WE ARE ALL NEW YORK LAWYERS NOW – HOW NEW YORK COURTS CAN SUPPORT INTERNATIONAL ARBITRATIONS AND LITIGATIONS

BY ERIC B. LAMONS

The state and federal courts of New York provide critical means of obtaining a wide range of discovery in, as well as enforcement of, foreign or international arbitral and judicial proceedings. Even if the parties, the contract, or the dispute at issue have little or no connection to New York, but potential documents, assets, or witnesses are located there, New York courts can provide tools to obtain broad information vital to a pending foreign proceeding, to attach assets to secure ultimate recovery or incentivize settlement, or to enforce final judgments or awards, including seizure of assets and other post-judgment remedies.

A. Obtaining Discovery in New York Federal Courts through 28 U.S.C. § 1782

U.S. federal law provides a means by which parties to foreign arbitrations and litigations can obtain discovery in the United States. Specifically, Title 28, Section 1782 of the United States Code ("28 U.S.C. § 1782" or "Section 1782") is designated "Assistance to foreign and international tribunals and to litigants before such tribunals." This statute specifically provides that a U.S. district court having jurisdiction over a person or entity within that district can order that person or entity to provide testimony or produce documents or other items "for use in a proceeding in a foreign or international tribunal." Sec. 1782(a). Such an order from a U.S. district court can be made pursuant to a letter rogatory or request from the foreign tribunal, but can simply be based "upon the application of any interested person." Such an order can adopt the "practice and procedure" of the foreign tribunal for the discovery sought, or it can be governed by the Federal Rules of Civil Procedure applicable to U.S. litigants. In other words, Section 1782 can give parties to foreign litigations and arbitrations access to the liberal methods and broad scope of discovery available in U.S. proceedings.

As articulated by the U.S. Court of Appeals for the Second Circuit, the federal appellate court in New York, the "twin aims" of the statute are "'providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts.'" (*In re Application of Al-Attabi*.) Consistent with these goals, there are three requirements to obtaining discovery through application of this statute:

> (1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made,
> (2) the discovery is for use in a foreign proceeding before a foreign [or international] tribunal, and
> (3) the application is made by a foreign or international tribunal or any interested person. (*Mangouras v. Squire Patton Boggs*)

Each of these three requirements can be addressed briefly. **First**, the scope of "discovery" and "evidence" to be sought is broad, encompassing both testimony in a deposition or documents or other items having any potential relevance to the proceeding. The statute also allows for such

testimony or documents to be sought from either a party or non-party to the proceeding. In fact, there is no requirement that the testimony or documents being sought even be discoverable or admissible in the foreign tribunal – it need only be discoverable under the expansive U.S. standards of discovery. However, there is a territorial limitation. The person or entity from whom the discovery is sought must reside in or be found in the district for which the district court has jurisdiction. This simply means that, for example, if the person resides in or the entity has an office in Manhattan, the application must be made to the U.S. District Court for the Southern District of New York, not any other federal court.

Second, the discovery sought must be "for use in a foreign proceeding," but both "use" and "foreign proceeding" are broadly defined. As for "use," this is not a requirement that the discovery is necessary for the requesting party to prevail; no such necessity need be demonstrated. "The plain meaning of the phrase 'for use in a proceeding' indicates something that will be employed with some advantage or serve some use in the proceeding — not necessarily something without which the applicant could not prevail." (*Mees v. Buiter*.) The discovery must merely serve some purpose at some stage in a foreign proceeding. And the "foreign proceeding" can be a foreign litigation, a foreign arbitration, a foreign appeal, or even a proceeding that has not even been initiated yet, but which is within "reasonable contemplation" of the requesting party.

Third, the request must be made by a foreign tribunal *or* by "any interested person." A request from an "interested person" (such as one of the parties) will likely take less time and allow for the requesting party to seek a broader scope of discovery than would be requested in a letter of request or letters rogatory issued by a foreign court.[1] But either option will satisfy this requirement.

If these three broad requirements are met, the U.S. district court has wide discretion to order discovery. Section 1782 "entrusts to the district courts many decisions about the manner in which discovery under the statute is produced, handled, and used." (*In re Accent Delight Int'l Ltd.*) In the exercise of such discretion, there are a number of factors for which the district court can take account. The U.S. Supreme Court (in *Intel Corp. v. Advanced Micro Devices, Inc*.) has identified four such factors:

> (1) whether the person from whom discovery is sought is a participant in the foreign proceeding, in which case the need for § 1782(a) aid generally is not as apparent; (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 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.

[1] Note that both the United States and the United Kingdom have ratified the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, the 1965 Hague Service Convention, and the 1961 Hague Apostille Convention, all facilitating the requests for and use of legal evidence across national jurisdictions.

In addition, "a district court [can] condition relief upon that [requesting] person's reciprocal exchange of information," but it is not required to do so. (*Sampedro v. Silver Point Capital.*)

However, the question of whether the sought-after evidence is *admissible* in the foreign proceeding is *not* a valid consideration when determining whether to order discovery pursuant to Section 1782. The Second Circuit has consistently held "that § 1782 [does] not require that the discovery material be admissible in the foreign proceeding, on the ground that, '[a]s in *Intel*, there is no statutory basis for [such a] requirement.'" (*Mees v. Buiter.*)

B. Obtaining Attachment of Assets in New York State and Federal Courts

One highly useful tool available under New York state and federal law before reaching a final judgment or final determination in arbitration is attachment of assets located in New York. This tool can ensure that sufficient assets are available to provide a full recovery should the party obtain a successful decision, and the act of freezing such assets may prompt the parties to consider settlement or another resolution of the matter.

There are four types of attachment of New York assets that are relevant here:

(1) attachment prior to reaching a decision in a U.S. or foreign arbitration;
(2) attachment while a motion is pending in a New York court to recognize an arbitration award (U.S. or foreign) or a foreign judgment;
(3) attachment before a judgment has been reached in a litigation commenced in New York; and
(4) attachment pursuant to U.S. federal maritime/admiralty law ("Rule B") prior to a final decision or judgment.

Notably, although the first three are remedies provided under New York state law, a federal court in New York can and will invoke any or all of those three state-law remedies, so long as there is diversity of citizenship between the parties involved.

For the **first** type of attachment, pursuant to New York Civil Practice Law and Rules ("NY CPLR") § 7502 a participant in a U.S. or foreign arbitration can seek an order from a New York court to attach assets in New York before a decision is reached in the arbitration. It must be an arbitration that is currently pending or will be commenced within 30 days. The arbitration can be taking place in the U.S., the U.K., or nearly anywhere else worldwide. The relevant New York 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, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards . . . ." NY CLS CPLR § 7502(c).

The basis for such an application must be "upon the ground that the [arbitration] award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." *Id.* Such a ground would include, for example, (i) a risk that the other party may become insolvent before an award is reached and satisfied, (ii) the other party is a non-resident of New York or a foreign corporation not qualified to do business in New York, or (iii) the other party, "with intent to defraud his creditors or frustrate the enforcement of a judgment [or award] that

might be rendered in [the other party's] favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts . . . ." NY CLS CPLR § 6201. If such a ground exists, an order of attachment can be granted both before any arbitration award is reached, as well as before any foreign arbitration award is domesticated as a New York judgment.

Procedurally, a party to a foreign arbitration can apply to a New York court having jurisdiction over the assets at issue, though an *ex parte* motion or a motion on notice. NY CLS CPLR § 6210-6211. The application or motion can seek to attach any tangible or intangible property held by the opposing party or by a third party on behalf of the opposing party. NY CLS CPLR § 6202. The application does require the movant to "give an undertaking, in a total amount fixed by the court." NY CLS CPLR § 6211(b). This means the movant must post a bond or make a cash deposit, typically 5-7% of the value of the assets to be attached, although whole subject to the discretion of the court. The undertaking can be waived by contract, so an arbitration agreement that does so would eliminate that requirement.

When faced with such an application, the court will look for (i) such irreparable harm as described above; (ii) the likelihood of success on the merits for the applicant; and (iii) a balance of the equities in favor of the applicant. *See* NY CLS CPLR § 6212(a), 6201, 7502. These are the same three elements used when ruling on motions seeking temporary restraining orders or preliminary injunctions (discussed below).

For the **second and third** types of attachment, Article 62 of the NY CPLR can be invoked to seek attachment of assets in New York (a) while a motion is pending in a New York court to recognize a foreign arbitration award of foreign judgment or (b) while an action is pending in New York but has not yet reached a judgment. A movant would use the same procedures outlined above, and the court will apply similar standards in determining whether to issue an order, namely, looking for irreparable harm in the absence of attachment, the likelihood of success on the merits, and a balance of equities. *See* NY CLS CPLR § 6212(a), 6201.

For the **fourth** type of attachment, it is federal admiralty law, specifically "Admiralty Rule B," that provides a basis for attaching property in New York. It allows for attachment of such property having a value up to the value of the claim in the foreign arbitration or foreign litigation. To seek such relief in the relevant U.S. District Court in New York, the movant must demonstrate that (i) the movant has a valid claim under admiralty law against the other party and (ii) the other party does not reside and cannot be found in the district. If those elements are met, the federal court can grant an order of attachment, and will, again, look for irreparable harm, the likelihood of success on the merits, and a balance of the equities.

Significantly, there is one form of property that *cannot* be subject to attachment under Admiralty Rule B. This property is "EFT funds," meaning funds that are in the hands of an intermediary bank processing them as a result of an electronic funds transfer – as opposed to funds simply sitting in the other party's account at the other party's bank.

Each of these forms of attachment of New York assets is potentially available in New York courts to a party to a foreign arbitration or foreign litigation.

C. Obtaining a Preliminary Injunction or Temporary Restraining Order in New York Courts

In addition to attachment, a party to a foreign arbitration or foreign litigation could also seek other preliminary, pre-judgment relief in the form of a preliminary injunction or a temporary restraining order. Pursuant to NY CPLR 6301,

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

NY CLS CPLR § 6301.

A preliminary injunction can only be granted upon a motion on notice to the other side in which the movant shows that the "defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual; or that the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." NY CLS CPLR § 6311-6312. It requires an undertaking to be given, as described above. In addition to this showing of irreparable harm, the movant must also show a likelihood of success on the merits and a balance of equities in the movant's favor.

A temporary restraining order ("TRO") is typically sought based upon an *ex parte* motion in which the movant "shall show that immediate and irreparable injury, loss or damages will result unless the [other party] is restrained before a hearing can be had." NY CLS CPLR § 6313. It also requires an undertaking to be given, as described above. If a TRO is granted, the court "shall set the hearing for the preliminary injunction at the earliest possible time." If this is in New York state court, it will be scheduled within a "reasonable" time after the grant of the TRO. If in New York federal court, it will be scheduled within 10 days of the grant of the TRO.

Each of these tools is potentially available in New York courts to a party to a foreign arbitration or foreign litigation.

D. Recognition of Foreign Judgments and Arbitral Awards in New York Courts

Generally, once one reaches a final judgment in a foreign litigation or a final award in a foreign arbitration, New York courts will readily recognize and enforce them. The rules for recognition are quite liberal in both New York state and federal courts, and, when recognized, a

foreign judgment or arbitration award is treated identically to any judgment originating from such courts.

First, with regard to foreign judgments, New York courts will *presumptively* recognize monetary judgments deriving from other countries having legal systems similar to that of the United States. New York state courts will follow the Uniform Recognition of Foreign Country Money Judgements, codified in Article 53 of the NY CPLR, and New York federal courts will invoke comity to provide recognition in a similar manner. More specifically, except as provided in NY CPLR 5304, "a court of this state shall recognize a foreign country judgment to which this article applies as conclusive between the parties to the extent that it grants or denies recovery of a sum of money." NY CLS CPLR § 5303. To do so, a party to a foreign judgment can file an action on the judgment or a motion for summary judgment in lieu of a complaint. If such recognition is sought in an action already pending in New York, the issue can be raised by counterclaim, crossclaim, or affirmative defense.

Thus, Per Article 53, the foreign monetary judgment *will* be recognized in New York state court, or in New York federal court applying comity or applying state law when there is diversity of citizenship, *unless* an exception from NY CPLR § 5304 applies. Per the terms of NY CPLR § 5303 and § 5304, there is no requirement of reciprocity in foreign recognition of judgments from U.S. courts. There is no requirement that the country whose courts rendered the judgment at issue is a country officially recognized by the United States, as Taiwan is not. A New York court could recognize a foreign judgment even if that judgment is on appeal in the foreign forum. Also, the application of comity and the liberal standards of recognition can often lead to recognition of foreign non-monetary judgments to enforce things like collateral estoppel and *res judicata*.

NY CPLR § 5304 provides the exceptions to recognition. It sets forth three *mandatory* grounds for non-recognition, based on complete lack of due process or jurisdiction.

> A court of this state *may not* recognize a foreign country judgment if:
> 1. the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
> 2. the foreign court did not have personal jurisdiction over the defendant; or
> 3. the foreign court did not have jurisdiction over the subject matter.

NY CLS CPLR § 5304(a) (emphasis added). The statute also provides nine *discretionary* grounds for non-recognition of a foreign judgment, based largely on procedural irregularities or conflicts with due process or U.S. public policy.

> A court of this state *need not* recognize a foreign country judgment if:
> 1. the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;
> 2. the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;

3. the judgment or the cause of action on which the judgment is based is repugnant to the public policy of this state or of the United States;
4. the judgment conflicts with another final and conclusive judgment;
5. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by a proceeding in that court;
6. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;
7. the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering courts with respect to the judgment;
8. the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law; or
9. the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions.[2]

NY CLS CPLR § 5304(b) (emphasis added). A New York court confronting one of these discretionary grounds for recognition could choose (i) to refuse to recognize the judgment; (ii) to simply stay the motion seeking recognition pending further inquiry or analysis; or (iii) to recognize the judgment despite this issue.

Importantly, the party *resisting* recognition of a foreign judgment in New York bears the burden of establishing that one of these grounds for non-recognition exists, without which the judgment will be recognized. NY CLS CPLR § 5304(c).

Second, with regard to foreign arbitration awards, New York courts will *presumptively* recognize and enforce arbitration awards issued in many foreign or international forums under either New York state law or pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the "NY Convention") adopted by the U.S., U.K., and 148 other countries.

The use of the NY Convention is subject to some restrictions. The United States limits the application of the NY Convention to *commercial* matters. Further, there are seven grounds set forth in the NY Convention for non-recognition of a foreign arbitral award, even if it is from a commercial matter. Those grounds, per Article V(1)-(2), are:

> [1] The parties to the agreement [to arbitrate] were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country were the award was made; or

[2] This ninth ground could prevent the recognition of certain libel or defamation judgments issued by courts in the U.K.

> [2] The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
> [3] The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
> [4] The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or . . .
> [5] The award has not yet become binding on the parties, or has been set aside by a competent authority of the country in which, or under the law of which, that award was made.
> [6] The subject matter of the difference is not capable of settlement by arbitration under the law of that country [*i.e*., the country where recognition and enforcement is sought]; or
> [7] The recognition or enforcement of the award would be contrary to the public policy of that country.

If the limitations of the NY Convention pose an issue, Article 75 of the NY CPLR provides even broader authority to recognize and enforce foreign arbitral awards. Indeed, any arbitration agreement "is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state [and on New York federal courts applying state law] *to enforce it and to enter judgment on an award*. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute." NY CLS CPLR § 7501 (emphasis added).

New York courts thus routinely recognize and enforce virtually all arbitration awards. In fact, per NY CPLR § 7510, the "court *shall confirm* an [arbitration] award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." NY CLS CPLR § 7510 (emphasis added). An award may be vacated if the rights of a party were prejudiced in some way or the arbitration agreement was invalid or breached or it may be modified if there was a miscalculation or an error in form, outside of the merits. NY CLS CPLR § 7511(b)-(c). In any event, the party opposing the recognition of the foreign arbitral award again bears the burden of demonstrating a basis for non-recognition, or it will be confirmed, per the presumption in NY CPLR § 7510.

Once an arbitration award is recognized by a New York state or federal court, it becomes a judgment of that court. NY CPLR § 7514 ("A judgment shall be entered upon the confirmation of an award."). As such, it is then entitled to identical treatment and enforcement, including in other U.S. states, as an original judgment originating from that court.

Third, once a foreign judgment or foreign arbitral award is recognized by a New York court, there is a myriad of tools available for post-judgment enforcement in New York.

As noted above, attachment of funds and assets in New York can be sought via *ex parte* motion while seeking the New York court's recognition of a foreign arbitration award or foreign judgment. In fact, "when a judgment debtor is subject to a New York court's personal jurisdiction, that court has jurisdiction to *order the judgment debtor to bring property into the state*" under that authority. (*Koehler v. Bank of Bermuda Ltd*.)

Additional discovery can be obtained post-judgement or post-award, in order to gather information about funds and other assets that may be needed to satisfy the judgment or award. New York courts will generally allow wide latitude to find such information. A judgment/award creditor can seek documents, answers to interrogatories or requests for admission, and even deposition testimony from the judgement debtor, from garnishees, and from third parties potentially having relevant knowledge, all to access such information and learn the best avenues to pursue for collection. Such discovery could be sought, for example, from a bank used by the judgment debtor to obtain credit, to obtain the information the judgment debtor provided the bank detailing his income, investments, property, other assets, debts, and liabilities. Or it could be used to obtain account statements from financial services companies or fund managers to track where funds may have been transferred. Or it could be used to gather information from or about spouses, family members, business partners, etc., to whom assets may have been transferred in order to hide them from the judgment creditor. Often at this point there are many questions in need of answers, and post-judgment/post-award discovery can provide some of those answers to ensure full recovery.

In addition to obtaining information about assets and attaching assets to secure them, a judgment/award creditor could potentially have a *restraining notice* issued to the judgment debtor and third parties. Once a foreign judgment or arbitral award has been recognized in a New York court, it becomes a judgment of that court, and, per NY CPLR § 5222(a), an attorney for the judgment creditor (or a clerk of the court) can issue a restraining notice to enforce that judgment. Such a notice will bar the judgment debtor or third parties, such as banks, broker/dealers, suppliers, vendors, business partners, etc., from "any sale, assignment, transfer or interference with any property" to which the notice applies. NY CPLR § 5222(b).

Other tools available in New York courts include (i) orders of seizure or levy on tangible property, such a real property, and intangibles, such as shares of stock and other investment holdings; (ii) income executions or garnishment; (iii) installment payment orders; (iv) receivership, if deemed necessary to prevent dissolution of assets; and (v) enforcement by contempt, meaning the judgment debtor is held in contempt of court as a result of failing to comply with the court's directives and is thereby subject to further orders and restrictions.

Clearly, there is a wide range of methods and processes readily available in New York state and federal courts to gather information in, secure resources for, and enforce decisions of foreign or international arbitrations and litigations. Parties to such proceedings should take full advantage of these many tools available to reach a positive resolution and maximize recovery.