⁰ The Second Circuit reversed the district court, which held that there was a valid arbitration agreement, and found that there was "no 'agreement in writing' sufficient to bring this dispute within the scope of the Convention."³¹

Sarhank Group v. Oracle Corp. confirmed that when the parties are before U.S. courts, U.S. law governs whether the parties have agreed to arbitrate their dispute, even when the parties have designated other law to govern the substantive claims.³² Sarhank petitioned the Southern District of New York to confirm an arbitral award against Oracle, a nonsignatory.³³ The arbitration clause at issue was executed by Sarhank and Oracle Systems, an Oracle subsidiary, and required any disputes to be arbitrated under Egyptian law.³⁴ The Egyptian arbitration panel, purportedly applying Egyptian law, found that the arbitration clause bound Oracle because it was the parent of Oracle Systems, the signatory.³⁵ In reversing the district court's grant of the petition to confirm, the Second Circuit noted that "whether a party has consented to arbitrate is an issue to be decided by the Court in which enforcement of an award is sought."³⁶ As Sarhank had not demonstrated that Oracle, as nonsignatory, could be nonetheless forced to arbitrate under "an articulable theory based on American contract law or American agency law," the Second Circuit remanded to the district court so that Sarhank could attempt to make that showing.³⁷

Where there is an agreement in writing to arbitrate, however, New York courts do not hesitate to enforce that agreement. The Southern District of New York, for instance, held that "Arbitration: If required in New York City" constituted a valid arbitration clause.³⁸ Similarly, "General average and arbitration in London—York/Antwerp rules as amended 1990 to apply, English law to apply" sufficed.³⁹ Courts have also found that a broad arbitration clause in a subcharter was incorporated by reference into bills of lading.⁴⁰

In addition, under certain circumstances, courts sitting in New York will also enforce arbitration agreements against nonsignatories.⁴¹ For instance, in *Best Concrete Mix Corp. v. Lloyd's of London Underwriters*, the Eastern District of New York held that the plaintiff was a party to an arbitration agreement even though it did not sign the agreement.⁴² As the plaintiff sought to "enforce its indemnification rights as an additional insured under [an insurance] policy" that contained an arbitration clause, it was "bound by [the] arbitration clause."⁴³

Similarly, in *Borsack v. Chalk & Vermilion Fine Arts, Ltd.*, the Southern District of New York held that the plaintiff was a party to an arbitration agreement even though he did not sign the agreement.⁴⁴ Instead, the parties executing the contract containing the arbitration agreement executed the contract for the plaintiff's benefit.⁴⁵ Insofar as the plaintiff was a beneficiary to the contract, he was also required to arbitrate any disputes arising under the contract.⁴⁶

Where the arbitration agreement limits the parties who can initiate arbitration, however, courts have not allowed other beneficiaries to initiate arbitration.⁴⁷ Nor have courts compelled a nonsignatory to arbitrate when the party seeking to compel arbitration fails to demonstrate "an articulable theory based on American contract law or American agency law" that binds the nonsignatory to the arbitration clause.⁴⁸

Once a New York court determines that the parties entered into a written agreement to arbitrate, the court then must determine whether their dispute is subject to the arbitration agreement.⁴⁹ The Supreme Court has counseled that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."⁵⁰

Accordingly, New York courts have generally read potential arbitration clauses broadly, manifesting the United States' and New York's public policy goals of supporting international arbitration.⁵¹ The broad reading of arbitration agreements has created a presumption that disputes are subject to arbitration, a presumption that may be overcome only "if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."⁵² For instance, courts have held that broad arbitration agreements in main contracts may be held to apply to collateral agreements.⁵³

When determining whether to compel arbitration, New York courts have recognized that "to enjoin a party from arbitrating where an agreement to arbitrate is absent is the concomitant of the power to compel arbitration where it is present."⁵⁴ Where parties did not agree to arbitrate, courts have not coerced the parties into arbitration.⁵⁵ For instance, in *Thomson-CF, S.A. v. American Arbitration Association*, the Second Circuit reversed and remanded a Southern District of New York order compelling arbitration.⁵⁶ The Second Circuit found that the party against whom the motion to compel was sought did not fall within the traditional requirements for compelling nonsignatories to an arbitration agreement to arbitrate.⁵⁷ The Eastern District of New York considered a similar situation in *VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P.*, in which a signatory tried to confirm an arbitral award against a nonsignatory.

The nonsignatory had only signed an addendum to the contract containing the arbitration clause; the addendum did not “purport[] to obligate [the nonsignatory]...to all the other provisions contained” in the contract, including the arbitration clause.⁵⁸ Because, under these facts, the nonsignatory could not have been compelled to arbitrate a dispute with a signatory, the court denied the signatory’s petition to confirm the award.⁵⁹

Courts apply a list of requirements for establishing a valid arbitration agreement; if the party requesting arbitration cannot satisfy those requirements, courts have dismissed motions to compel.⁶⁰ Further, courts have examined equitable factors and may refuse to compel arbitration when those factors counsel against it.⁶¹ Especially concerned about fraudulent inducements to arbitrate, courts have held hearings and ordered limited discovery to determine the validity of purportedly fraudulent arbitration clauses.⁶² And when federal courts compel a party to arbitrate and dismiss the related judicial proceedings, a party may appeal the court’s decision.⁶³

In some situations, the parties’ contract envisions arbitration of disputes arising under the contract but either fails to designate any arbitral body or designates a nonexistent arbitral body. When this occurs, there is no specified instrumentality through which their disputes will be resolved. If the parties expressed a clear desire to arbitrate, however, courts have designated substitute bodies to potentiate parties’ agreements.⁶⁴

2. Determining Whether the New York Convention Governs the Agreement to Arbitrate

Even if the court is satisfied that the parties agreed to arbitrate the dispute, federal courts sitting in New York must also establish subject matter jurisdiction to enforce the arbitration agreement. The FAA provides a grant of subject matter jurisdiction for “action[s] or proceeding[s] falling under the [New York] Convention.”⁶⁵ The Second Circuit has established “four basic requirements for enforcement of arbitration agreements under the Convention: (1) there must be a written agreement; (2) it must provide for arbitration in the territory of a signatory of the convention; (3) the subject matter must be commercial; and (4) it cannot be entirely domestic in scope.”⁶⁶

Accordingly, New York federal courts have refused to compel arbitration even though, at first glance, there appears to be a valid arbitration clause. Federal courts generally have not compelled arbitration in foreign states not party to the New York Convention.⁶⁷ Similarly, federal courts have not enforced, under the New York Convention, “international” arbitration agreements that are either noncommercial or entirely domestic in scope.⁶⁸ And federal courts have dismissed or remanded cases based on arbitration proceedings not covered under the New York Convention.⁶⁹

3. Compelling Parties to Arbitrate

Once a New York court is satisfied that the parties have agreed to arbitrate the dispute and the court has jurisdiction, the FAA explicitly grants courts the power to compel the parties to arbitrate in the location designated by the arbitration agreement.⁷⁰ Additionally, courts may appoint arbitrators pursuant to the terms of the arbitration agreement.⁷¹ Accordingly, where appropriate, New York courts have given effect to the expressed contractual agreements between the parties by compelling the parties to arbitrate.

The Second Circuit, in *Smith/Enron Cogeneration Ltd. Partnership v. Smith Cogeneration International, Inc.*, compelled arbitration in a dispute arising out of power plant partnership agreements.⁷² Appealing to the New York Convention, the contract between the parties, and the parties’ subsequent behavior, the court determined that the parties entered into a valid arbitration agreement and compelled the parties to arbitrate their dispute.⁷³

While the *Smith/Enron* contract concerned partnership agreements, New York courts have also compelled parties to arbitrate in other scenarios. In *Usinor Steel Corp. v. M/V Koningsborg*, the Southern District of New York found and enforced a valid international arbitration agreement in a shipping contract.⁷⁴ Similarly, in *Amaprop Ltd. v. Indiabulls Financial Services Ltd.*, the Southern District of New York compelled a Cayman Islands company and two Indian companies to arbitrate, as the parties earlier agreed to arbitrate any disputes arising under a put-option contract.⁷⁵ And in *Filanto, S.p.A. v. Chilewich International Corp.*, the Southern District of New York enforced an arbitration clause between an Italian plaintiff and an American defendant in a contract for the sale of goods.⁷⁶

Occasionally, New York courts have looked to equitable considerations when deciding whether to compel. If the court finds that the party requesting arbitration prejudiced the other party through undue delay, the court may decline to compel arbitration.⁷⁷ If the court determines the motion to compel is an attempt to bypass a dispute currently in arbitration, the court may refuse to compel arbitration.⁷⁸ Similarly, when the arbitration agreement affords a party a choice between resolving a dispute through either litigation or arbitration, courts have held that a party may not compel arbitration to circumvent unfavorable results in litigation on the same dispute.⁷⁹ By contractual provisions, parties may even decide to let courts, rather than arbitrators, consider the application of statute of limitations defenses.⁸⁰

B. Courts May Enjoin Attempts to Circumvent Arbitration

On rare 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. When the moving party shows that the parallel foreign proceedings were commenced as a tactic to avoid arbitration, New York courts may use anti-suit injunctions to compel that party to cease the litigation that may undermine the arbitration.⁸¹

In determining whether to issue anti-suit injunctions, New York courts use a similar analysis when they determine whether to compel arbitration.⁸² *Paramedics Electro-medica Comercial Ltda. v. GE Medical Systems Information Technologies, Inc.* established the test for issuing international arbitration-based anti-suit injunctions: The present parties must be the same as in the arbitration, and the resolution of the present issue before the court must be dispositive of the action to be enjoined.⁸³ Since the injunctive action before the court does not concern the merits of the arbitral dispute, the court's judgment "disposes of the foreign action by determining the arbitrability of the issues."⁸⁴

If these two criteria are satisfied, New York courts may engage in a multifactor test, examining whether: (1) the foreign suit threatens the jurisdiction of the New York court; (2) strong public policies of the enjoining forum are threatened by the foreign suit; (3) the foreign suit is vexatious; (4) the foreign suit prejudices equitable considerations (such as preventing forum shopping); and (5) the adjudication of the same issues in separate suits will result in delay, inconvenience, expense, inconsistency, or a race to judgment.⁸⁵ Additionally, where a judgment has already been rendered on the validity of the arbitration agreement and the arbitrability of the claims, the court may be more inclined to grant an anti-suit injunction.⁸⁶ 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.

In *Storm LLC v. Telenor Mobil Communications AS*, the Southern District of New York faced a dispute between Telenor, a Norwegian company, Storm, a Ukrainian company, and Alpen, a 49.9% owner in Storm.⁸⁷ When a business deal between Telenor and Storm fell apart, Telenor commenced arbitration proceedings. Storm and Alpen sued in Ukrainian courts, which enjoined the arbitration and threatened Telenor with criminal sanctions if it continued with the arbitration.⁸⁸ Finding that Storm had proceeded "in the most vexatious way possible," the court enjoined the Ukrainian proceedings.⁸⁹

In scenarios where allowing parallel proceedings neither undermines nor threatens arbitration, however, New York courts have been reticent to issue anti-suit injunctions. Courts have not enjoined foreign proceedings where the party against whom the injunction is sought already "submitted itself to the arbitral forum" and is not trying to circumvent the arbitration process.⁹⁰ Similarly, if the foreign proceeding "is not in itself a failure, neglect,

or refusal to arbitrate," courts have not issued anti-suit injunctions.⁹¹ Further, in some New York courts a party may find obtaining an anti-suit injunction difficult if fails to show irreparable harm from failure to issue the injunction.⁹² Finally, courts may decline to issue an anti-suit injunction where foreign courts have a compelling interest in determining questions of that country's law.⁹³

For instance, in *LAIF X SPRL v. Axtel, S.A. de C.V.*, the Second Circuit found that the party against whom the anti-suit injunction was sought continued to participate in the arbitration: "It has thus submitted itself to the arbitral forum, exercised its right in that forum to assert a procedural defense, and invoked the discretion of the arbitral forum to stay proceedings...."⁹⁴ The court held that the company's conduct was neither "an evasion of the arbitral forum" nor "an attempt to sidestep arbitration."⁹⁵ Further, the court found that Mexican courts had a legitimate interest in deciding questions of Mexican corporate law, which governed the arbitration.⁹⁶ With these holdings in mind, the court denied the anti-suit injunction.

Similarly, the Southern District of New York refused to issue an injunction in *Comverse, Inc. v. American Telecommunications, Inc.*⁹⁷ The court determined that the party against whom the anti-suit injunction was sought had neither failed nor refused to participate in the arbitration; indeed, the party's actions "had actively furthered the arbitration."⁹⁸

Further, New York courts narrowly tailor anti-suit injunctions to the parties and factual issues at hand. While recognizing that anti-suit injunctions support international arbitrations, courts also understand that they "effectively restrict[] the jurisdiction of the court of a foreign sovereign," which counsels against issuing unnecessary or improper anti-suit injunctions.⁹⁹ The injunction should be preliminary in nature, expire at the conclusion of the arbitration, be issued only against the offending parties, and specify the activities to be enjoined.¹⁰⁰

Following these guidelines, in *Ibeto Petrochemical Industries Ltd. v. M/T Beffen*, the Second Circuit affirmed the general issuance of an anti-suit injunction by the Southern District of New York but remanded with instructions for the lower court to rework the injunction to both include only the parties at issue and expire at the completion of the arbitration.¹⁰¹

C. Courts May Attach Property to Ensure the Effectiveness of an Arbitral Remedy

Recognizing that effective international arbitration requires that parties hold confidence in their ability to collect arbitral awards, New York law allows state courts to 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.¹⁰² Because federal courts are re-

quired to use the attachment criteria of the state in which the federal court sits,¹⁰³ both federal courts sitting in New York and New York state courts consider the same international arbitration attachment criteria.

Courts in New York may attach assets where the party requesting the attachment can demonstrate that the other party engaged in fraudulent or deceptive behavior. In *Daye Nonferrous Metals Co. v. Trafigura Beheer B.V.*, the Chinese plaintiffs produced evidence suggesting that the Dutch defendant fraudulently altered contractual documents, circumvented a restraining order and avoided another attachment order by rerouting funds;¹⁰⁴ the court held that these actions justified an attachment order against the defendant.¹⁰⁵

In rare instances, courts in New York may also attach the property of shell corporations that are parties to arbitrations to ensure that the shell's parent cannot hide assets behind the corporate veil. Because New York courts recognize that "corporate independence and limited shareholder liability serve[] to encourage...development," they strongly enforce the corporate form,¹⁰⁶ and "[t]hose seeking to pierce a corporate veil...bear a heavy burden of showing that the corporation was dominated...and that such domination was the instrument of fraud otherwise resulted in wrongful or inequitable consequences."¹⁰⁷

Where a party satisfies that heavy burden, however, New York courts may pierce the corporate veil to attach assets in aid of arbitration against the dominated corporation. In *Alvenus Shipping Co. v. Delta Petroleum (U.S.A.) Ltd.*, for instance, Alvenus commenced an arbitration under the Convention against Delta in London.¹⁰⁸ Delta had received an award in a parallel arbitration, which was held in escrow pending the outcome of *Alvenus*.¹⁰⁹ Alvenus demonstrated that Delta was a shell of Ionian, its parent company and sole shareholder.¹¹⁰ "Delta ha[d] no assets, no cash in its one bank account, [did] no business... ha[d] no employees and no office of its own."¹¹¹ Further, deposition testimony "establishe[d] that Delta's insolvency [was] not unintentional," as Ionian funneled all Delta revenue directly to Ionian.¹¹² Recognizing that Delta would immediately transfer the award to Ionian, the court found that "Alvenus ha[d] demonstrated that absent equitable relief..., a money judgment in the London Arbitration will go unsatisfied."¹¹³ Accordingly, the court placed the award in escrow with Delta's lawyer and enjoined Delta from transferring that award until resolution of the current arbitration.¹¹⁴

Further, if the party requesting attachment demonstrates likely success in arbitration, New York courts may also attach the assets of companies facing potential insolvency. In both *SiVault Systems, Inc. v. WonderNet, Ltd.*¹¹⁵ and *Sojitz Corp. v. Prithvi Information Solutions Ltd.*,¹¹⁶ the court attached property of nearly insolvent parties; without the attachment, any future arbitral award likely would have remained unsatisfied and ineffective.

While showing that an arbitral party engaged in fraud or is near insolvency generally satisfies the requirement for irreparable harm, New York courts may also attach a party's property to provide security for a potential arbitral future award. In *Sierra USA Communications, Inc. v. International Telephone & Satellite Corp.*, the New York Supreme Court extended a temporary restraining order freezing one party's assets pending an arbitral hearing to ensure that the arbitration remedy "would not be rendered ineffectual."¹¹⁷

Similarly, New York courts may enforce an arbitrator's pre-arbitration security-bond requirement or attachment order if that order will help effectuate a future award. In *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, for instance, the Second Circuit affirmed two arbitration panel preliminary decisions requiring a state-owned Uruguayan corporation to post security pending a full arbitral hearing.¹¹⁸ The Second Circuit held that because the parties' "arbitration clause was broad...[their] arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself."¹¹⁹ Further, the parties had "expected the Panel to rule on the issue of pre-hearing security," as the issue was fully briefed and presented to the panel.¹²⁰

Similarly, in *CE International Resources Holdings LLC v. S.A. Minerals Ltd. Partnership*, the Southern District of New York enforced an arbitrator's pre-arbitral order requiring a Thai corporation, a British Virgin Islands company, and a Thai individual to post a \$10,000,000 security bond and, if they failed to post the bond, issuing a *Mareva* injunction "enjoin[ing] [them] from transferring any assets located anywhere in the world up to the amount of \$10 million."¹²¹ The court, agreeing with *British Insurance Co. of Cayman v. Water Street Insurance Co.*,¹²² held that an arbitrator's temporary equitable relief, such as security or an injunction, "was separable from the merits of the arbitration, and thus subject to federal review."¹²³ While the parties' arbitration agreement did not provide for pre-arbitral security, the court enforced the security bond because the parties expressly chose to arbitrate under American Arbitration Association (the "AAA") rules that provided for pre-arbitral security.¹²⁴ While the court recognized that the *Mareva* injunction "present[ed] a thornier issue," as federal and New York state courts are without power to issue those injunctions,¹²⁵ the court also enforced the arbitrator's grant of the *Mareva* injunction for much the same reason: By adopting the AAA rules, which allow an arbitrator to issue a *Mareva* injunction, the court could also enforce an arbitrator's pre-arbitral issuance of a *Mareva* injunction.¹²⁶

D. Courts May Preserve the Status Quo to Prevent Irreparable Harm to the Parties

Between the time when one party requests international arbitration and when the arbitration begins, one of the parties may threaten irreparable harm on another

party. New York law allows courts to 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.¹²⁷ Although the First Department recently disclaimed the propriety of taking additional considerations into account,¹²⁸ some New York courts may issue pre-arbitration preliminary injunctions to maintain the status quo where the moving party can show both likely success in an arbitration and the imminent threat of irreparable harm before the arbitration begins.

Preliminary injunctions may prevent parties from altering the structure of a business. In *CanWest Global Communications Corp. v. Mirkaei Tikshoret Ltd.*, a Canadian company, CanWest, and an Israeli company, Mirkaei, entered into an agreement to purchase various media groups in Israel.¹²⁹ The agreement fell apart, and Mirkaei took control of the disputed media groups. In aid of a pending international arbitration, the court enjoined Mirkaei from, among other acts, merging with, altering the corporate structure of, or terminating the employment of any executives of the media group.¹³⁰

The injunctions may also require parties to continue to perform under a contract for the sale of goods. In *AIM International Trading, L.L.C. v. Valcucine S.p.A.*, an Italian company, Valcucine, sought to end a distributorship contract with an American company, AIM, and commenced arbitration proceedings.¹³¹ AIM’s business was based almost entirely on the distribution of Valcucine’s products.¹³² Finding that AIM would both suffer irreparable harm in the absence of a preliminary injunction in aid of arbitration and likely succeed in the arbitration, the Southern District of New York preliminarily enjoined Valcucine from terminating the contract.¹³³

Additionally, the injunctions may enjoin foreclosure of loans. In *Invar International, Co. v. Zorlu Enerji Elektrik Uretim Anonim Sirketi*, two American companies sought a preliminary injunction against a Turkish company, Zorlu.¹³⁴ The three companies jointly operated two power plants in Russia.¹³⁵ The parties sought additional financing, which was provided—on Zorlu’s suggestion—by Bundoran, a supposedly neutral third party. At the time of the arbitration and the suit, the parties disputed whether the Bundoran was actually neutral at the time of the loan’s execution; it had subsequently been acquired by Zorlu.¹³⁶ Bundoran threatened to foreclose on the American companies’ loan, which would have transferred full control of the power plants to Zorlu. The court enjoined the foreclosure, which would have destroyed the interest in the plants that the American companies were trying to protect in the arbitration.¹³⁷

In some circumstances, both parties to an international arbitration may be subject to a preliminary injunction to preserve the status quo. In *Blom ASA v. Pictometry International Corp.*, the Western District of New York

required an American company to continue to perform its contractual obligations while restraining the opposing Norwegian party from performing under a later contract with a third party.¹³⁸

In most New York courts, parties seeking attachment orders in aid of international arbitrations must demonstrate that they will likely succeed on the merits in arbitration and will suffer irreparable harm.¹³⁹ Additionally, the property to be attached must be within the jurisdiction of the New York courts.¹⁴⁰ If the moving party fails to demonstrate any of these criteria, courts have denied requests for preliminary relief.¹⁴¹

Several federal courts sitting in New York elected not to issue preliminary injunctions in aid of international arbitration where the party requesting the injunction has not demonstrated that it will likely succeed on the merits. In *Anwar v. Fairfield Greenwich Ltd.*, for instance, the Southern District of New York refrained from enjoining ongoing discovery because the party requesting the injunction had failed to either convince the arbitration panel to enjoin discovery or show that it would likely prevail in the arbitration.¹⁴²

Similarly, some New York courts have not issued preliminary injunctions in aid of international arbitration when the party requesting the injunction has not demonstrated that it will likely face irreparable harm in the absence of judicial intervention. In *Andersen Consulting Business Unit Member Firms v. Andersen Worldwide Societe Cooperative*, several of Arthur Andersen’s member firms commenced arbitration against Arthur Andersen.¹⁴³ The member firms also requested a preliminary injunction from the Southern District of New York, contending that Arthur Andersen had passed a resolution threatening some of the member firms with breach and requesting that implementation of that resolution be enjoined.¹⁴⁴ In rejecting that argument, the court focused on irreparable harm, holding that the member firms neither showed that the mere threat of termination caused irreparable harm nor demonstrated that they would lack satisfactory recourse through the international arbitration process.¹⁴⁵

Importantly, a New York federal court has held that the mere fact that an international arbitration is ongoing may defeat a claim of irreparable injury. In *Emirates International Investment Co. v. ECP Mena Growth Fund, LLC*, ECP declared Emirates International a defaulting shareholder because of a supposedly late payment.¹⁴⁶ The parties submitted their dispute to an arbitration panel.¹⁴⁷ Emirates International sought a preliminary injunction preventing ECP from selling Emirates International’s portion of the fund until the conclusion of the arbitration.¹⁴⁸ In denying the injunction, the court noted that the parties were already engaged in an arbitration, precluding Emirates International from demonstrating irreparable harm.¹⁴⁹

Further, even when a party to arbitration can establish the prerequisites for a preliminary injunction or an attachment in aid of arbitration, the moving party must itself post security.¹⁵⁰ In both *AIM International Trading, L.L.C. v. Valcucine, S.p.A.*¹⁵¹ and *Alvenus Shipping Co. v. Delta Petroleum (U.S.A.) Ltd.*,¹⁵² for instance, the courts considered the amount of the security bond that the moving parties were required to post. Should a party be wrongfully enjoined or have property wrongfully attached, that party may receive damages up to the amount of the security bond, even if it was ultimately unsuccessful in the arbitration.¹⁵³

IV. Conclusion

New York courts possess a powerful toolkit of preliminary relief measures to aid in international arbitration. To support the United States' and New York' public policy in favor of international arbitrations, New York state courts and federal courts sitting in New York have been willing to use preliminary relief when doing so helps potentiate parties' desires to arbitrate their dispute and assists the international arbitration process. On the other hand, when preliminary relief fails to effectuate international arbitrations and unduly burdens other involved parties, courts have refused to issue preliminary relief. At the heart of New York courts' decisions to issue preliminary relief remains a careful consideration of whether that relief would aid the international arbitration process.

Endnotes

1. The recent case of *Kadish v. First Midwest Securities, Inc.* in the First Department casts significant doubt on whether inquiry into irreparable harm and other CPLR Article 63 injunctive standards are appropriate in the context of injunctions in aid of arbitration. 981 N.Y.S.2d 525, 526 (App. Div. 2014); see also *Camilli v. Meyers Assocs., L.P.*, No. 650341/15, 2015 WL 1623803, at *3 (N.Y. Sup. Ct. Apr. 13, 2015) (applying only the "rendered ineffectual" standard); *H.I.G. Capital Mgmt., Inc. v. Ligator*, 650 N.Y.S.2d 124, 125 (App. Div. 1996) ("CPLR 7502(c) is the sole applicable standard, and we find that it was correctly applied. Even were standards of CPLR article 63 applicable, we would find that the relief granted was within the court's discretion." (citations omitted)). See generally *infra* Section II.B. Nonetheless, because there appears to be disagreement on this point among New York courts, case law discussing injunctive standards such as irreparable harm in the context of arbitration is included in this article.
2. Although tribunal-granted preliminary relief is generally permitted in New York, provided such authority is consistent with the arbitration agreement, arbitration rules, and governing law, the availability of such relief generally assumes that a tribunal has already been constituted or that there are provisions allowing for the appointment of an emergency arbitrator in the applicable rules. See, e.g., ICC Rules of Arb. art. 29 (2012). And even when emergency arbitrators are available, parties may instead prefer to seek relief from courts for various reasons, including cost, inability to choose the identity of the arbitrator, lack of precedent in the use of emergency arbitrators and uncertainty in enforcement. For a discussion of issues related to the ICC emergency arbitrator provisions, see Baruch Baigel, *The*

Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis, 31 J. INT'L ARB. 1, 1–18 (Kluwer Law International 2014).

3. For instance, courts may exercise jurisdiction over nonparties to the arbitration agreement where property to be attached in aid of arbitration is held by a third party. See, e.g., *Alvenus Shipping Co.*, 876 F. Supp. at 488 (enjoining defendant Fleet Bank, a nonparty to the arbitration agreement, from releasing funds held in escrow to defendant Delta Petroleum to ensure that plaintiff's English arbitration award could be satisfied).
4. Historically, New York state courts have been more willing to grant injunctive relief on an ex parte basis than their federal counterparts. In 2006, however, the Uniform Rules for the Trial Courts applicable to New York state courts were amended to require "an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by giving of notice" in the case of ex parte applications. 22 N.Y.C.R.R. § 202.7(f) (2015). Thus, the requirements for the issuance of preliminary relief on an ex parte basis are now similarly stringent in New York state and federal court, and accordingly such relief may be more difficult to obtain than historically.
5. Tribunal-granted provisional relief does not immediately come into effect. Rather, the party seeking enforcement must apply to a court for judicial review and enforcement of the provisional measure. New York courts will generally enforce an order for preliminary relief provided that it can be properly characterized as an "award" or "order," the procedure complied with due process requirements, and the award or order is considered "final." See, e.g., *Sperry Int'l Trade, Inc. v. Gov't of Israel*, 532 F. Supp. 901, 909 (S.D.N.Y. 1982), *aff'd*, 689 F.2d 301 (2d Cir. 1982) (holding that the arbitrator's order regarding placing a letter of credit in escrow pending a final determination of the dispute was "a final Award on a clearly severable issue, [and therefore] it is clearly subject to confirmation by this Court").
6. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I, June 6, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter "New York Convention"].
7. *Id.* at art. II(3).
8. See, e.g., *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990) (holding that "[e]ntertaining an application" for preliminary relief "is not precluded by the Convention but rather is consistent with its provisions and its spirit"); *Sojitz Corp. v. Prithvi Info. Solutions Ltd.*, 921 N.Y.S.2d 14, 17 (App. Div. 2011) (noting that CPLR 7502(c) allows New York courts to grant preliminary relief in support of international arbitrations); Martin Davies, *Court-Ordered Interim Measures in Aid of International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 299, 317 (2006).
9. See Davies, *supra* note 8, at 309 (approving of courts that "grant injunctions and provisional remedies in the context of pending arbitrations, including international arbitrations") (citing *Bahrain Telecomm. Co. v. Discoverytel, Inc.*, 476 F. Supp. 2d 176, 178 (D. Conn. 2007)).
10. 919 F.2d at 826 (citations omitted).
11. *Id.*
12. *Holzer v. Mondadori*, 12 Civ. 5234, 2013 U.S. Dist. LEXIS 37168(NRB), at *19 (S.D.N.Y. Mar. 14, 2013); see also *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 71 (2d Cir. 2012) ("[The FAA] provides federal jurisdiction over actions to confirm or vacate an arbitral award that is governed by the Convention...." (citation omitted)).
13. See *Goel v. Ramachandran*, 823 F. Supp. 2d 206, 215–16 (S.D.N.Y. 2011) (discussing the Second Circuit's liberalization of international arbitration subject matter jurisdiction).
14. See *Venconsul N.V. v. Tim Int'l N.V.*, No. 03 Civ. 5387 (LTS)(MHD), 2003 WL 21804833, at *3 (S.D.N.Y. Aug. 6, 2003) ("*Borden* has been interpreted as recognizing a court's power to entertain requests for provisional remedies in aid of arbitration even where the request

- for remedies does not accompany a motion to compel arbitration or to confirm an award.”).
15. CPLR 7502(c) (Consol. 2015).
 16. 57 N.Y.2d 408 (1982).
 17. See Davies, *supra* note 8, at 317 (noting that CPLR 7502(c) “reverses the effect of Cooper”).
 18. CPLR 7502(c).
 19. See, e.g., *SG Cowen Sec. Corp. v. Messih*, 224 F.3d 79, 83–84 (2d Cir. 2000) (“Section 7502(c) was intended to provide preliminary relief in state court that had previously been unavailable but to condition that relief—when available under the criteria set out in Article 63—to cases where an arbitration award might otherwise be rendered ineffectual.”); *Advanced Dig. Sec. Sols., Inc. v. Samsung Technwin Co., Ltd.*, 862 N.Y.S.2d 551, 552 (2d Dep’t 2009) (“[A] party seeking relief under CPLR 7502(c) ‘must also make a showing of the traditional equitable criteria for the granting of temporary relief under CPLR article 63’” (citation omitted)); *Thornton & Naumes, LLP v. Athari & Nixon, LLP*, 829 N.Y.S.2d 248, 249 (3d Dep’t 2007) (“In granting an order of attachment in aid of arbitration, petitioners were required to show that there is a viable cause of action, a probability of success on the merits, that the award may be rendered ineffectual without the relief sought and that the amount demanded exceeds all counterclaims known to petitioners.”).
 20. See, e.g., *Kadish v. First Midwest Sec., Inc.*, 115 A.D.3d 445, 446 (1st Dep’t 2014) (rejecting application of CPLR Article 63 and applying only “the ‘rendered ineffectual’ standard with regard to a CPLR 7502 (c) attachment in aid of arbitration”); *Camilli v. Meyers Assocs., L.P.*, No. 650341/15, 2015 WL 1623803, at *3 (N.Y. Sup. Ct. Apr. 13, 2015) (applying only the “rendered ineffectual” standard); *H.I.G. Capital Mgmt., Inc. v. Ligator*, 650 N.Y.S.2d 124, 125 (App. Div. 1996) (“[CPLR 7502(c)] is the sole applicable standard, and we find that it was correctly applied. Even were standards of CPLR article 63 applicable, we would find that the relief granted was within the court’s discretion.” (citations omitted)).
 21. *Energy Transp., Ltd. v. M.V. San Sebastian*, 348 F. Supp. 2d 186, 197 (S.D.N.Y. 2004).
 22. See *id.* at 197–98 (“The codification of the New York Convention was designed to empower federal courts to recognize and enforce qualifying arbitration agreements between and among parties of signatory states, without the traditional jurisdictional limits based on the citizenship of the parties to the agreement and the locus of the matter in dispute.”).
 23. See *infra* notes 77–80 and accompanying text.
 24. *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 392 (2d Cir. 2011) (quoting *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648 (1986)); see also *Thomson-CSF, S.A. v. Am. Arb. Assoc.*, 64 F.3d 773, 776 (2d Cir. 1995) (“Arbitration is contractual by nature—a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit” (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).
 25. *Energy Trans.*, 348 F. Supp. 2d at 202 (quoting *Hartford Accident & Indem. Co v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001)).
 26. See *Hartford Accident & Indem. Co v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001) (requiring both questions to be answered in the affirmative before compelling arbitration).
 27. *Glencore Ltd. v. Degussa Engineered Carbons L.P.*, 848 F. Supp. 2d 410, 420 (S.D.N.Y. 2012); see also *id.* at 423 (“[T]he party must show a binding agreement under ‘ordinary state-law principles that govern the formation of contracts.’” (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995))).
 28. New York Convention, *supra* note 6, art. II § 2; see also *Glencore Ltd.*, 848 F. Supp. 2d at 423 (“However, in a non-domestic case, to accord with the standards set by the New York Convention, the prevailing theory of contract formation must also entail an agreement or an arbitral clause that is either ‘signed by the parties’ or ‘contained in an exchange of letters or telegrams.’” (quoting *Kahn Lucas Lancaster, Inc. v. Lark Int’l Ltd.*, 186 F.3d 210, 218 (2d Cir. 1999)); *Gabriel Capital, L.P. v. CAIB Investmentbank Aktiengesellschaft*, 814 N.Y.S.2d 66, 68 (App. Div. 2006) (reversing trial court decision denying motion to stay pending arbitration because trial court failed to apply the New York Convention’s definition of “written agreement”).
 29. 186 F.3d 210, 213 (2d Cir. 1999), *abrogated on other grounds by Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 n.2 (2d Cir. 2005).
 30. See *Glencore Ltd.*, 848 F. Supp. 2d at 437 (analyzing *Kahn Lucas* and noting that the arbitration clause there was “included in a form unilaterally supplied by one party following the parties’ agreement”).
 31. *Kahn Lucas*, 186 F.3d at 218.
 32. See 404 F.3d 657 (2d Cir. 2005).
 33. *Id.* at 658.
 34. *Id.*
 35. See *id.* at 662.
 36. *Id.* at 661.
 37. See *id.* at 662–63. For a discussion of the theories under which a nonsignatory can be bound to an arbitration clause, see *infra* note 41.
 38. *Oriental Commercial & Shipping Co. v. Rosseel, N.V.*, 609 F. Supp. 75, 77–78 (S.D.N.Y. 1985) (holding that the phrase “evidenced [the parties’] intention to arbitrate disputes arising under that contract”).
 39. *Standard Tallow Corp. v. Kil-Management A/S*, 901 F. Supp. 145, 148, 151 (S.D.N.Y. 1995) (lower case letters added) (applying the provision because the preamble of the contract states that the part containing the provision controlled over other language).
 40. *Cont’l Ins. Co. v. M/V Nikos N*, 00 Civ. 7985(RLC), 2002 U.S. Dist. LEXIS 6029, at *9 (S.D.N.Y. Apr. 8, 2002) (finding the arbitration clause was incorporated by reference where the bills of lading referenced “all terms and conditions” in the subcharters).
 41. See *Smith/Enron Cogeneration Ltd. P’ship v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 99 (2d Cir. 1999) (“In this circuit, we have repeatedly found that non-signatories to an arbitration agreement may nevertheless be bound according to ‘ordinary principles of contract and agency.’ These principles include ‘(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel.’” (citations omitted)); *MAG Portfolio Consultant, GmbH v. Merlin Biomed Grp. LLC*, 268 F.3d 58, 61 (2d Cir. 2001) (same); *Belzberg v. Verus Invs.*, 21 N.Y.3d 626, 630–33&n.3 (2013) (applying *MAG Portfolio*, 268 F.3d at 61).
 42. 413 F. Supp. 2d 182, 187 (E.D.N.Y. 2006).
 43. *Id.*
 44. 974 F. Supp. 293, 302 (S.D.N.Y. 1997).
 45. *Id.*
 46. *Id.*
 47. See *Republic of Iraq v. ABB AG*, 769 F. Supp. 2d 605, 601–11 (S.D.N.Y. 2010) (refusing to allow Iraq to initiate arbitration when the arbitration agreement expressly provided that only the UN or BNP could initiate), *aff’d sub nom. Republic of Iraq v. BNP Paribas USA*, 472 F. App’x 11 (2d Cir. 2012).

48. *Sarhank Grp.*, 404 F.3d at 662; *see also infra* notes 54–59 and accompanying text.
49. “[A]rbitrability questions are presumptively to be decided by the courts, not the arbitrators themselves.” *Telenor Mobile Commc’ns AS v. Storm LLC*, 584 F.3d 396, 406 (2d Cir. 2009). Parties may defeat this presumption “only by ‘clear and unmistakable evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator.’” *Id.* (quoting *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002)).
50. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983), *superseded by statute on other grounds* by 9 U.S.C. § 16(b)(1); *see also Telenor Mobile Commc’ns AS*, 584 F.3d at 406 (same); *Highland HC, LLC v. Scott*, 978 N.Y.S.2d 302, 305–06 (App. Div. 2014) (same).
51. One case, *Hoogovens Ijmuiden Verkoopkantoor B.V. v. M.V. Sea Cattleya*, 852 F. Supp. 6 (S.D.N.Y. 1994), fails to follow the liberal construction of arbitration clauses of the cases in this Subsection. Perhaps for this reason, *Hoogovens* has been roundly criticized. *See, e.g., Usinor Steel Corp. v. M/V Koningsborg*, No. 03 Civ. 4301 (AKH), 2004 U.S. Dist. LEXIS 1615, at *4–5 (S.D.N.Y. Feb. 4, 2004); *Standard Tallow Corp. v. Kil-Mgmt. A/S*, 901 F. Supp. 147, 151 n.4 (S.D.N.Y. 1995).
52. *Smith/Enron Cogeneration Ltd. P’ship v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 99 (2d Cir. 1999) (quoting *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 74 (2d Cir. 1997)).
53. *See David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 251–52 (2d Cir. 1991).
54. *Copape Produtos de Pétroleo Ltda. v. Glencore Ltd.*, No. 11 Civ. 5744 (LAK), 2012 U.S. Dist. LEXIS 15990, at *14 (S.D.N.Y. Feb. 8, 2012) (quoting *Société Générale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co.*, 643 F.2d 863, 868 (1st Cir. 1981)).
55. *Cf. Copape Produtos de Pétroleo*, 2012 U.S. Dist. LEXIS 15990, at *14 (“[A]rbitration is a matter of consent, not coercion.” (alteration in original) (quoting *Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp.*, 130 S. Ct. 1758, 1773 (2010))).
56. 64 F.3d 773 (2d Cir. 1995).
57. *See id.* at 780.
58. No. 11 Civ. 0198 (MGC), 2014 U.S. Dist. LEXIS 141036, at *5 (E.D.N.Y. Oct. 2, 2014), *aff’d* 605 F. App’x 59 (2d Cir. 2015).
59. *Id.* at *7.
60. *See Dapuzzo v. Globalvest Mgmt. Co., L.P.*, 263 F. Supp. 2d 714, 725–26 (S.D.N.Y. 2003).
61. *See Bechtel do Brasil Construções Ltda. v. UEG Araucária Ltda.*, No. 09 Cv. 6417 (BSJ), 2009 U.S. Dist. LEXIS 131360 (S.D.N.Y. Nov. 14, 2009); *Astro Vencedor Compania Naviera, S.A. v. Gen. Org. for Supply Goods, Cairo*, No. 94 Civ. 3429 (AGS), 1996 U.S. Dist. LEXIS 602 (S.D.N.Y. Jan. 23, 1996); *see also infra* Subsection III.A.3.
62. *See Linon Imps., Inc. v. Tehnoforestexport*, No. 92 Civ. 9407 (LAP), 1993 U.S. Dist. LEXIS 6530, at *6 (S.D.N.Y. May 18, 1993).
63. *See Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002), *abrogated on other grounds* by *Katz v. Cellco P’ship*, 794 F.3d 341 (2d Cir. 2015). *Salim Oleochemicals* overruled *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 984 F.2d 58 (2d Cir. 1993). Between *Filanto* and *Salim Oleochemicals*, the Supreme Court issued *Green Tree Financial Corp.-Alabama v. Randolph*, which held that an order dismissing a suit with prejudice and compelling arbitration is appealable under the Federal Arbitration Act. 531 U.S. 79, 88–89 (2000). Because the Second Circuit has held that “dismissals with and without prejudice are equally appealable as final orders,” *Allied Air Freight, Inc. v. Pan Am. World Airways, Inc.*, 393 F.2d 441, 444 (2d Cir. 1968), any court order dismissing a suit and compelling arbitration is appealable. *Salim Oleochemicals*, 278 F.3d at 93. Orders staying a suit and compelling arbitration, however, are not appealable. *Id.*
64. *See Travelport Glob. Distribution Sys. B.V. v. Bellview Airlines Ltd.*, No. 12 Civ. 3483 (DLC), 2012 U.S. Dist. LEXIS 128604, at *12–14 (S.D.N.Y. Sept. 10, 2012); *HZI Research Ctr., Inc. v. Sun Instruments Japan Co.*, No. 94 Civ. 2146 (CSH), 1995 U.S. Dist. LEXIS 13707, at *8–9 (S.D.N.Y. Sept. 19, 1995).
65. 9 U.S.C. § 203 (2015); *see also Goel v. Ramachandran*, 823 F. Supp. 2d 206, 217 (S.D.N.Y. 2011) (noting that in “cases involv[ing] a request to arbitrate, or an already ongoing arbitration,” the Second Circuit has held that § 203 grants subject matter jurisdiction for “requests for remedies that aid arbitration”). Even if a federal court lacks subject matter jurisdiction under the Convention and FAA, parties can allege some other basis for subject matter jurisdiction. *Cf. Dapuzzo*, 263 F. Supp. 2d at 721& n.26 (holding that the court could exercise diversity jurisdiction over the parties despite the Convention not governing the arbitration clause); *Frydman v. Cosmair, Inc.*, No. 94 Civ. 3772 (LAP), 1995 U.S. Dist. LEXIS 9333, at *22 (S.D.N.Y. June 30, 1995) (dismissing case for lack of subject matter jurisdiction because the “action [did] not relate to an arbitration falling under the Convention, and because no other basis for federal subject matter jurisdiction ha[d] been alleged”).
66. *Smith/Enron Cogeneration Ltd. P’ship*, 198 F.3d at 92; *see also Ogden Power Dev.—Cayman, Inc. v. PMR Ltd. Co.*, No. 14-cv-8169 (PKC), 2015 U.S. Dist. LEXIS 66417, at *7 n.1 (S.D.N.Y. May 21, 2015) (applying the four *Smith/Enron Cogeneration* requirements to the arbitration agreement *sub judice*).
67. *Dapuzzo*, 263 F. Supp. 2d at 721 n.6, 726–27 (refusing to compel arbitration in the Bahamas, a nonsignatory state, because an order to compel “would contravene congressional policy explicitly conferring federal jurisdiction to compel arbitration in foreign states only in connection with arbitration agreements encompassed by the Convention and the [FAA]”).
68. *Id.* at 725 (citing *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 146 (2d Cir. 2001)). The Federal Arbitration Act considers agreements to be domestic in scope when they are entirely between U.S. citizens and do not involve foreign property, foreign performance, or some other close relationship to a foreign state. *See* 9 U.S.C. § 202.
69. *See, e.g., Frydman*, 1995 U.S. Dist. LEXIS 9333, at *22 (remanding a case to state court for lack of subject matter jurisdiction, as the parties jointly terminated the arbitration governed by the New York Convention, and the remaining arbitration fell outside of the New York Convention’s ambit).
70. “A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.” 9 U.S.C. § 206.
71. *See id.*
72. *See* 198 F.3d 88, 98 (2d Cir. 1999) (enforcing broad arbitration agreement that requires arbitration agreement “[i]n the event of any dispute, disagreement, controversy or claim arising under or relating to...this [a]greement”).
73. *Id.* at 97–99.
74. *See* No. 03 Civ. 4301 (AKH), 2004 U.S. Dist. LEXIS 1615, at *7 (S.D.N.Y. Feb. 4, 2004) (determining agreement’s “if any” language “simply means that if any sort of dispute arises, resolution by arbitration becomes mandatory”).
75. *See* No. 10 Civ. 1853 (PGG), 2010 WL 1050988, at *4 (S.D.N.Y. Mar. 23, 2010) (enforcing agreement requiring any dispute to be “settled by arbitration in the State of New York”).
76. *See* 789 F. Supp. 1229, 1240 (S.D.N.Y. 1992) (compelling arbitration where the American defendant had incorporated a previous contract, containing an arbitration clause, into the contract at issue and the Italian plaintiff failed to object until litigation ensued). Other cases have also involved the sale of goods. *See, e.g., Hart Enters. Int’l, Inc. v. Anhui Provincial Imp. & Exp. Corp.*, 888 F. Supp. 587 (S.D.N.Y. 1995) (compelling arbitration over a contract on a sale of textiles).

77. See, e.g., *Rafferty v. Xinhua Fin. Ltd.*, No. 11 Civ. 133 (CM), 2011 U.S. Dist. LEXIS 9628, at *22–23 (S.D.N.Y. Jan. 31., 2011) (holding that the petitioner waived arbitration against Chinese company by litigating arbitrable issues in the courts for eighteen months); *Astro Vencedor Compania Naviera, S.A. v. Gen. Org. for Supply Goods, Cairo (In re Gen. Org.)*, No. 94 Civ. 3429 (AGS), 1996 U.S. Dist. LEXIS 602, at *25 (S.D.N.Y. Jan. 23, 1996) (denying a motion to compel on statute-of-limitations grounds where the party requesting arbitration failed to move on the claim for eighteen years and the other party had originally consented to arbitration).
78. See *Andersen Consulting Bus. Unit Member Firms v. Andersen Worldwide Societe Coop.*, No. 98 Civ. 1030 (JGK), 1998 WL 122590, at *7 (S.D.N.Y. Mar. 18, 1998) (declining to compel arbitration where, among other things, respondent had not resisted arbitration).
79. See *Satcom Int'l Grp. PLC v. Orbcom Int'l Partners, L.P.*, 49 F. Supp. 2d 331, 338 (S.D.N.Y. 1999) (denying petitioner's attempt to "make the choice between litigation and arbitration a second time for the same dispute"), *aff'd*, 205 F.3d 1324 (2d Cir. 1999).
80. See *Bechtel do Brasil Construções Ltda. v. UEG Araucária Ltda.*, No. 09 Cv. 6417 (BSJ), 2009 U.S. Dist. LEXIS 131360 (S.D.N.Y. Nov. 14, 2009) (staying arbitration and holding that the combination of a provision providing that New York law governed the contract and a provision providing that New York law governed the procedure and administration of the arbitration allowed the court to adjudicate a statute of limitations defense before the commencement of arbitration).
81. See Julie Bédard & Shannon T. Lazzarini, *Anti-Suit Injunctions in International Arbitration*.
82. See *id.*
83. 369 F.3d 645, 652 (2d Cir. 2004); see also Bédard & Lazzarini, *supra* note 81, at ___.
84. *Storm LLC v. Telenor Mobile Commc'ns AS*, No. 06 Civ. 13157 (GEL), 2006 WL 3735657, at *7 (S.D.N.Y. Dec. 15, 2006) (citing *Paramedics Electromedicina Comercial, Ltda.*, 369 F.3d at 653).
85. *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987) (quoting *Am. Home Assurance Co. v. Ins. Corp. of Ireland*, 603 F. Supp. 636, 643 (S.D.N.Y. 1984)); see also *Ibeto Petrochemical Industry Ltd. v. M/T Beffen*, 475 F.3d 56, 64 (2d Cir. 2007) (noting that preventing forum shopping is one equitable consideration to be considered); *Stolt Tankers BV v. Allianz Seguros, S.A.*, No. 11 Civ. 2331 (SAS), 2011 U.S. Dist. LEXIS 67755, at *17–19 (S.D.N.Y. June 16, 2011) (applying the *China Trade* and *Paramedics Electromedicina* factors in granting an anti-suit injunction).
86. See *Paramedics Electromedicina Comercial, Ltda.*, 369 F.3d at 654; *T-jat Sys. 2006 Ltd. v. Amdocs Software Sys. Ltd.*, No. 13 Civ. 5356 (HB), 2013 WL 6409476, at *3–4 (S.D.N.Y. Dec. 9, 2013) (enjoining Amdocs' action in Israel because court had previously granted a motion to compel arbitration).
87. *Storm LLC*, 2006 WL 3735657, at *2.
88. *Id.* at *1–4.
89. *Id.* at *9.
- Similarly, in *Amaprop Ltd. v. Indiabulls Financial Services Ltd.*, the Southern District of New York granted the request of Amaprop, a Cayman Island company, to compel arbitration against Indiabulls, two Indian companies. No. 10 Civ. 1853 (PGG), 2010 WL 1050988, at *1 (S.D.N.Y. Mar. 23, 2010). While initially participating in the arbitration, Indiabulls obtained *ex parte* orders against Amaprop in India that purported to prohibit Amaprop from continuing with the arbitration. *Id.* at *2. In issuing the anti-suit injunction, the Southern District of New York found that Indiabulls proceeded in bad faith and created considerable inconvenience and expense for Amaprop. *Id.* at *6.
90. *LAIF X SPRL v. Axtel, S.A. de C.V.*, 390 F.3d 194, 200 (2d Cir. 2004); see also *SH Tankers Ltd. v. Koch Shipping Inc.*, No. 12 Civ. 00375 (AJN), 2012 U.S. Dist. LEXIS 85729, at *10 (S.D.N.Y. June 19, 2012) (denying an anti-suit injunction where the moving party "cast the first litigation stone by filing this action protesting [the other party's] decision to *abide* by the Panel's Ruling" and the other party neither refused to arbitrate nor commenced litigation.).
91. *Comverse, Inc. v. Am. Telecomms., Inc.*, No. 06 Civ. 6825 (PKL), 2006 WL 3016315, at *3 (S.D.N.Y. Oct. 23, 2006).
92. See *Empresa Generadora De Electricidad Itabo, S.A. v. Corporación Dominicana De Empresas Eléctricas Estatales*, No. 05 Civ. 5004 RMB, 2005 WL 1705080, at *8–9 (S.D.N.Y. July 18, 2005); see also *supra* Section II.B.
93. See *LAIF X SPRL*, 390 F.3d 194, 200 (2d Cir. 2004).
94. *Id.*
95. *Id.* (citation omitted).
96. See *id.* at 200.
97. No. 06 Civ. 6825 (PKL), 2006 WL 3016315, at *3 (S.D.N.Y. Oct. 23, 2006).
98. *Id.*
99. *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 655 (2d Cir. 2004) (quoting *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 37 (2d Cir. 1985)).
100. *Amaprop Ltd. v. Indiabulls Fin. Servs. Ltd.*, No. 10 Civ. 1853 (PGG), 2010 WL 1050988, at *9 (S.D.N.Y. Mar. 23, 2010).
101. See 475 F.3d 56, 65 (2d Cir. 2007).
102. CPLR 7502(c) (Consol. 2013).
103. See *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 330–31 (1999).
104. No. 96 Civ. 9740 (RWS), 1997 U.S. Dist. LEXIS 9661, at *6–9 (S.D.N.Y. July 7, 1997).
105. *Id.* at *17; see also *Sojitz Corp. v. Prithvi Info. Sols. Ltd.*, 921 N.Y.S.2d 14 (App. Div. 2011) (attaching funds in aid of arbitration because, *inter alia*, the Indian company had misappropriated escrow funds likely owed to a Japanese company).
106. *Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1052 (2d Cir. 1997); see also *Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140 (1993) ("[A] corporation exists independently of its owners, as a separate legal entity, [and] the owners are normally not liable for the debts of the corporation, and...it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners.").
107. *TNS Holdings, Inc. v. MKI Secs. Corp.*, 92 N.Y.2d 335, 339 (1998) (refusing to pierce the corporate veil to require a nonsignatory to arbitrate); see also *Freeman*, 119 F.3d at 1053 ("Unless the control is utilized to perpetrate a fraud or other wrong, limited liability will prevail.").
108. 876 F. Supp. 482, 484 (S.D.N.Y. 1994).
109. See *id.* at 483.
110. See *id.* at 485.
111. *Id.* at 487.
112. *Id.* at 486.
113. *Id.* at 487.
114. See *id.* at 488.
115. No. 05 Civ. 0890, 2005 U.S. Dist. LEXIS 4635, at *13 (S.D.N.Y. Mar. 28, 2005) (attaching shares in aid of arbitration where defendant "possesse[d] no assets in the United States other than the shares at issue here,...had a negative net worth as of the end of 2002, and... ha[d] borrowed \$1,000,000 from a bank in Israel, a loan secured by all of [defendant's] assets[,] which suggest[ed] [defendant's] potential insolvency").
116. 921 N.Y.S.2d 14, 15, 19 (App. Div. 2011) (affirming attachment in aid of arbitration where defendant admitted that it diverted money meant to go into an escrow "because it had 'cash flow problems'").

117. 824 N.Y.S.2d 560, 561 (Sup. Ct. 2006).
118. 344 F.3d 255, 264 (2d Cir. 2003).
119. *Id.* at 262.
120. *Id.* at 263.
121. See 12 Civ. 8087, 2012 U.S. Dist. LEXIS 176158, at *1–2 (S.D.N.Y. Dec. 10, 2012) (emphasis added). “A Mareva injunction is an interlocutory (normally ex parte) injunction restraining a defendant in civil litigation from disposing of assets so as to render itself judgment proof.” David Capper, *The Need for Mareva Injunctions Reconsidered*, 73 FORDHAM L. REV. 2161, 2162 (2005). Neither federal nor New York courts may entertain Mareva injunctions in aid of pending litigations. See *Grupo Mexicano de Desarrollo, S.A.*, 527 U.S. at 333 (federal); *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541, 550–51 (Ct. App. 2000) (New York).
122. 93 F. Supp. 2d 506, 514 (S.D.N.Y. 2000) (“[A]n award of temporary equitable relief such as a security award, separable from the merits of arbitration, is subject to federal review.”).
123. *CE Int’l Res. Holdings*, 2012 U.S. Dist. LEXIS 176158, at *7.
124. See *id.* at *10–11.
125. *Id.* at *11; see also *supra* note 121.
126. See *CE Int’l Res. Holdings*, 2012 U.S. Dist. LEXIS 176158, at *13 (“But where, as here, the parties have agreed that the arbitrator has the power to issue what is, in effect, an extra-legal remedy, the policies underlying *Grupo Mexicano* and *Credit Agricole* are not implicated. Furthermore, in the arbitral context, there is a strong countervailing policy of enforcing arbitral awards in accordance with the terms, as long as the arbitrators have not exceeded their powers.”).
127. CPLR 7502(c) (Consol. 2013).
128. *Kadish v. First Midwest Sec., Inc.*, 981 N.Y.S.2d 525 (memo) (1st Dep’t. 2014); see also *H.I.G. Capital Mgmt., Inc. v. Ligator*, 650 N.Y.S.2d 124, 125 (1st Dep’t 1996) (“[CPLR § 7502(c)] is the sole applicable standard, and we find that it was correctly applied. Even were standards of CPLR article 63 applicable, we would find that the relief granted was within the court’s discretion.” (citations omitted)).
129. See 804 N.Y.S.2d 549 (Sup. Ct. 2005).
130. *Id.* at 556, 571.
131. 02 Civ. 1363, 2002 U.S. Dist. LEXIS 10373, at *7–8 (S.D.N.Y. June 11, 2002).
132. *Id.* at *12–13.
133. *Id.* at *20–21.
134. 934 N.Y.S.2d 34 (table) (Sup. Ct. 2010).
135. *Id.*
136. *Id.* The American companies claimed that Zorlu had controlled the financier when Zorlu suggested it. *Id.*
137. *Id.* For another example of a New York court issuing a preliminary injunction in similar circumstances, see *Suchodolski Assocs., Inc. v. Cardell Fin. Corp.*, 03 Civ. 4148, 2004 U.S. Dist. LEXIS 1427 (Feb. 3, 2004).
138. 757 F. Supp. 2d 238 (W.D.N.Y. 2010).
139. See *supra* Section II.B.
140. See *Int’l Legal Consulting Ltd. v. Malabu Oil & Gas Ltd.*, 950 N.Y.S.2d 723 (table) (Sup. Ct. 2012) .
141. See *id.* (denying a preliminary injunction and an attachment order where, *inter alia*, the moving party could not demonstrate likely success on the merits and the property was located in London, outside of the court’s jurisdiction).
142. 728 F. Supp. 2d 462, 473 (S.D.N.Y. 2010).
143. No. 98 Civ. 1030(JGK), 1998 WL 122590, at *1 (S.D.N.Y. Mar. 18, 1998).
144. *Id.*
145. *Id.* at *8–9.
146. 11 Civ. 9227, 2012 U.S. Dist. LEXIS 83616, at *1 (S.D.N.Y. June 14, 2012).
147. *Id.* at *4–5.
148. *Id.* at *1.
149. *Id.* at *18–19; see also *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 462 (S.D.N.Y. 2010); *Lintjes Bischoff GmbH v. Joy Evtl. Techs., Inc.*, 986 F. Supp. 183, 187–88 (S.D.N.Y. 1997) (determining that the preliminary injunction requested—the extension of a new letter of credit—could be issued by the arbitral panel in months, while the damage caused by the lack of the injunction would not be felt for years).
150. See FED. R. CIV. P. 65(c); N.Y. CPLR 6212(b), 6312(b) (Consol. 2015).
151. No. 02 Civ. 1363 (PKL), 2002 U.S. Dist. LEXIS 10373, at *20–26 (S.D.N.Y. June 11, 2002).
152. 876 F. Supp. 482, 488 (S.D.N.Y. 1994).
153. See *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049 (2d Cir. 1990) (allowing wrongfully enjoined party to recover against Merrill Lynch’s security bond, even though the arbitration panel had ultimately ruled for Merrill Lynch).

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