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A Seat at the Table

Will CPLR amendment make New York state courts a more hospitable environment for international arbitration?

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AT A RECENT conference of New York area judges and lawyers, one very experienced federal judge observed that 10 years ago he had many cases involving Fortune 500 companies; he now has very few. When he mentioned this development to two former colleagues who were now inside counsel at two of the leading corporations in his district, he was told that these companies had become more multinational and dealt increasingly with non-American contract parties who insisted that disputes be arbitrated to avoid the risks and expenses associated with U.S. juries and discovery. Perhaps more surprisingly, he was also told that these companies had found they preferred arbitration and were now themselves demanding arbitration clauses in their contracts—even with domestic suppliers.

What is behind this development? First, the procedural flexibility and expertise offered by international arbitration provide counsel with a greater sense of control over their disputes. Second, because of the widespread acceptance of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as both

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the U.N. Convention and the New York Convention)—an international arbitration is almost certain to be enforced in the many jurisdictions throughout the world where a party may have assets.[1] (The U.N. Convention has been adopted by 137 nations, including the United States.)

Third, international arbitration provides a way for companies to opt out of the burdensome and uncertain world of electronic discovery (and the sideshow "spoliation" litigation it has spawned).[2] Finally, courts and legislatures are recognizing the important role that international arbitration plays in the global economy and are taking steps to make sure that the appropriate legal structures are in place to allow international arbitration to proceed in a rational and effective manner.

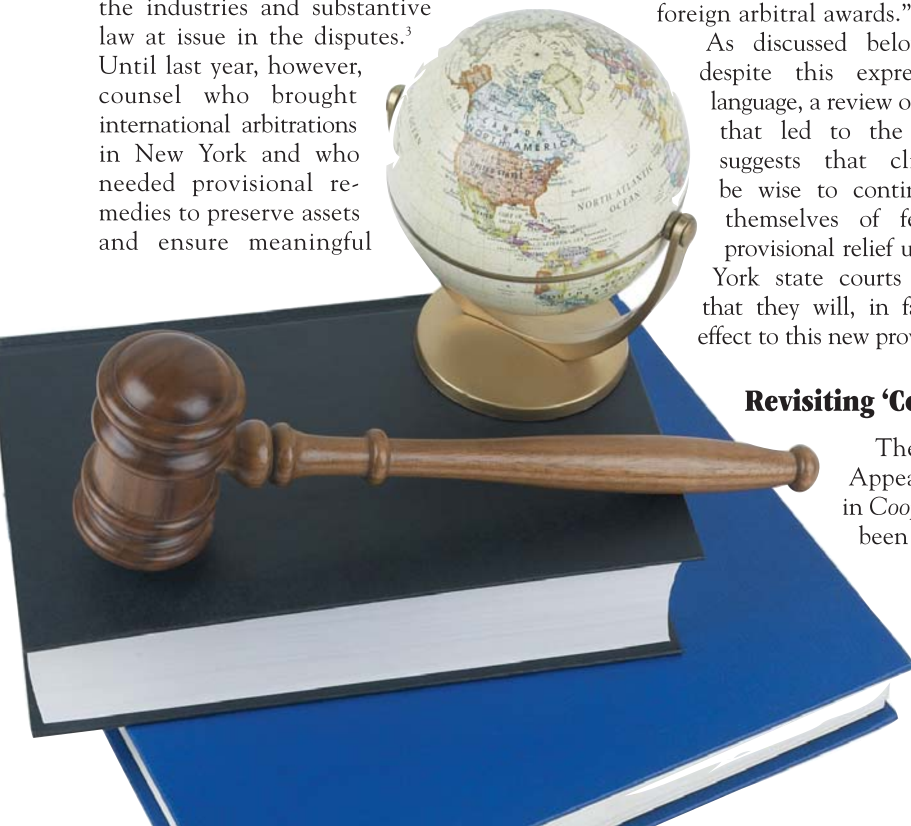
As more disputes are resolved in arbitration, however, clients need to consult counsel with international arbitration experience in order to assess ongoing procedural developments and avoid the satellite litigation that clouded some companies' earlier experience with arbitration. One such example involves the recent amendment to New York's Civil Practice Law and Rules (CPLR) regarding the availability of provisional remedies in international arbitration.

New York has often been considered a favored venue for the arbitration of international disputes because of its convenience and the ready availability of sophisticated arbitrators with expertise in the industries and substantive law at issue in the disputes.[3] Until last year, however, counsel who brought international arbitrations in New York and who needed provisional remedies to preserve assets and ensure meaningful recovery had to seek such relief in federal court;[4] New York state courts were barred from granting attachments or injunctions in aid of international arbitration by the 1982 decision of the Court of Appeals in *Cooper v. Atelier de la Motobecane, S.A.*[5]

The amendment to CPLR 7502(c), which became effective as of Oct. 4, 2005, is clearly designed to remove this restriction.[6] Indeed, amended CPLR §7502(c) underscores its broad intended application by stating that preliminary injunctions and attachments may be granted in an "arbitration that is pending or that is to be commenced inside or outside this state" and, to signal its application to international arbitrations, "whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards."[7]

Almost every other federal and state court that has addressed this issue has found that the U.N. Convention does not preclude court-imposed attachments and injunctions in aid of arbitration.

As discussed below, however, despite this express statutory language, a review of the case law that led to the amendment suggests that clients would be wise to continue to avail themselves of federal court provisional relief until the New York state courts demonstrate that they will, in fact, give full effect to this new provision.



Revisiting 'Cooper'

The Court of Appeals' decision in *Cooper* has never been overturned. Consequently, in assessing how the amendment to the CPLR will affect a party's ability to obtain a provisional remedy in aid of arbitration, it is helpful to revisit the analysis in *Cooper*.

In *Cooper*, the parties commenced an arbitration in Switzerland pursuant to the terms of their agreement. Plaintiff then brought an action in New York to stay the arbitration and when that action failed, brought a second action against defendant for a money judgment. In connection with that second action, plaintiff sought to attach a debt that a New York corporation owed to defendant.

In a 4-3 decision, the New York Court of Appeals denied the attachment on two grounds. First, the Court noted that the CPLR at that time did not provide for an attachment where the parties' underlying dispute was subject to arbitration. Second, and "[m]ore important here," the Court of Appeals decried the uncertainty that would result from attachments and judicial proceedings that would subject the foreign business entity "to foreign laws with which it is unfamiliar."[8]

After reviewing the scope and text of the U.N. Convention, which the Court found applied to the pending arbitration, the Court of Appeals held that where the parties' agreement provided for arbitration that was covered by the U.N. Convention (i.e., almost all international arbitrations), New York courts were prevented "from acting in any capacity except to order arbitration" such that attachments were unavailable in commercial arbitrations subject to the treaty.[9]

A Resilient Legacy

Following *Cooper*, the New York Legislature enacted CPLR §7502(c) in 1985 to expressly provide that attachments and preliminary injunctions would be permitted in aid of arbitration. In *Drexel Burnham Lambert Inc. v. Ruebsamen*, however, the Appellate Division, First Department, found that notwithstanding the enactment of CPLR §7502(c), the limitations on state court aid to international arbitrations remained: "[I]n instances in which the UN Convention is applicable, the 'arbitration is governed by the UN Convention, and pursuant to the terms thereof, prejudgment attachment is prohibited. It was the intention of the UN Convention that there should be no significant judicial intervention until *after* an arbitration award is made.'"[10]

Some commentators and courts have observed that one reason that *Cooper* continued to be cited to deny provisional

remedies in aid of arbitration was that the Advisory Notes to the 1985 amendment indicated that the amendment was not inconsistent with *Cooper* and that the original CPLR §7502(c) would not affect proceedings governed by the U.N. Convention.[11] The drafters and supporters of new CPLR §7502(c), which expressly indicates that it applies to arbitrations covered by the U.N. Convention, seek to close that loophole.

Notably, however, the *Drexel Burnham Lambert* case, the only Appellate Division case to discuss the application of *Cooper* to the original CPLR §7502(c), did not rely at all upon the Advisory Notes that these commentators blame for *Cooper's* continued vitality; rather, the First Department based its analysis on *Cooper's* holding that the U.N. Convention limits pre-award court intervention to compelling the parties to arbitrate.[12] Consequently, until the effectiveness of the recent amendment to CPLR §7502(c) in international arbitrations is addressed by at least the Appellate Division, the safer course would be to pursue existing federal court conservatory measures.

Significant Impetus for Reform

In making the above recommendation, we do not mean to suggest that we are pessimistic about whether the new CPLR amendment will ultimately be sustained. To the contrary, many factors suggest that New York courts will ultimately permit provisional remedies in aid of international arbitration.

- Almost every other federal and state court that has addressed this issue—including the U.S. Court of Appeals for the Second Circuit—has disagreed with *Cooper* and found that the U.N. Convention does not preclude court-imposed attachments and injunctions in aid of arbitration.[13]
- The facts in *Cooper* were atypical in that the party seeking an attachment was not merely seeking relief in aid of arbitration, but rather was attempting to do an end run to avoid an arbitration to which it had earlier agreed.[14] The Court's comments on the importance of supporting the U.N. Convention and international arbitration may, in retrospect, be seen as directed to overly aggressive tactics.
- The language of the text of the amendment—which expressly states that it applies to arbitrations that are subject to the U.N. Convention—underscores the legislative commitment to making this relief available,[15] and the Advisory Committee Report also makes clear that the amendment is "in reaction to the Court of Appeals decision in *Cooper*."[16]
- Comprehensive treatment of the subject by respected New York commentators, such as the Joint Report of the International Commercial Disputes Committee and Committee on Arbitration of the Association of the Bar of the City of New York, persuasively make the case for distinguishing *Cooper*.

Continuing Uncertainty

Nevertheless, the international arbitration practitioner would be wise to give the New York state courts time to clarify the scope and contours of CPLR §7502(c). Indeed, even if New York courts find that CPLR §7502(c) applies to international arbitrations, courts will still need to resolve which standard is to be used to determine whether injunctive relief is warranted. In domestic arbitrations under CPLR §7502(c), for example, some New York courts, tracking the language of that section, only require that "the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief."[17] Other courts, however, also require the movant to satisfy the criteria applicable for provisional relief set forth in CPLR Articles 62 and 63—which require a movant to show a likelihood of success on the merits, irreparable harm and a balancing of the equities in its favor.[18]

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Conclusion

In today's global business environment, those inside counsel who have not already done so should take a closer look at the advantages of international arbitration. Many of the impediments that caused frustration only a decade ago—such as the concern that arbitration would get dragged into disputes over arbitrability, confirmation and enforcement—are often avoidable with careful drafting of arbitration clauses and the handling of arbitrations by experienced practitioners. Moreover, counsel and other contract drafters can exert considerable influence over the manner in which disputes will be resolved by addressing in their arbitration clauses the administering organization, the rules to be applied, the location of the arbitration, the scope and nature of discovery (if any) to be permitted, and the permissibility and nature of provisional remedies. Then, when the dispute arises, counsel can resolve disputes efficiently and effectively—not just in the "new" world of international arbitration in New York, but worldwide.

1. 330 U.N.T.S. 3, 21 U.S.T. 2517, TIAS 6997 (June 10, 1958). For the full text of the U.N. Convention, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html. In fact, parties that go to court to challenge arbitration awards when they have no sound basis for doing so may well be inviting sanctions. See *B.L. Harbert Intern., LLC v. Hercules Steel Co.*, No. 05-11153, 2006 WL 462368 (11th Cir. Feb. 28, 2006).
2. See, e.g., Fulbright & Jaworski L.L.P., Survey (Oct. 10, 2005), http://www.fulbright.com (reporting that in-house counsel identify electronic discovery as their primary new concern). While there is no formal bar to electronic discovery in international arbitration, broad disclosure has traditionally been disfavored, particularly in arbitrations involving parties or arbitrators from civil law countries.
3. See Fulbright & Jaworski L.L.P., Second Annual Litigation Trends Survey Findings (2005) (2005 Fulbright Report) at 30.
4. See Federal Arbitration Act §206 and Fed. R. Civ. P. 65.
5. 57 N.Y.2d 408, 456 N.Y.S.2d 728 (1982).
6. See Joint Report of the International Commercial Disputes Committee and Committee on Arbitration of the Association of the Bar of the City of New York (Feb. 11, 2005), http://www.abcny.org/pdf/report/international_arb_rpt_on_equit_remedies.pdf (Joint Report).
7. Comm. on Civil Practice and Rules, Report Prepared by the Comm. on Civil Practice and Rules. S.4837 (2005); CPLR §7502(c).
8. Id. 57 N.Y.2d at 414, 456 N.Y.S.2d at 731.
9. Id.
10. 139 A.D.2d 323, 330, 531 N.Y.S.2d 547, 551 (1st Dept. 1988) (citing *Shah v. Eastern Silk Indus.*, 112 A.D.2d 870, 871, 493 N.Y.S.2d 150, 151 (1st Dept. 1985)) (emphasis in original).
11. See *Canwest Global Communications Corp. v. Mirkaei Tikshoret Ltd.*, 9 Misc.3d 845, 862, 804 N.Y.S.2d 549, 564 (Sup. Ct. New York Co. 2005), *ContiChem LPG v. Parsons Shipping Co.*, 229 F.3d 426, 432 (2d Cir. 2000), Joint Report at n. 6.
12. *Drexel Burnham Lambert Inc.*, 139 A.D.2d 323, 531 N.Y.S.2d 547.
13. "Over the past 23 years since *Cooper* was decided, the vast majority of courts, both here and abroad, have agreed [that provisional relief] is not precluded by the Convention but rather is consistent with its provisions and its spirit." Joint Report at 10 (internal quotation omitted).
14. "Action II, the instant case, is nothing more than plaintiff's attempt to circumvent Special Term's ruling in Action I." *Cooper*, 57 N.Y.2d at 415, 456 N.Y.S.2d at 732.
15. CPLR §7502(c).
16. S.4837, Comm. on Civil Practice and Rules (2005).
17. See *Guarini v. Severini*, 223 A.D.2d 196, 650 N.Y.S.2d 4 (1st Dept. 1996); see also *H.I.G. Capital Mgt., Inc. v. Ligator*, 223 A.D.2d 270 (1st Dept. 1996).
18. See *Erber v. Catalyst Trading, LLC*, 303 A.D.2d 165, 754 N.Y.S.2d 885 (1st Dept. 2003); *Cheng v. Worldco, L.L.C.*, 781 N.Y.S.2d 623, 623, 1 Misc.3d 903(A) (Table) 2003 WL22964397, at *2 (Sup. Ct. New York Co., Nov. 26, 2003).

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