INTERNATIONAL ARBITRATION IN NEW YORK: A PRACTICAL PERSPECTIVE

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Abstract

This article explores the legal frameworks and practical considerations underlying international arbitration in New York. The means by which New York courts can assist parties involved in international arbitration include imposing time limits for certain objections, obtaining evidence, enforcing a tribunal's third-party subpoena, issuing an order of attachment or preliminary injunction, and confirming an arbitral award. This article discusses key considerations and challenges concerning these modes of judicial action, and also provides an overview of other factors contributing to New York's role in the field of arbitration.

New York is a premier forum for arbitration, not solely because it is the leading venue among arbitrations seated in the United States of America [the "**United States**" or the "**U.S.**"], but also because federal and state courts in New York can provide essential support for arbitral proceedings situated both within and outside the U.S. This article explores the legal frameworks and practical considerations underlying international arbitration in New York. Section I of this article discusses five notable methods of court assistance available to parties involved in international arbitration, and Section II highlights the factors that contribute to New York's eminent position in the field of arbitration.

I. The Role of New York Courts in Aid of International Arbitration

The policy of the United States strongly favours arbitration. This approach is embodied in the Federal Arbitration Act [the "**FAA**"],[1] which applies to all international arbitrations and implements both the New York Convention[2] and the Panama Convention.[3] The FAA and state law provide numerous means by which a federal or state court in New York may assist a party in an international arbitration.

This section discusses five key forms of judicial action potentially available to a party involved in an international arbitration: (a) imposing a time limit for the opposing party to object to arbitration on certain grounds; (b) obtaining testimony or documents for use in a non-U.S. arbitration; (c) enforcing a tribunal's subpoena to a third party in an arbitration situated in the

1 9 U.S.C. § 1 *et seq*.

2 Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, June 10, 1958, 330 U.N.T.S. 38 [hereinafter "New York Convention"].

3 Organization of American States, Inter-American Convention on International Commercial Arbitration of 1975, January 30, 1975, OAS/SER. A20 (SEPEF), 14 I.L.M. 336 (1975).

U.S.; (d) obtaining an order of attachment or a preliminary injunction in connection with an arbitration located anywhere; and (e) confirming an arbitral award. This section also notes potential challenges concerning these modes of court assistance.

As a preliminary matter, a party bringing an action before a U.S. court must establish that the court has both personal jurisdiction over the adverse party and subject matter jurisdiction over the dispute. Under New York law, a court may exercise personal jurisdiction over a party who, for example, transacts business within the state or contracts anywhere to supply goods or services in the state, or who owns, uses, or possesses property situated within the state.[4] With regard to subject matter jurisdiction, in order for an action to be maintained in federal court, rather than state court, there must be a basis for the federal court to hear that type of action. For instance, the FAA confers direct subject matter jurisdiction on a federal court to confirm an arbitral award pursuant to the New York or Panama Conventions.[5] However, because the FAA does not provide for direct federal subject matter jurisdiction to vacate or set aside an arbitral award, a party may seek vacatur in federal court only if there is either diversity jurisdiction (*i.e.*, the claim exceeds $75,000 and there is complete diversity of citizenship between the parties) or federal question jurisdiction (*i.e.*, the claim arises under U.S. federal law).[6]

A. Twenty-Day Limitation of Time to Object to Arbitration on Certain Grounds

New York state law contains a unique feature that limits the period of time in which a party resisting arbitration may seek a judicial stay of the arbitration on the grounds that (1) the arbitration agreement is not valid or has not been complied with, or (2) the arbitration is barred by the statute of limitations. Pursuant to section 7503(c) of the New York Civil Practice Law and Rules, a party may, but is not required to, serve a demand for arbitration or a notice of intention to arbitrate that explicitly states that unless the party served applies to the court to stay the arbitration within twenty days after service, that party will be "precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar

4 *See* New York Civil Practice Law and Rules § 302(a)(1), (4).
5 9 U.S.C. § 207 (incorporated by FAA § 302 so as to apply to Panama Convention awards).
6 *See* Judiciary and Judicial Procedure, 28 U.S.C. § 1331-32.

of a limitation of time."[7] However, the law is currently unsettled as to whether this state law provision is applicable in cases arising under the FAA.[8]

B. Discovery in Aid of International Arbitration

Under 28 U.S.C. § 1782(a), a federal statute, a court has the discretion to order a person to give "testimony or [a] statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal."[9] The Second Circuit Court of Appeals, the federal appellate court whose jurisdiction includes New York, has set forth a three-part test for courts to decide such discovery applications: (1) the person from whom discovery is sought must reside or be found in the district of the federal district court in which the application is made; (2) the discovery must be for use in a foreign proceeding before a foreign tribunal; and (3) the application must be made by a foreign or international tribunal or any "interested person."[10]

As a threshold matter, the type of foreign arbitration proceedings encompassed by the statute's scope remains an open question. Generally, tribunals in investment treaty arbitrations and UNCITRAL (United Nations Commission on International Trade Law) arbitrations have been considered to be "foreign or international tribunals" for purposes of § 1782(a) applications.[11] Courts differ, however, in their approach as to whether a tribunal in a purely private arbitration also falls within the scope of § 1782(a). The Second Circuit has held that a Paris International Chamber of Commerce ["**ICC**"] arbitration does not meet the requirements of a "foreign tribunal" set forth in § 1782(a).[12] However, five years after the Second Circuit addressed this issue, the U.S. Supreme Court in *Intel Corp. v. Advanced Micro Devices Inc.*, observed that the U.S. Congress amended § 1782(a) to replace the term "*any judicial proceeding*" with "*a proceeding in a foreign or international tribunal*," in contemplation of "*the possibility of U.S. judicial assistance in connection*

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7 New York Civil Practice Law and Rules § 7503(c).

8 *See* I.K.Bery, Inc v. Boody & Co., No. 99 Civ. 10968 (SAS), 2000 WL 218938, at *6 n.10 (S.D.N.Y. Feb. 23, 2000) (noting that the law in the Second Circuit "*is not settled on the applicability of CPLR § 7503(c) in cases arising under the FAA*"); In re Herman Miller, Inc., No. 97 Civ. 7878 (SAS), 1998 WL 1932, at 13 (S.D.N.Y. Apr. 21, 1998) (holding that § 7503(c) applies to arbitrations under the FAA); PMC Inc. v. Atomergic Chemetals Corp., 844 F. Supp. 177, 182 (S.D.N.Y. 1994) (holding that § 7503(c) is inapplicable to arbitrations under the FAA).

9 Judiciary and Judicial Procedure, 28 U.S.C. § 1782(a).

10 *See* Optimal Inv. Servs., S.A. v. Berlamont, 773 F.3d 456, 460 (2d Cir. 2014); Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 80 (2d. Cir. 2012).

11 *See* In re Chevron Corp., 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010) (holding that a tribunal established under the bilateral investment treaty between the U.S. and Ecuador, and pursuant to the UNCITRAL Rules, satisfied the threshold requirement of § 1782); Ukrnafta v. Carpatsky Petroleum Corp., No. 3:09 MC 265 (JBA), 2009 WL 2877156, at 4 (D. Conn. Aug. 27, 2009) (holding that an UNCITRAL arbitral proceeding before the Arbitration Institute of the Stockholm Chamber of Commerce fell within the purview of § 1782).

12 National Broad. Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184, 191 (2d Cir. 1999) (concluding that an ICC arbitration in Mexico did not meet the requirements of a "foreign or international tribunal" set forth in 18 U.S.C. § 1782(a)).

with [administrative and quasi-judicial proceedings abroad]."[13] The Supreme Court thus concluded that § 1782(a) authorized a federal court to provide assistance to a complainant in a European Commission proceeding that would lead to "*a dispositive ruling, i.e., a final administrative action both responsive to the complaint and reviewable in court*," because the European Commission acted as a "first-instance decision maker" whose decisions were subject to judicial review.[14] Although the Supreme Court in *Intel* did not specifically address whether private arbitral tribunals fall within the scope of § 1782(a), some federal district courts have applied similar reasoning to conclude that private arbitrations satisfy the statute's threshold requirement.[15]

Once the statutory requirements for a § 1782(a) application are satisfied, a court considers four discretionary factors in determining whether to grant the petition for discovery: *"(1) whether the person from whom discovery is sought is [not] a participant in the foreign proceeding, which militates in favour of granting the request; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance; (3) whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the request is unduly intrusive or burdensome*."[16] By way of illustration, a federal district court in New York recently denied an investment company's § 1782(a) petitions for discovery relating to property in New York allegedly owned by the respondents, an Indian real estate developer and associated individuals and companies.[17] The court concluded that the petitions were merely attempts to circumvent a U.S. court's prior adverse discovery ruling, and were being used as a fishing expedition for the petitioner to identify additional foreign venues in which to seek confirmation of an arbitral award.[18]

C. The Tribunal's Ability to Issue Subpoenas to Third Parties

Where an arbitration is seated in the U.S., a federal court may, in some circumstances, enforce a subpoena issued by the arbitral tribunal to a third party. Section 7 of the FAA empowers

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13 Intel Corporation v. Advanced Micro Devices Inc., 542 U.S. 241, 258 (2004) (alteration in original) (citation omitted).

14 *Id.* at 255, 258.

15 *See* In re Babcock Borsig AG, 583 F. Supp. 2d 233, 242 (D. Mass 2008) (concluding that an ICC tribunal is a "tribunal" within the meaning of § 1782(a) because it is a "first-instance decisionmaker" that conducts proceedings which lead to a dispositive ruling); In re Roz Trading Ltd., 469 F. Supp. 2d 1221, 1226-28 (N.D. Ga. 2006) (applying similar reasoning to hold that an arbitral panel of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna falls within the scope of § 1782(a)).

16 Mare Shipping Inc. v. Squire Sanders (US) LLP, 574 F. App'x 6, 8 (2d Cir. 2014) (quoting Intel, 542 U.S. at 264-65).

17 In re Harbour Victoria Inv. Holdings Ltd. Section 1782 Petitions, No. 15-MC-127, 2015 WL 4040420 (S.D.N.Y. June 29, 2015).

18 *See id.* at 6-8.

arbitrators to issue subpoenas to third parties to appear before the tribunal "as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."[19] If the third party does not comply with the tribunal's subpoena, "upon petition, the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt" in the same manner provided for in domestic litigation.[20]

This subpoena power is subject to geographical limitations. Pursuant to Rule 45(c) of the Federal Rules of Civil Procedure, a subpoena may command a witness to attend a hearing, or to produce documents or information, generally only within 100 miles of where the person resides, is employed, or regularly transacts business in person, subject to certain exceptions.[21] These restrictions also govern subpoenas to third parties issued by an arbitral tribunal under Section 7 of the FAA.[22]

There is also a split among jurisdictions regarding the scope of a tribunal's ability to compel discovery from a third party. The Second Circuit has held that Section 7 of the FAA must be read narrowly, and does not authorize a tribunal to issue pre-hearing document subpoenas to third parties.[23] Instead, under the Second Circuit's approach, a tribunal can order a third party to produce documents so long as the third party does so upon being called as a witness at a hearing in the arbitration.[24]

D. Interim Relief in Aid of Arbitration

Parties may seek an order of attachment or a preliminary injunction from a New York court in aid of any arbitration, regardless of the parties' nationalities and the place of arbitration. Under section 7502(c) of the New York Civil Practice Law and Rules, a court "*may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state,* [. . .] *but only upon the grounds that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.*"[25] This provision can

19 9 U.S.C. § 7.

20 *Id.*

21 Federal Rules of Civil Procedure, Rule 45(c).

22 *See* Dynergy Midstream Servs. L.P. v. Trammochem, 451 F.3d 89, 96 (2d Cir. 2006) (holding that Section 7 of the Federal Arbitration Act "*does not authorize nationwide service of process*"); Legion Ins. Co. v. John Hancock Mut. Life Ins. Co., 33 F. Appx. 26, 27-28 (3d Cir. 2002) ("*under the FAA,* [Federal Rule of Civil Procedure] *45 also governs the service of arbitration subpoenas*").

23 Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 218 (2d Cir. 2008).

24 *See id.*

25 New York Civil Practice Law and Rules § 7502(c).

allow for the preservation of assets or property that is the subject of the dispute, and can provide protection to an applicant where the opposing party lacks assets to cover a potential award or is attempting to hide assets.[26]

In addition to showing that an arbitration award "may be rendered ineffectual" without interim relief, the applicant must also satisfy the three criteria traditionally examined by U.S. courts in deciding motions for preliminary relief in domestic cases, *i.e.*, (1) irreparable harm in the absence of relief, (2) likelihood of success on the merits of the dispute, and (3) a balance of equities in favour of the applicant.[27] Procedurally, a party may apply *ex parte* for interim relief in aid of arbitration, and may be required to post an undertaking in an amount to be fixed by the court.[28] If the arbitration proceeding has not already commenced, it must commence within thirty days of the granting of provisional relief.[29] However, courts may extend this period of time upon a showing of good cause such as settlement negotiations during which the party that obtained interim relief abstained from commencing arbitration proceedings.[30]

E. Confirmation of an Arbitral Award

The procedure for enforcing an international arbitral award in New York courts pursuant to the New York Convention is straightforward. A party can seek to confirm an award falling under the Convention within three years from the award's issuance.[31] The party need only file a motion or petition with the court, rather than a complaint.[32] Once such a petition is submitted, along with a copy of the arbitral award and the parties' arbitration agreement, the burden shifts to the adverse party to resist enforcement under the grounds set forth in the Convention.[33] This burden is a heavy one, and a high showing is required to avoid summary confirmation of an arbitral award.[34]

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26 *See, e.g.,* Matter of Sojitz Corp. v. Prithvi Info. Solutions, Ltd., 82 A.D.3d 89 (1st Dep't 2011) (affirming order of attachment against funds located in New York belonging to a client of the respondent that owed payment to the respondent, where the petitioner demonstrated that the respondent might dissipate the assets in the time it would take to constitute the tribunal in an arbitration in Singapore).

27 *See* In re Tapimmune, Inc., No. 654460/12, 2013 WL 1494681 (N.Y. Sup. April 8, 2013*)*; G Builders IV, LLC v. Madison Park Owner, LLC, 84 A.D.3d 694 (1st Dept. 2011).

28 *See* New York Civil Practice Law and Rules § 6212(e) (pertaining to orders of attachment), § 6312(b) (pertaining to preliminary injunctions).

29 New York Civil Practice Law and Rules § 7502(c).

30 See id; see also Sierra USA Commc'ns, Inc. v. Int'l Tel. & Satellite Corp., 842 N.Y.S.2d 560 (N.Y. Sup. 2006).

31 9 U.S.C. § 207.

32 *See* 9 U.S.C. § 6 ("*Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions*").

33 *See* New York Convention, *supra* note 2, art. V.

34 *Cf.* Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F. 3d 85, 90-92 (2d Cir. 2005) (affirming refusal to confirm arbitral award on the grounds that the appointment of a third arbitrator was premature, resulting in a tribunal that was not selected in accordance with the parties' agreement).

It should also be noted that the FAA sets forth limited grounds for vacating an arbitral award that was rendered in the U.S.: if (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption among the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy, or of any other misbehaviour by which the rights of any party have been prejudiced; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[35] New York courts construe these grounds for vacatur narrowly.

II. New York as a Venue for International Arbitration

New York is the centre of international arbitration in the United States and a leading venue for international arbitration worldwide. The city's prominent position in arbitration is derived from myriad factors, including its role as a major global commercial hub, the presence of leading arbitration institutions, the support of the local court system, and the international expertise and experience of legal professionals based in New York. This section highlights certain features that distinguish New York as a forum for international arbitration.

A. Leading Arbitration Institutions and Supporting Organisations

Several prominent arbitration institutions are based in New York, including the American Arbitration Association [the "**AAA**"] and its international division, the International Centre for Dispute Resolution [the "**ICDR**"]. The AAA administers commercial disputes and has developed general commercial rules as well as specialised rules for complex disputes, construction disputes, and other subject matters. The ICDR administers international disputes, has multilingual staff, and has developed a separate set of arbitration rules. New York is also home to SICANA, which administers ICC arbitrations in North America, as well as the International Center for Conflict Prevention and Resolution, which offers rules for administered and non-administered arbitrations. Each of these arbitral institutions offers a panel of distinguished arbitrators with experience in international disputes.

For parties interested in holding arbitral proceedings in New York, the New York International Arbitration Center ["**NYIAC**"] can be an especially valuable resource. NYIAC is not an arbitral institution; it is a non-profit organisation supported by many of New York's leading law firms that offers state-of-the-art hearing rooms for any type of administered or *ad hoc* arbitration.

35 9 U.S.C. § 10.

NYIAC also organises educational programs on dispute resolution subjects and provides programs for the New York judiciary. Hearing facilities are also offered by the ICDR, JAMS, and the New York City Bar Association, and are also available through many law firms and hotels in the city.

B. The Court System's Strong Support of International Arbitration

Both U.S. federal and New York state courts view arbitration favourably and pursue a well-established policy of recognizing and enforcing international arbitration awards. In the federal court system, the state of New York has four separate federal judicial districts, two of which cover New York City: the Southern District of New York, which has the largest civil caseload in the U.S., and the Eastern District of New York. The judges of these courts hear a significant number of arbitration-related cases and are familiar with the issues that typically arise.

Matters involving arbitration in New York state courts are typically brought in the Supreme Court for New York County, a trial level court whose jurisdiction encompasses Manhattan. This court has a separate Commercial Division devoted entirely to business disputes. One of the Commercial Division's justices, the Hon. Charles E. Ramos, is designated to handle all matters involving international arbitration. The presence of a specialist arbitration judge increases New York's attractiveness as an arbitration venue.

III. Conclusion

The United States—and New York in particular—serves as a favourable venue for international arbitration and offers a legal framework that enables courts to assist parties involved in arbitrations outside the state or country. The statutory provisions discussed in this article illustrate the valuable role federal and state courts in New York can play in support of international arbitration.