

# Judicial interim measures in aid of arbitration: New York's muddled landscape

UNITED STATES

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**A**rticle 75 of the New York Civil Practice Law and Rules ('CPLR') addresses, in section 7502(c), the circumstances in which a New York court may give a provisional measure in aid of arbitration.

## Section 7502(c) of the New York Civil Practice Law and Rules

CPLR 7502(c) is a particularly significant provision of state law in the world of international arbitration, given New York's role as host to many international commercial arbitrations. The Federal Arbitration Act includes no sections concerning provisional relief, so when interim measures are sought in a New York court under CPLR 7502(c), there is no issue of federal law pre-emption. Several years ago CPLR 7502(c) was amended to make it expressly applicable in arbitrations based on agreements governed by the New York Convention. The legislature made this change to overcome a New York Court of Appeals decision that had held that the New York Convention's ouster of judicial jurisdiction in an arbitrable matter included an ouster of jurisdiction to give provisional measures. Finally, when a proceeding is brought in federal court to obtain provisional relief in aid of arbitration, Federal Rule of Civil Procedure 64 provides that the relief shall be available under the conditions specified in the law of the state where the federal court is sitting.

Further, while CPLR 7502(c) has no necessary application to a request for interim measures made to an international arbitral tribunal seated in New York, parties will often cite it as a source of applicable standards.

It is therefore quite useful to know what those standards are, and on this point there has been some longstanding uncertainty that has never been resolved by New York's highest court, the New York Court of Appeals.

### The test

CPLR 7502(c) states in relevant part that the court 'may entertain an application for an order of attachment or a preliminary injunction

in connection with an arbitration ... but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief'. The statute goes on to state that the CPLR articles concerning attachment 62 and preliminary injunctions 63 'shall apply to the application ... except that the sole ground for the granting of the remedy shall be as stated above'.

Before 2000, several decisions in New York's intermediate appellate court, the Appellate Division, interpreted CPLR 7502(c) to mean that in the context of a preliminary injunction in aid of arbitration, the traditional equitable criteria mentioned in CPLR Article 63 – the likelihood of success on the merits, irreparable harm, and a balance of hardships tipping in favour of the movant – no longer apply and that the sole test for relief is whether the eventual award might be rendered ineffectual. In the attachment context, some New York courts held that the 'rendered ineffectual' standard superseded the 'grounds' for attachment enumerated in CPLR 6201 – such as removal of assets from the state, or actual or threatened actions to defraud creditors or frustrate enforcement of a judgment. Other courts went further, and held that the 'rendered ineffectual' standard also supplanted the other criteria in CPLR 6212 – that a cause of action exists, probable success on the merits, and that the amount demanded from the defendant exceeds all known counterclaims. Subsequent jurisprudence, however, has interpreted CPLR 7502(c) more restrictively.

### *SG Cowen Securities Corp Co v Messih*: back to basics – traditional criteria for obtaining injunctive relief must be met

In 2000, the US Second Circuit Court of Appeals in *SG Cowen Securities Corp Co v Messih* (224 F.3d 79) ('*Cowen*') held that the language 'may entertain an application... but only on the ground...' should be read to mean that the threat that an award will be 'rendered ineffectual' is a necessary but not sufficient condition for obtaining relief. The Court read the reference in CPLR 7502(c) to CPLR Articles 62 and 63

to mean that the standards for obtaining relief as specified in those Articles remain applicable and that the 'sole ground for the granting of the remedy' language did not prevent a court from denying relief where other statutory requirements for relief such as probable success on the merits were not satisfied.

Further, the Second Circuit examined the legislative history of CPLR 7502(c) and found that its purpose was to clarify the courts' power to grant relief rather than to broaden the availability of relief by excusing movants from showing probable success or irreparable harm. Finally, the Second Circuit observed that due process concerns would arise if provisional remedies interfering with property could be obtained without any showing relating to the merits and even if the hardships of the measures upon the enjoined party would be far greater than those suffered by the movant absent interim relief.

#### **Post-Cowen: where have we gone from there?**

For the past decade, decisions in New York state courts have mainly found *Cowen* to be persuasive, and have followed it, holding that traditional equitable criteria for preliminary injunctions must be satisfied, and, in the attachment context, that CPLR 7502(c) only obviates the need to show one of the 'grounds' in 6201 – but that the 6212 criteria including probable success on the merits do apply. Federal decisions in the injunction context have followed *Cowen*. In the attachment context, a federal decision in 2010 reviewed the disparate case law, took note that the narrow holding of *Cowen* concerned only preliminary injunctions, not orders of attachment, and did not find it necessary to decide whether a ground for attachment such as misconduct to frustrate creditors must be shown, because the movant could not meet the minimum 'rendered ineffectual' threshold. (See, *Shah v Commercial Bank*, 2010 US Dist Lexis 19717 (SDNY, 4 March 2010)). More recently, a federal district court adhered to the position that traditional judicial requirements for a preliminary injunction, in addition to the 'rendered ineffectual' requirement of 7502(c), must be satisfied to obtain an injunction in aid of international arbitration. (See, *AFA Dispensing Group BV v Anheuser-Busch, Inc*, 2010 US Dist Lexis 86459 (SDNY, 18 August 2010)) ('*AFA*'). It is notable that the Court in *AFA*, having found no sufficient showing of irreparable harm, engaged in only very cursory discussion of the merits.

Under the current state of the law, parties seeking judicial interim measures in aid of international arbitration must be prepared to make a substantial evidentiary presentation by documents, affidavits and sometimes live testimony in order to obtain relief from a New York court. This may, for example, involve live testimony and cross-examination of experts on foreign law, where foreign law governs the merits and the merits position depends on a contested legal premise. In this context, the courts' deference to the arbitrator on matters touching upon the merits collides with the entrenched principle that preliminary relief is 'drastic' – and is viewed as such largely because the merits have not yet been fully explored. Therefore, many judges are inclined to make an accelerated and intensive inquiry into the merits in connection with preliminary relief. Absent clear statutory direction or a definitive ruling from the New York Court of Appeals that interprets CPLR 7502(c) to limit inquiry into the merits, this disposition among judges is likely to remain.

Arbitral tribunals seated in New York may, in an effort to preserve their neutrality, prudently avoid studying a judge's decision on an interim measures application and the record presented to the court. But the tribunal must be mindful that if provisional relief from a court has been granted, it can be inferred that at least on a 'first look' basis, a judge found probable merit to the movant's position on the merits.

#### **Alternative solution for interim relief: considering arbitrators over judicial intervention**

One good solution for parties inclined toward a New York seat but not sanguine about this landscape for judicial interim measures is to use the ICDR's emergency arbitrator process, the ICC's pre-arbitral referee procedure, or comparable procedures provided institutionally or created specially by contract to address truly urgent requests that must be heard before the tribunal is constituted. Subject to the particulars of the applicable rules of arbitration, the emergency arbitrator selected will have considerable discretion in choosing applicable standards for provisional relief. And the emergency arbitrator is likely to be more persuadable than a New York state or federal judge to be guided by transnational arbitral norms concerning provisional measures that de-emphasise the merits and focus mainly on the extent of truly irreparable harm and disproportionate hardship.